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REPORTS

OF CASES RELATING TO

MARITIME LAW CASES

CONTAINING ALL

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

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2. *Practice—Amendment of award—" Error arising from any accidental slip or omission "—Arbitration Act* 1889 (52 & 53 *Vict. c.* 49), *s.* 7 (*c*).—S. and Co. were the charterers and H. and Co. were the sub-charterers of a steamship. At the termination of the charter-party questions arose with regard to the balance of hire and of insurance premiums. The owners claimed against the charterers, and the charterers claimed against the sub-charterers. Both disputes were referred to arbitration. As the arbitrators disagreed, the disputes came before the same umpire, who, in the first case, namely, that between the owners and the charterers, awarded that the costs of the arbitration, which he assessed at 130*l.*, and taxed costs should be paid by the charterers. In the second case, that between the charterers and the sub-charterers, the umpire awarded that the sub-charterers should pay to the charterers for hire and insurance, and proceeded: " I further find and award that the costs of this arbitration, which I assess at 130*l.*

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and taxed costs, as well as costs of the arbitration between the owners and Sutherland and Co. (the charterers) on the same subject, except taxed costs of the sitting of the 27th June 1919, shall be paid by the charterers" [*i.e.*, the sub-charterers in the second arbitration]. As the parties were not clear as to what costs were payable by the sub-charterers under the umpire's award, correspondence ensued between the solicitors for S. and Co. and the solicitors for H. and Co., and a letter was written to the umpire suggesting that a clerical mistake or error arising from an accidental slip had been made in the award. The umpire being under the impression that he had made an error in writing his award delivered a further award which he said he had amended so that it should read as he had originally intended to state it. The amended award was as follows: "I further find and award that the costs of this arbitration, which I assess at 130*l.* and taxed costs, as well as costs of the arbitration and the taxed costs of the owners against Sutherland and Co. and Sutherland and Co.'s own costs of the arbitration . . . shall be paid by the charterers (*i.e.*, the sub-charterers in the second arbitration) . . ." Held, that the amended award must be set aside because the umpire had no power to expound what he had purposely written in his original award. The arbitrator had written down everything which he intended, and nothing which he had not intended, to write down; he had therefore no jurisdiction to alter his award. There was no "error arising from an accidental slip or omission" within the meaning of sect. 7 (c) of the Arbitration Act 1889, which enacts that an arbitrator had power "to correct in an award any clerical mistake or error arising from an accidental slip or omission." (K. B. Div. Ct.) (Rowlatt and McCardie, J.J.) *Re Sutherland and Co. and Hannevig Brothers* 203

3. *Practice—Appeal—Case stated by arbitrator—Arbitrator desiring case may go back in certain events—Consultative jurisdiction of court—Arbitration Act* 1889 (52 & 53 *Vict. c.* 49), *ss.* 7 *and* 19. —An award stated by an arbitrator for the opinion of the High Court is not a final award stated in accordance with sect. 7 of the Arbitration Act 1889, if on the face of the award it is apparent that in the exercise of the duties originally undertaken by him the arbitrator desires that in a certain event further opportunity should be afforded for the final exercise of his authority. Such an award is an award stated for the consultative opinion of the court under sect. 19 of the Act. An umpire in stating a special case after stating certain findings of fact and conclusions of law proceeded, "The question for the opinion of the court is whether upon the true construction of the charter-party and the facts as stated by me the decisions at which I have arrived are correct in point of law. If they be correct, my award is to stand, but if incorrect in any particular, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the court." Held, (Lord Parmoor and Lord Carson dissenting) that the award was not final and no appeal lay from the decision of the judge at the hearing of the award. Decision of the Court of Appeal (15 Asp. Mar. Law Cas. 134; 124 L. T. Rep. 204; (1921) 1 K. B. 87) affirmed. (House of Lords) *Re an arbitration between C. T. Cogstad and Co. and H. Newsum, Sons and Co. Limited* 369

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Bottomry bond—Maritime risk—Voyage undefined in the bond—Validity of the bond—Co-ownership—Writ of fi. fa.*—Seizure of the ship by the sheriff—Action* in rem*—Arrest by the Marshal of the Admiralty—Sale by the Marshal—Necessaries men—Execution creditors—Priorities.*—A bottomry bond must define the voyage of which the lender undertakes the maritime risk. An instrument is not a bottomry bond, notwithstanding that the parties to it describe it as such, if its terms provide nothing to prevent the lender demanding repayment at any time, even before the ship has sailed from the port where the bond was given, or if, by leaving undefined the time when repayment shall become due, it enables the lender to maintain a secret maritime lien on the ship at his pleasure. In determining priorities between necessaries men and execution creditors for whom the sheriff has seized a ship under a writ of *fi. fa.*, the execution creditors will be preferred to the necessaries men, since the former are secured creditors from the time of seizure, whilst the latter have only acquired a security for such sums as they may become entitled to under a subsequent judgment. An American ship, which was jointly owned by two sets of American owners, was seized by the sheriff under a writ of *fi. fa.* in execution of a judgment recovered in the King's Bench Division against one set of owners. Soon afterwards she was arrested by the Marshal of the Admiralty at the suit of parties suing *in rem* for necessaries. Other necessaries men subsequently commenced proceedings, and either effected arrest or entered caveats. The ship was then sold by the Marshal acting with the consent of all parties. An action was then commenced against her by parties claiming to be holders of a bottomry bond. The bond had been given by the master some months previously in order to provide funds to free his vessel from arrest under which she then lay. By the terms of the bond, which described itself as a bottomry bond, the master agreed "to bond and lien the ship" in the amount advanced, the lenders "to have absolute lien upon the vessel until the said loan is repaid," and undertook to draw no other bond on the ship without the consent of the lenders. In an action on this bond

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the execution creditors under the judgment in the King's Bench Division intervened. Held, that this bond was void. No time was fixed for repayment. The loan was therefore repayable on demand, and there was nothing in the documents to prevent the plaintiffs demanding repayment before the ship sailed from the port where the bond was given. Nor was there anything to prevent them from allowing the loan to run on indefinitely and maintaining a maritime lien on the ship all the time. The execution creditors and the necessaries men who had established their right *in rem* were, therefore, entitled to the proceeds of the sale. As between these claimants, held that the sheriff could effectually seize the shares in a foreign ship, to which no statutory restriction to the contrary applied, in the same way that he could seize an undivided share in any other chattel; but that, on the other hand, seizure by the sheriff did not deprive the Marshal of his power to arrest the ship, since both were alike the servants of the court. It followed that the execution creditors were secured creditors from the moment of seizure; as such they ought to enjoy priority to the necessaries men who had only obtained a security for sums to which they might become entitled under a subsequent judgment. The rule of the Admiralty Court that necessaries men shared in the proceeds of a sale *pari passu* without regard to the dates of arrest and judgment should not be extended to include execution creditors. The shares held by those owners against whom judgment had been signed in the King's Bench Division were, therefore, ordered to be paid out to the execution creditors. The shares held by the other owners were ordered to be paid out to the necessaries men, ranking *pari passu*. (Hill, J.) *The James W. Elwell* 418

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1. *Quebec Harbour—Corporation of pilots—Legislative authority—British North America Act* 1867 (30 & 31 *Vict. c.* 3), *ss.* 91-92—*Canada Shipping Act* (*Revised Statutes of Canada*, 1906, *s.* 123—4 & 5 *Geo. 5, c.* 48, *ss.* 1, 2, 3 (*Stat. of Can.*).—The respondent corporation, which consists of licensed pilots of the Harbour of Quebec and below, sued the first appellant, a pilot and a member of the corporation, to recover a sum earned by him for services of a pilot of the harbour during the season of navigation of 1917. The defendant pleaded that under 4 & 5 Geo. 5, c. 48 (Stat. of Can.), he was entitled to retain for his own use and benefit the amount of his earnings over and above such sum as might be required for the pilots' pension fund. Held, that the power conferred on the corporation by 23 Vict. c. 123 (Stat. of Can.), to demand pilot dues and to call on pilots to hand over their earnings as received was extinguished by 4 & 5 Geo. 5, c. 48, ss. 1, 2, 3 (Stat. of Can.). The Dominion Legislature had power under the British North America Act 1867, s. 91, Head 10 (Navigation and Shipping), to enact laws with regard to pilotage, although they trenched upon the property and civil rights in a province. On the question whether the corporation was still entitled to demand from a pilot a contribution to the pilots' pension fund their Lordships expressed no opinion. Judgment of the Court of King's Bench, reported Q. Rep. 27 K. B. 409, reversed. (Privy Council.) *Paquet and another* v. *Corporation of Pilots for and below the Harbour of Quebec; Attorney-General for Canada, Intervener* 105

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2. *British master's certificate—Suspension of certificate—Wreck Commissioner's Court—Canadian procedure—Shipping Casualties and Appeals and Rehearing Rules* 1907, *rr.* 22, 3, 12—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 470—*Canada Shipping Act* 1908 (7 & 8 *Edw. 7, c.* 65), *s.* 36.—The certificate of a British master was suspended by a Wreck Commissioner's Court sitting at Montreal. The master appealed on the ground (*inter alia*) that the procedure under the Canada Shipping Act 1908, s. 36, was not consistent with the rights to which a British master is entitled under the Merchant Shipping Act 1894, s. 470, sub-s. 4, and the Shipping Casualties and Appeals and Rehearing Rules 1907, rr. 3 and 12. Held, that the rights of British shipmasters in a Canadian Wreck Commissioner's Court are to be determined by considering whether the Canadian statutes diminish the rights assured to them by British legislation. The safeguards provided for the interests of shipmasters by the Merchant Shipping Act and the rules made thereunder are in no way diminished by sect. 36 of the Canada Shipping Act 1908. But as in this case the Wreck Commissioner's Court had not complied with the provisions of sect. 36, the decision must be quashed and the master's certificate restored to him. (Adm. Divisional Court, Sir Henry Duke, P. and Hill, J.) *The Chelston* 158

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1. *Charter-party—Prescribed route—Refusal of master to follow—Error of judgment—Breach of charter-party.*—By a charter-party dated the 8th April 1916, for a voyage from Liverpool to Archangel, it was provided by clause 9 that the master was to prosecute his voyage with the utmost dispatch, and by clause 14, that all losses and damages occasioned by "negligence, default or error of judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer" were to be absolutely excepted. The vessel sailed from Liverpool on the 26th Sept. 1916 and arrived at Honningsvaag, in the north of Norway. From there, owing to the danger of German submarines, a special route to Archangel was prescribed by the British Admiralty and the Norwegian War Insurance Association; the master, however, after waiting some days, decided to proceed by another route and reached Vardoe on the 11th Oct. 1916. Subsequently the crew refused to continue the voyage to Archangel owing to reports as to the presence of a hostile submarine, and, in spite of the charterers' protests, the voyage was abandoned and the cargo discharged. The claim of the owners for the hire and of the charterers for damages for breach of the charter-party were referred to arbitration. The umpire found that the master in refusing to follow the prescribed route was guilty of a grave error of judgment, and that in failing to sail he had committed a breach of clause 9 of the charter-party, and he awarded the charterers damages for this breach. Held, that the decision of the master not to

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follow the prescribed route was an error of judgment as to route, and not an error of judgment "in the management or navigation" of the steamer, and that consequently the owners were not protected by the exceptions in clause 14 of the charter-party. Award upheld. (Bailhache, J.) *Owners of the Steamship Lord* v. *Newsum* 19

2. *Charter-party—Demurrage—Exception in cases of "accidents or other hindrances beyond charterers' control"—Martial law*—Ejusdem generis *rule.*—In Sept. 1914 the defendants chartered the plaintiffs' vessel for a voyage to Port Nolloth, in Cape Colony. The vessel duly arrived at Port Nolloth and made ready to discharge. Owing, however, to the fact that, on her arrival, the port was under Government control and was being used for disembarking troops and war material for an expeditionary force which was being sent to German South-West Africa, the charterers were unable to discharge her until eighty-six days' demurrage had expired. The charter-party contained three "exception" clauses. The first dealt with the charterers' obligation to load; the second was the usual exception clause containing, *inter alia*, "the King's enemies" and "restraint of princes and rulers"; the third, which was directed to the unloading of the cargo, excepted the charterer from his liability to pay demurrage "in cases of strikes, riots, lock-outs, labour disturbances, trade disputes, accidents, and other hindrances beyond the charterer's control." The defendants relied upon the exceptions contained in the second and third clauses. Held, that the second clause, from its position in the charter-party, from its express words, and from the fact that the obligations on the charterers were specifically limited by the other two clauses, did not apply to the charterers' obligation to unload the vessel; as to the third clause, the Government control could not be said to be an accident, and the "other hindrances beyond the charterers' control" must be construed *ejusdem generis* with the named "exceptions." The defendants therefore failed. (Greer, J.) *Aktieselskabet Frank* v. *Namaqua Copper Company Limited* 20

3. *Charter-party—English contract—Freight payable in Spain—Payment of part of freight illegal by Spanish law—Implied condition—Mutual inability to perform—Conflict of laws—"Restraint of princes"—Mutual exception.*—An English firm chartered a Spanish vessel from Spanish owners to carry a cargo of jute to Spain. The charter-party, which was in English, made in London in charterer's usual form, provided that part of the freight should be paid by the charterers in London when the vessel sailed, and the balance at the port of discharge in Spain, by the receivers of the cargo, who were Spaniards. It contained clauses terminating the liability of the charterer on shipment of cargo, except for the payment of freight, and excepting (*inter alia*) "restraints of princes." There was also a clause submitting disputes to arbitration in London. When the vessel arrived at the port of discharge the balance of freight payable was, owing to fluctuations in the rates of exchange, in excess of the amount fixed by a decree of the Spanish Commission of Supplies. The decree was issued on the day previous to that on which the charter-party was dated. The decree, which was shortly afterwards confirmed by Royal Proclamation, subjected to penalties persons paying or receiving freight for jute in excess of the specified rate. The receivers refused payment in excess of the rate fixed by the decree. The shipowners sued the charterers for the balance. Held, that the charter-party was an English contract and that the charterers were liable for the balance of the freight; but that there was an implied condition excusing the parties from obligations which neither was able legally to fulfil. The Spanish decree made illegal the payment or

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receipt of freight in excess of a certain figure at the place where the material part of the contract was to be performed, and the charterers were therefore excused from paying any higher rate. The mutual application of the exception "restraint of princes," upon which Bailhache, J. had in part based his decision, not considered by the Court of Appeal. Appeal dismissed. *Ford* v. *Cotesworth* (23 L. T. Rep. 165; L. Rep. 5 Q. B. 544) and *Cunningham* v. *Dunn* (3 Asp. Mar. Law Cas. 595; 38 L. T. Rep. 631; 3 C. P. Div. 443) approved and followed. (Court of Appeal.) *Ralli Brothers* v. *Compania Naviera Sota y Aznar* 33

4. *Charter-party—Termination of hire—Implied rights—Breach of charter-party—Requisition—Termination—"Restraint of princes"—Measure of damages.*—A charter-party provided, *inter alia*, for the hire of a chartered vessel for one calendar month from the date at which it was placed at the disposal of the charterers, and that thereafter hire was to continue at the same rate of payment until determined by fourteen days' notice given by the charterers. Some months later the shipowners withdrew the vessel from the service of the charterers, claiming an implied right to terminate the charter-party by reasonable notice, which they said that they had given. The tug was then requisitioned by the Government, and the shipowners contended further that the charter-party, if it was in existence at the time, was put an end to by the requisition; if it was not put an end to by the requisition, they relied upon the exception of "restraint of princes" in respect of the period under requisition. The charterers replied that the charter was still in existence, but that the ship was deviating when the requisition took place; her owners were not, therefore, entitled to rely upon the exceptions. Held, that the charter-party was to continue in existence until terminated by the charterers, and that the shipowners had no implied right to put an end to it by notice or otherwise. Nor was it ended by the Government requisition, but, as the requisition was wholly unconnected with the wrongful act of the shipowners, the question of the application of the exceptions contained in the charter did not arise. On general grounds damages were not awarded for the period during which the vessel was under requisition. *Davis* v. *Garrett* (1830, 6 Bing. 716) distinguished. Dictum of Tindal, C.J., at p. 724, held not to apply. (Rowlatt, J.) *Elliott Steam Tug Company Limited* v. *John Payne and Co.* 78

5. *Carrier—Perishable goods—Delay in transit—Strike of railway employees—Sale by necessity—Duty of carrier to communicate with owner of goods.*—In Sept. 1918 the defendants contracted with the plaintiff to carry tomatoes from Jersey to London. There was no fixed period for delivery. The tomatoes were duly loaded on board the steamship *C.* at St. Helier, but the vessel was weatherbound there for about three days. By the time she arrived at Weymouth a strike had broken out among the defendants' employees, in consequence of which considerable delay occurred in unloading the vessel, and it became impossible to dispatch the goods to London by rail for an indefinite time. The cargo was already in bad condition. No attempt was made by the defendants to communicate with the owners and inform them of the state of things at Weymouth and of the condition of the cargo. The defendants decided that the best thing to do in the circumstances was to endeavour to sell the cargo as a whole forthwith, and that was done. Salter, J. (following *Sims* v. *Midland Railway Company*, 107 L. T. Rep. 700; (1913) 1 K. B. 103) held that the sale of the plaintiff's goods was a breach of contract to carry the goods unless the defendants could satisfy the court that it was commercially impracticable to communicate with the plaintiff and that the sale of the plaintiff's goods was really necessary. Whether communication with the owner is commercially

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practicable or not must depend on the facts of each case, but if communication is physically possible without disproportionate expense, and if there is reason to expect that instructions can be obtained before a final decision is made, then the carrier must at least attempt to obtain such instructions before he deals with the goods otherwise than under the express terms of the contract of carriage. He held on the facts that the sale of the plaintiff's goods was a breach of the contract of carriage and a wrongful conversion of the goods. Held, on appeal, that the judgment of Salter, J. (*infrâ*) was right. (Court of Appeal.) *Springer* v. *Great Western Railway Company*.... 85

6. *Shipping agents—Obligations—Loss of goods—Pilferage — Insurance — Liability of the forwarding agent.*—In July 1918 the plaintiff forwarded to the defendants, who were shipping agents, eight bales of cloth to be shipped to a French port and thence by rail to Lyons. The defendants undertook to have the goods insured against pilferage during transit from warehouse to warehouse. They held an open policy of insurance under which they were able to declare the goods in question and obtain the protection of the underwriters' undertaking. The defendants made the usual and proper arrangements with steamships and railways for the carriage of the goods in question to their destination, and also made proper arrangements with the underwriters for the insurance of the goods during transit. While the goods were in the custody of the French Customs authorities two bales were lost, and only six bales reached their destination. It was thought that the two bales were stolen. There was no evidence of any negligence or default on the part of the defendants having caused the loss of the goods. Held, that the obligation imposed upon the defendants was, not to carry the goods, but to make arrangements with the carriers, and to make such arrangements as might be necessary for the intermediate steps in the journey between the different sets of carriers and others who had successive possession of the goods. As to the contract to insure, the defendants were only obliged to place the plaintiff's risk with the underwriters, for whose subsequent actions they were not responsible. In discharging these obligations the defendants had shown no negligence. (Rowlatt, J.) *Jones* v. *European and General Express Company*..... 138

7. *Cesser of hire during grounding of ship and consequent repairs—Construction of words "or other accident preventing the working of the steamer"*—Ejusdem generis *rule.*—A charter-party contained a clause providing "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; but should the steamer be driven into port or to anchorage by stress of weather or from any accident to the cargo or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." The steamer forming the subject of the award was chartered in Aug. 1916 to load at Sunderland and to discharge at a French port. The steamer was ordered by the French Government to discharge at Marans, which was a safe port within the meaning of the charter-party. She arrived at Marans Roads at 6 p.m. on the 16th Oct. 1916 and went aground on soft clay while going up the river. She remained aground till 1 p.m. on the 24th Oct., and was damaged in consequence. The work of repairing began on the 8th Nov. and lasted for some time. The harbour contained no bar which would cause detention through grounding or otherwise. The arbitrator awarded that hire

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ceased (a) as from 6 p.m. on the 16th Oct. 1916 till 1 p.m. on the 24th Oct. 1916 and (b) during the time occupied while the damage to the steamer consequent upon such grounding was being repaired. Held that the *ejusdem generis* rule did not apply so as to restrict the meaning of the words "or other accident preventing the working of the steamer," in the clause in question, there being no common or dominating feature in the specific words contained in such clause, and that therefore the award of the arbitrator must be upheld. (McCardie, J.) *Steamship Magnhild, Owners of,* v. *McIntyre Brothers and Co.* 107

8. *Requisition — Charter-party — Accident — Liability for continuous hire.*—A ship was requisitioned under charter-party T. 99, by which the Shipping Controller was entitled to make certain deductions from the freight in the event of the voyage being protracted by the deficiencies of the steamer. The concluding subsection of the clause allowing these deductions provided as follows: "If through any accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and reloading same to be deducted from the hire." In the course of the voyage time was lost in discharging and reloading on account of a fire which broke out in the cargo. The fire could not be attributed to any particular cause. The Shipping Controller claimed the right to make the deductions. Held, that the meaning of "accident" depends upon the circumstances and intentions of the parties concerned. An accident may or may not arise from negligent or wilful acts or from causes unconnected with negligence or wrongdoing. In this case there was no accident in the sense contemplated by the parties. Even if the fire had been an accident, the Shipping Controller must still have failed, since it would have been accident to the cargo, not to the ship. In any event the Shipping Controller could not succeed, since hire runs continuously in favour of the shipowner in the absence of clear provisions to the contrary. The provisions relied upon in this case were ambiguous. (McCardie, J.) *Denholm Limited* v. *Shipping Controller*..... 141

NOTE.—Since reversed by Court of Appeal.—ED.

9. "*Always afloat*"*—Alongside as customary—Custom of Port of Yarmouth—Custom inconsistent with terms of charter.*—A charter-party provided for a vessel to deliver timber at Yarmouth "always afloat," the cargo to be taken from alongside at the charterer's risk as customary. She could not float within 13ft. of the side of the quay, and it was accordingly necessary to erect staging between the ship and the wharf. The cargo was then carried from the ship's side across this staging and stacked 12ft. from the edge of the quay. This method of unloading follows the custom of the port. In an action by the shipowner in the County Court to recover the cost of carrying the timber from the ship's side to the quay, and of erecting the staging over which it was carried, it was held that the custom of the port was not consistent with the terms of the charter. Held, that this judgment was right. Although a custom may be admitted to show that delivery from "alongside" need not mean delivery over the ship's rail, it did not follow that the place of delivery was the place indicated by the custom. Judgment of the Court of Appeal in *Holman* v. *Wade* (Times Newspaper, May 11, 1877, supplemented by further particulars from the Public Record Office) followed. (Adm. Divisional Court, Sir Henry Duke, P. and Hill, J.) *The Turid* 155

NOTE.—Since affirmed by House of Lords, see Nos. 10, 31 (*infrâ*.).—ED.

10. *Charter-party—Expense of unloading timber—"Cargo to be taken from alongside at charterers' expense as customary"—Custom of port of Yarmouth—Custom inconsistent with term of charter-party.*—By a charter-party of

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the 1st. Oct. 1914 it was agreed between the plaintiffs, the owners, and the defendants, the charterers, that the steamship *T.* should load a cargo of timber at Soroka for carriage to Yarmouth and deliver there "as ordered, or so near thereunto as she may safely get, always afloat"; and that the cargo should be taken "from alongside the steamer at charterer's risk and expense as customary." The *T.* was ordered to discharge at a part of the quay occupied by the charterers, to which she was always afloat unable to get nearer than about 13ft., and the cargo was there discharged by stagings slung from the ship's side to the quay, the stevedore's men working in two gangs, one carrying the timber to the ship's rail and the other carrying it ashore. It was proved that there was a custom at the port of Yarmouth that the whole of this work should be done by and at the cost of the ship. The shipowners objected that the alleged custom was inconsistent with the terms of the charter-party, and sued the charterers to recover the costs of discharge over and above the rate for delivery at the ship's rail. Held, that the case was indistinguishable from *Holman* v. *Wade* (Times, May 11, 1877) and that the court were bound by that case to hold that the custom was inconsistent with the charter-party; and that the shipowners were entitled to recover from the charterers the costs of discharge over and above the rate for delivery at the ship's rail. Decision of the Divisional Court (15 Asp. Mar. Law Cas. 155; 123 L. T. Rep. 587) affirmed. (Court of Appeal.) *The Turid* 184

NOTE.—Since affirmed by House of Lords, see No. 31 (*infrâ*).—ED.

11. *Charter-party — Discharge of cargo — "As customary" — "Arrived ship" — Commencement of discharge—Time fixed by charter-party —Delay in finding berth—Discharge with customary dispatch—Presence of other ships.*—In July 1920 the plaintiffs, the owners of the steamship *N.*, chartered the steamship to the defendants to proceed to the port of N., and, after loading a cargo, to proceed to Q., and there deliver the cargo. A clause in the charter-party provided that the cargo was to be discharged "as customary," and that the time for discharge should be counted from the first high water on or after the arrival of the steamship at or off a discharging berth. The steamship arrived at the port of Q. and was off her discharging berth at ten o'clock on the morning of the 5th July 1920, and the first high water after her arrival was at 3.30 o'clock in the afternoon of that day. There were a number of other ships in the port, which had arrived before the steamship *N.*, and were therefore entitled to priority over the steamship *N.* Consequently the steamship *N.* did not begin to discharge until about the 9th July. She was then discharged within forty-eight hours. The plaintiff claimed 150*l.* demurrage as being the amount due at 2*s.* per gross ton per day for the period between the 7th July and the 11th July, according to the tonnage of the vessel, under a provision in the charter-party to that effect. Held, that the effect of the charter-party was to determine when the *N.* became an "arrived ship." Thereafter the defendants were only bound to do what was reasonable under existing circumstances, such as the presence of other ships in the port. The defendants, having discharged with customary dispatch after securing a suitable berth, were not liable for demurrage. (Roche, J.) *Bargate Steam Shipping Company Limited* v. *Penlee and St. Ives Stone Quarries Limited*..... 188

12. *Charter-party — Dead-weight — Permanent ballast of cement—"Whole reach and lawful burthen of ship"—Carrying capacity—"Carrying about 600 tons dead-weight without guarantee" —Rate of hire.*—The steamship *T.* was described in a charter-party dated the 24th April 1917 as being "supposed to carry about 600 tons, but no guarantee given dead-weight on Board of Trade summer freeboard inclusive of bunkers." The charterers on the same day sub-chartered the vessel by a sub-charter, describing her therein as "carrying about 600 tons dead-weight on Board of Trade summer freeboard inclusive of bunkers without guarantee." At the time when the vessel was delivered under the terms of the charter and the sub-charter she had some 100 to 150 tons of hard cement fixed in her holds, which reduced her total dead-weight capacity to about 497 tons. Held, (1) that in giving the whole reach and burthen of the ship as it existed at the time of the charter, the owners had performed their covenant that the whole reach and lawful burthen of the ship should be at the charterers' disposal; and (2) that the words "without guarantee" protected the owners from liability in respect of the dead-weight capacity being short of 600 tons. (Decision of Rowlatt, J. reversed.) (Court of Appeal.) *Japy Freres and Co.* v. *R. W. J. Sutherland and Co*; *R. W. J. Sutherland and Co.* v. *Owners of the Steamship Thoeger* 198

13. *Shipping and forwarding Agents—Casual transaction—Contract to collect and lighter goods—No express terms—Usual terms—Loss of goods by pilferage—Lighterman's liability—Common carrier.* —The plaintiffs employed the defendants, who were shipping and forwarding agents, in Oct. 1919, to collect and carry a quantity of goods, including tin, from certain wharves where they were lying to a ship on the Thames. The defendants were not lightermen having wharves and barges of their own, and nothing was said about the terms on which this lighterage was to be done, except that the defendants were to be paid a flat rate for their services. The defendants employed carters to cart the goods from the wharves where the goods were lying to a wharf which they used under an arrangement with the wharf owners, and which they described in their correspondence with the plaintiff as "our wharf." They then employed a firm of lightermen to lighter the goods from the wharf to the ship in the river. Owing to the watchman's negligence a quantity of the tin was stolen. The plaintiffs claimed to recover the value of the stolen goods. The defendants relied on a custom that all contracts for lightering goods in the Port of London were subject to the terms of the London Lighterage clause, which exempted lightermen from liability for any loss in any circumstances whatever, howsoever, whensoever any such loss might be caused, and whether caused by negligence or the wrongful act or default of the servants or agents of the lightermen, or other persons for whose acts the lightermen would otherwise be liable. The transaction was of a casual nature, and the defendants did not act strictly as shipping agents, but were contractors to employ carriers at a rate which included their own remuneration. Held, that no express terms with regard to lighterage having been arranged, the defendants must be taken to have been employed on the usual forms. They were, therefore, exempt from liability for loss by pilferage, and the plaintiffs could not recover. (Rowlatt, J.) *Lynch Brothers Limited* v. *Edwards and Fase*.... 208

14. *Charter-party—Cesser of hire—"Or other accident preventing the working of the steamer"— Ejusdem generis rule—"Shallow harbours, rivers, or ports, where there are bars"—Liability of charterers for hire.*—A steamer was chartered to load at Sunderland and to discharge at a French port. The French Government ordered the steamer to discharge at Marans, which was a safe port within the meaning of the charter-party. She arrived at Marans Roads at 6 p.m. on the 16th Oct. 1916, and got aground on soft clay while going up the river. She remained aground till 1 p.m. on the 24th Oct. and was damaged in consequence of the grounding. Repairs began about the 8th Nov. and took a considerable time. There was no bar in the harbour, river or port. By clause 12 the charter-party provided: "That in the event of loss of time from deficiency of men

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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 ; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." The umpire found that hire ceased (*a*) as from 6 p.m. on the 16th Oct. 1916 till 1 p.m. on the 24th Oct. ; (*b*) during the time occupied for repairing the damage done to the steamer. (McCardie, J. affirmed the award.) Held, that the *ejusdem generis* rule was not applicable to the words " or other accident " in the first part of clause 12, and that those words included any accident to the vessel preventing her from working for more than twenty-four consecutive hours. (Judgment of McCardie. J. affirmed on this point. But held that the words " where there are bars " in the latter part of clause 12 applied only to ports, and not to shallow harbours or rivers, and that as the grounding which caused the detention occurred when the vessel was trading to a river, the time lost was for charterers' account. Judgment of McCardie, J. (15 Asp. Mar. Law Cas. 107 ; 124 L. T. Rep. 160 ; (1920) 3 K. B. 321) reversed. (Court of Appeal.) *Owners of Steamship Magnhild* v. *McIntyre Brothers and Co.* 230

15. *Failure to deliver goods—Bills of lading—" Received for shipment "—Indorsees of the bills of lading—Several indorsees join in one writ—Arrest of ship—Procedure—Admiralty Court Act* 1861 (24 *Vict. c* 10), *s.* 6—*Colonial Courts of Admiralty Act* 1890 (53 *&* 54 *Vict. c.* 77), *s.* 2, *sub-s.* 2.—A document which acknowledges that goods have been received for shipment by a named vessel, or by some vessel belonging to named shipowners, does not on that ground fail to be a bill of lading w'thin the meaning of the Bills of Lading Act 1855 (18 & 19 Vict. c. 111). The sailing ship *M. H.* loaded at New York a cargo of general merchandise for carriage to Sydney. F. E. and Co., of New York, as agents for the charterers, received for shipment certain packages consigned to, among other persons in Sydney, the various respondents. To each consignor there was issued a document which acknowledged the receipt of the goods " for shipment by the sailing ship *M.H.* or by some other ship owned or operated by " certain lines of vessels, to be transported to Sydney, and there delivered to shipper's order. The document contained references to itself as a " bill of lading " and was signed F. E. and Co. " for the master." The goods, not being delivered upon the arrival of the *M. H.* at Sydney, the respondents, who were each indorsees of one of the documents, issued a writ *in rem* against the ship, claiming severally to recover damages in an action for non-delivery of goods under bills of lading, and the ship was arrested. The appellants thereupon took out a summons to set aside the writ and by order a special case was stated for the opinion of the full court to have decided (1) whether the Supreme Court in its Admiralty Jurisdiction had jurisdiction to hear the action, and (2) whether the plaintiffs were properly joined. Held that the documents were bills of lading within the meaning of sect. 6 of the Admiralty Court Act 1861 ; and that the joinder of plaintiffs, an obviously convenient course in the present case, depended upon rule 29 of the Supreme Court (Admiralty Jurisdiction), and, that being a matter of procedure, their Lordships were not disposed to differ from the decision of the Supreme Court, and the case should proceed to trial. Accordingly the appeal would be dismissed. (Privy Council). *The Ship Marlborough Hill* v. *Alex. Cowan and Sons Limited and others* 163

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16. *Charter-Party—War risks—Stranding of ship—Sailing in convoy—" Consequences of hostilities or warlike operations."*—The steamship *I.* was at all material times under requisition by the Admiralty under the terms of the charter-party T. 99. Under this charter-party the Admiralty were not liable for ordinary risks at sea but undertook to be liable for risks from all " consequences of hostilities or warlike operations." The *I.* was under orders to sail and did sail from Salonica to Taranto in Italy. She had on board hospital stores for the British Government and carried a few British troops and officers. When nearing Taranto she was navigated without lights, being then in the war zone. She was escorted by a British destroyer. No lights on shore were visible and she was ordered by the commander of the destroyer to follow a pilot escort which had come out of Taranto. This order she complied with, although without such an order the master would not have attempted to enter the port. Almost immediately after being ordered to follow the pilot escort the *I.* lost sight of her lights and was stranded on the rocks just outside the port of Taranto. Held, following the decision of the House of Lords in *Green* v. *British India Steam Navigation Company* (*The Matiana*) (15 Asp. Mar. Law Cas. 58 ; 123 L. T. Rep. 721 ; (1921) A. C. 104) that though the stranding of the *I.* took place while she was being navigated under war conditions the damage done to her did not arise in consequence of warlike operations, and the Admiralty were not liable. *The British Steamship Company* v. *The King* (*The Petersham*) (15 Asp. Mar. Law Cas. 58 ; 123 L. T. Rep. 721 ; (1921) 1 A. C. 100) explained. (McCardie J.) *Harrisons Limited* v. *Shipping Controller*..... 270

17. *Charter-party — Requisitioned ship — T.* 99 (*clause* 25)—*Cargo of coal—Fire in cargo—" Accident "—Whether " accident " limited to ship or includes cargo.*—The concluding lines of clause 25 (b) of the charter-party T. 99 which provides that " if through any accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and reloading the same is to be deducted from the hire " are not limited to an accident to the ship but include an accident to the cargo. So held by Bankes and Atkin L.JJ. (Scrutton L.J. doubting). Judgment of McCardie J. (15 Asp. Mar. Law Cas. 141 ; 124 L. T. Rep 378) reversed. (Court of Appeal.) *Denholm Limited* v. *Shipping Controller* 277

18. *Bill of lading—Short delivery—Claim against shipowner—Mistake—Onus of proof—How discharged.*—The plaintiffs claimed from the defendants, who were shipowners, damages for short delivery of a cargo of linseed from Argentina. The plaintiffs said that they delivered on board the defendants' ship at Buenos Ayres 17,104 bags of Plate linseed for carriage to London. The defendants by their bill of lading and mate's receipts admitted that they received that number of bags on board. The defendants only delivered 16,948 bags in London. The bags delivered on board at Buenos Ayres were tallied by tallymen on behalf of both the plaintiffs and the defendants ; and as to 2,085 bags by three tallymen. The tallymen all agreed as to the number of bags delivered to the ship, but an error appeared in one tally-book and an alteration in another. The total amount arrived at by the tallymen was accepted by the mate for the purpose of the mate's receipt and was accepted as correct for the purpose of insertion in the bill of lading signed by the master. It was clear on the evidence that there was no possibility of loss by theft or otherwise during the voyage. The learned judge therefore found that it was proved beyond a reasonable doubt that all the bags and their contents that were received by the ship from the plaintiffs at Buenos Ayres were delivered by the ship to the plaintiffs in London and he held that all

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cases of short delivery turned on inferences of fact. A plaintiff claiming damages for short delivery must prove his case and it was *prima facie* enough to entitle him to succeed if he proved the delivery of a less number or weight or measure of goods than that admitted in the bill of lading. That proof placed the onus on the shipowner to establish that the number, weight, or measure admitted by the bill of lading was wrong. The shipowner might discharge that onus by direct evidence that a mistake was made by the tallymen from whose tallies the bill of lading was made out or by indirect evidence proving beyond reasonable doubt that none of the goods were lost or stolen after receipt and that he delivered all that he received. In this case the defendants, the shipowners, had proved beyond all reasonable doubt that they had delivered all that they received and that there must have been a mistake in the tally at Buenos Ayres and in the bill of lading figures which were the result of that tally. Held on appeal that the learned judge had fully appreciated the question of law which governed the matter and that there was no ground for setting aside his findings of fact. (Court of Appeal.) *Sanday and Company* v. *Strath Steamship Company Limited* 280

19. *Charter-party—Baltic and White Sea Conference Uniform Time Charter* (*Clause* 16)—*Icebound port—Port kept open by icebreakers—Damage by forcing ice*—"*Nor shall steamer be obliged to force ice*"—*Manchester Ship Canal—Ship unable to leave Manchester in light draft*—"*Good and safe port.*"—A safe port is a port to which a ship can safely get and from which she can safely return. By a charter-party dated the 25th Nov. 1919 and made on the Baltic and White Sea Conference Uniform Time Charter 1912 form the plaintiffs' steamer was chartered and it was provided that the steamer should be delivered to the charterers and should be employed between good and safe ports or places within the limits of one Baltic round where she could always safely lie afloat, as the charterers or their agents should direct. Clause 16 of the charter-party provided that "the steamer shall not be ordered to . . . any icebound port" or any port "where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or get after loading or discharging nor shall the steamer be obliged to force ice"; should the steamer be detained by any of the above causes such detention should be for charterers' account but nevertheless "if on account of ice the captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and (or) damaged he shall have liberty (but not be obliged) to sail to a convenient open port and await charterers' fresh instructions." The charterers ordered the steamer to proceed to the port of Abo, which port was kept open in the winter by means of ice-breakers. While proceeding to Abo the steamer encountered ice. Sometimes she was able to force her way through without the aid of an ice-breaker, sometimes she tried and failed; but eventually with the aid of an ice-breaker she got through and arrived at Abo. In the course of her voyage to and from Abo she was very seriously damaged by the ice. After loading a cargo at Abo the charterers ordered the steamer to proceed to Manchester. To reach the port of Manchester the steamer had to proceed up the Manchester Ship Canal. She was able to pass through the canal loaded on her way to Manchester but after she had discharged her cargo at Manchester her draft was such that she could not proceed down the canal and clear the bridges without cutting her masts. In a claim by the plaintiffs against the charterers for breach of charter-party Bailhache J. held (1) that the charterers had committed no breach of the charter-party in ordering the steamer to proceed to Abo because that port being kept open by means of ice-breakers was not an ice-bound port within the meaning of the charter-party; (2) that

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on the true construction of clause 16 of the charter-party the steamer was not bound to force her way through ice; whether she attempted to do so rested in the master's discretion; therefore the charterers were not liable for the damage suffered by the steamer through encountering ice on the way to Abo; (3) that Manchester was not a good and safe port within the meaning of the charter-party because a safe port meant a port to which a ship could safely get and from which she could safely return. The charterers therefore committed a breach of the charter-party in ordering the steamer to Manchester and were accordingly liable for the expense of cutting the masts to enable her to return under the bridges of the Manchester Ship Canal. Held on appeal (1) that Abo was not an ice-bound port within the meaning of the charter-party; and (2) (Atkin L.J. doubting) that the charterers had not ordered the ship to a port on her way to which she was obliged to force ice; and that there had not been a breach of the charter-party in either respect. Judgment of Bailhache J. (*infra*); (1921) 1 K.B. 568 affirmed. (Court of Appeal.) *Limerick Steamship Company Limited* v. *W. H. Stott and Co. Limited* 323

20. *Bill of lading*—"*Shipped in good order and condition*"—"*Weight quality condition unknown*"—*Cargo damaged on shipment—Clean bill of lading—Estoppel—Skipper acting as agent of the consignee—Undertaking to indemnify the master.*—The description "shipped in good order and condition" when it appears in a bill of lading refers to the outward condition and appearance of the goods. The subsequent description "weight quality condition unknown" refers to the internal condition of the goods not visible to the person who signs the bill. A bill of lading which contains both these expressions is not thereby contradictory in terms. The plaintiffs agreed to purchase through A. and the B. agency in Sweden potatoes f.o.b. Gothenburg, payment to be made on signing clean bills of lading. A. chartered the Dutch sailing vessel *T.* to carry some of the potatoes to Hull. The plaintiffs subsequently ratified the chartering of the *T.*, and the potatoes were loaded under the supervision of A., whom the plaintiffs authorised to act for them in certain matters connected with the stowage of the cargo. The bags of potatoes were brought to the ship in a wet condition, and the full number described in the bills of lading was not loaded. The master of the *T.* accordingly refused to sign clean bills of lading. On the undertaking of the B. agency, given with the knowledge and approval of A., to indemnify him against liabilities which he might incur thereby, and acting upon the advice and with the approval of the owners' agents, he ultimately signed clean bills of lading which described the cargo as "shipped in good order and condition . . . weight quality condition unknown." Thereupon payment was made by the plaintiffs in Gothenburg in accordance with the terms of sale. On the arrival of the *T.* at Hull the whole of the cargo was found to be damaged. The plaintiffs accordingly arrested the *T.* in an action for damage to cargo and short delivery, contending that they were indorsees of the bills of lading without notice of the condition of the cargo, and that the defendants were estopped by the admissions contained in the bills from denying that the cargo was shipped in good order and condition. The defendants denied that the plaintiffs were indorsees without notice, saying that A. was the agent of the plaintiffs and that the property in the goods passed to the plaintiffs before shipment. Held, that A. was not the agent of the plaintiffs. The plaintiffs were therefore indorsees of the bills of lading without notice, and the property in the potatoes therefore passed to them on the signing of the bills. The defendants were therefore estopped from denying as against them that the potatoes were shipped in good order and condition. The description "shipped in good order and condition" applied to the external condition of the bags which was

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visible to the master, and was not in contradiction with the subsequent words "weight quality condition unknown." The defendants were liable for the injury to and loss of the potatoes. (Sir Henry Duke, P.) *The Tromp* 338

21. *Time charter-party — Construction — Payment monthly in advance—Extension of charter beyond stipulated period—Frustration of adventure—Effect on payment of hire.*—The appellants chartered from the respondents a steamer for four calendar months under a charter-party, which provided that the charterers should pay as hire a fixed sum per month, and *pro rata* for any fractional part of a month until re-delivery of the steamer to owners as therein stipulated, payment of hire to be made monthly in advance. Provision was also made for re-delivery of the steamer at a United Kingdom coal port. Should the steamer be on a voyage at the expiration of the period fixed by the charter, the charterers were to have the use of the steamer at the rate and on the conditions therein stipulated to enable them to complete the voyage, provided always that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter. In the event of a breakdown of machinery or other accident preventing the working of the vessel for more than twenty-four hours, the charter-party provided for the cesser of hire until she was again in an effective state to resume her services; but should the vessel be driven into port or to anchorage by stress of weather, and in certain other events the time so lost and expenses incurred were to be for the charterers' account, and in the event of the vessel being lost, the hire paid in advance or not earned was to be returned to the charterers, who were to have a lien on the steamer for all moneys paid in advance and not earned. The period fixed by the charter-party expired on the 10th Aug. 1919. In the previous July the charterers had loaded the steamer at Antwerp with a cargo of coal for Toulon, intending that she should return to Great Britain with a cargo of mineral, but on the 14th July the Shipping Controller notified that after the completion of her discharge at Toulon the steamer was required to go to Australia. The steamer proceeded to Toulon, but the discharge of her cargo was not completed until the 16th Aug., on which day the owners took delivery of their steamer at Toulon without prejudice to their rights, and under the requisition she was sent to Australia. The charterers claimed that they were only entitled to pay a fractional portion of a month's hire, namely, from the 10th to the 16th Aug., when the steamer was delivered, and the question was referred to arbitration. Held, (1) that the provision for payment in advance applied to the case of an extension of the charter-party beyond the stipulated period, and that, on the 10th Aug. a full month's hire was payable by the charterers; and (2) (Lord Finlay and Lord Wrenbury dissenting on this point) that there having been no re-delivery as prescribed by the charter, the charterers were not entitled to a *pro rata* adjustment by reason of the frustration of the adventure. (House of Lords.) *French Marine* v. *Compagnie Napolitaine D'Eclairage et de Chauffage par le Gaz* 358

22. *Bill of lading—Clause requiring claims to be made within seven days—Refrigerating apparatus—Obligation to maintain imposed by statute on shipowner—Whether "weakened, lessened, or avoided" by the bill of lading—Fiji Ordinance No. XIV. of 1906, s. 4.* The Fiji Ordinance, No. XIV. of 1906, relating to the sea carriage of goods (which is in substance identical with the Sea Carriage of Goods Act 1904 of Australia) enacts by sect. 4 that where any bill of lading or document contains any clause whereby the obligation of a shipowner (*inter alia*) to make and keep the ship's refrigerating chambers fit for the carriage and preservation of the goods should in any way be weakened, lessened, or avoided, that clause shall be illegal and void. By sect. 5 the parties to a bill

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of lading are to be deemed to have intended to contract according to the laws in force at the place of shipment, and by sect. 7 (1) a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects. The respondent shipped at Fiji bananas on board a vessel belonging to the appellants. The bill of lading provided that no claim for loss or damage should be enforecable unless made within seven days from the date at which the cargo was or should have been landed. The refrigerating chambers were defective and the fruit was damaged on the voyage. The shipper sued to recover the loss so caused him, contending that the shipowners were liable in that the ship was unseaworthy, but he failed to claim within seven days. Held, that as the clause in the bill of lading weakened or lessened the shipowner's obligation, it was void under sect. 4 of the Ordinance, and consequently the shipper was not barred by his delay in claiming from recovering damages. Judgment of the Supreme Court of Fiji affirmed. (Privy Council.) *Australasian United Steam Navigation Company Limited* v. *Hunt* 367

23. *Shipping and forwarding agents—Through bill of lading—Prepayment of lump sum freight—Consignee voluntarily taking delivery of goods at place short of original destination—Freight for unperformed portion of transit unexpended—Principal or agent—Obligation to account.*—The plaintiff delivered to the defendants in Liverpool a large quantity of cigars and cigarettes for carriage to Petrograd *via* Vladivostock at the rates (previously quoted by the defendants) of 4*l.* 7*s.* 6*d.* per ton for the sea portion of the carriage to Vladivostock, and 99*l.* 10*s.* per ton for the land portion from Vladivostock to Petrograd, and on the terms of a document in the form of a bill of lading, which stated that "Goods are forwarded on the basis of the present existing tariff and in accordance with the exceptions and (or) conditions of the railway companies, steamship lines, or other transport media concerned in the carriage, and we only act in our capacity as shipping and forwarding agents without responsibility on our part for other transport media concerned in the transport," and "Freight on above goods payable in Liverpool." The plaintiff duly prepaid at Liverpool the amount of the freight, which was 125*l.* for the sea portion of the carriage, and 928*l.* for the land portion, and it was assumed by the plaintiff that the rates which the defendants had quoted to the plaintiff were intended to cover the defendants' remuneration. The consignee of the goods, owing to the internal troubles in Russia, voluntarily elected to take delivery of the goods at Vladivostock. The defendants had not paid the railway company any sum of money in respect of carriage from Vladivostock to Petrograd. The plaintiff claimed to recover back the sum of 928*l.* as money received by the defendants as the plaintiff's agents and not expended by them. Rowlatt, J. held, that as the sum paid to the defendants by the plaintiff in Liverpool was a lump sum for procuring the carriage, and included the defendants' remuneration, they were under the obligation to account to the plaintiff for any portion of the money which was not expended by reason of the consignee electing to take delivery at a place short of the original destination of the goods. Held, that on the facts the defendants were in this transaction acting, not as forwarding agents, but as principals, and that the judgment of Rowlatt, J. was right. (Court of Appeal.) *Troy* v. *Eastern Company of Warehouses Insurance and Transport of Goods and Advances Limited (of Petrograd)* 387

24. *General average expenditure—Port of refuge—Subsequent total loss of ship and cargo—Liability of cargo owner for general average—Termination of adventure—York-Antwerp Rules* 1890, *r.* 17.—By rule 17 of the York-Antwerp Rules 1890, the contribution to a general average shall be made upon the actual values of the property at the termination of the adventure. A steamship left

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Cuba with a cargo of sugar, which, under the bills of lading, was to be carried to Queenstown for orders and to be delivered at the port of destination to certain consignees. The bills of lading provided that general average should be payable according to York-Antwerp Rules. During the voyage the ship incurred general average expenses at a port of refuge, and soon after resuming her voyage she and her cargo were totally lost at sea by fire. The shipowner claimed general average contribution from the consignees of the cargo. Held, that, under the York-Antwerp Rules which were incorporated in the contract, the claim failed, because at the termination of the adventure, namely, on the total loss of the ship and cargo, the cargo had no value. *Quaere*, whether the claim would have succeeded at common law, apart from the York-Antwerp Rules. Decision of Sankey, J. (*infrà.*) ; (1921), 2 K. B. 627) affirmed. (Court of Appeal.) *Chellew* v. *Royal Commission on Sugar Supply* 393

25. *Charter-party — Exceptions — "Fire . . . always mutually excepted"—Fire caused by negligence of charterers' servants—Damages which could not reasonably have been anticipated—Liability of charterers—Negligence — Remoteness — "Natural and probable cause."*—In a time charter-party "fire" was "always mutually excepted." Fire broke out in the ship, which was totally destroyed. Arbitrators found that the fire arose from a spark igniting petrol vapour in the hold ; that the spark was caused by a board, knocked into the hold by the charterers' servants, coming into contact with some substance in the hold ; and that the causing of the spark could not reasonably have been anticipated, though some damage to the ship might reasonably have been anticipated. The charterers contended : (1) That the exception of "fire," in the charter-party protected them from liability ; and (2) that the damages were too remote as it could not reasonably have been anticipated that the falling of the board would have caused a spark. Held, (1) that the exception of "fire" did not relieve the charterers from loss by fire caused by the negligence of their servants as there was no express term to that effect in the exceptions clause ; and (2) that the fall of the board being due to the negligence of the charterers' servants, the charterers were liable for all the direct consequences of the negligence, notwithstanding that the consequences could not reasonably have been anticipated. The question whether the damage that ensues can reasonably be anticipated is material only on the question whether an act is negligent or not. Dictum of Pollock, C.B., in *Greenland* v. *Chaplin* (1850, 5 Ex. 248) disapproved. (Court of Appeal.) *Polemis* v. *Furness Withy and Co. Limited* 398

26. *Charter-party—Ship's name—Implied warranty of nationality—Breach—Shipowner selling vessel to foreign subject—Change of nationality of vessel—Change of flag—Implied term—Damages.*—By a charter-party a British ship was chartered by her owners to the plaintiffs for twelve months in direct continuation of an earlier time charter. During the currency of the charter-party the owners sold the ship to a Greek subject, thereby causing her to change her flag. The charterers did not attempt to avoid the charter, but kept the services of the ship until it expired. By the contract of sale the owners reserved the right, and it was agreed that they should retain the right of satisfying any requirement of the charterers with regard to the personal performance of any obligations of the charter-party. Held, that although there was no implied warranty in the charter-party that the ship was a British ship because she was called by a British name, the owners had committed a breach of the charter-party in selling the ship to a foreign subject and causing her to change her flag, and the charterers were entitled to such a sum in damages as would represent the increased difficulty of getting suitable and remunerative employment in consequence of the change of flag. (Rowlatt, J.) *Isaacs and Sons Limited* v. *William McAllum and Co. Limited.* 411

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27. *Time charter—Monthly hire—Right of owners to withdraw steamer from services of charterers in default of payment.—Measure of damages.*—Under a time charter-party hire was to be paid monthly in advance, and in default of such payment the owners were to have the faculty of withdrawing the steamer from the service of the charterers. The charterers did not pay the hire, and the owners withdrew the steamer from their service. Held, that the owners were entitled to recover damages for the chartered period remaining after the withdrawal of the steamer from the charterers' service. The measure of such damages is the difference between the rate of hire provided in the charter-party and the market rate at the date of withdrawal. (Greer, J.) *Leslie Shipping Company* v. *Welstead* 413

28. *Bill of lading—Special form—Reasonableness—"On deck" clause—Duty of shipowner to give notice to shipper of intention to carry on deck—Booking slip.*—The plaintiffs shipped a quantity of candles on board the defendants' steamer for carriage from London to Antwerp, on the terms of a booking slip which the defendants had given to the plaintiffs, and which was approved of by the plaintiffs. The booking slip was as follows (*inter alia*) : "We beg to confirm freight engagement. . . . All engagements are made subject to the conditions, terms, and (or) exceptions of our bills of lading and also to the conditions and (or) regulations of any steamboat, railway, or canal company by whom the goods may be conveyed and all goods are at the risk of senders or owners thereof until actually shipped on board the steamer. No insurances of any description are booked without special instructions. No cargo shipped unless Walford Line's Bills of Lading are used ; no other bills of lading accepted." The goods were shipped on the 18th March 1919, and a bill of lading, dated the 19th March, was given to the plaintiffs. By clause 11 of the bill of lading it was provided that : "The company has the right to carry the goods below deck and (or) on deck, and in branch steamers, coasting or river steamers or vessels and (or) lighters, launches, or boats, and to land or store goods for the purpose of transhipment, re-shipment, or further carriage, and shall have the right to sub-contract in respect of any such carriage or part thereof, and shall not be liable for any loss, damage, or injury within the exceptions in this bill of lading whether due to negligence or not, but such exceptions shall apply to carriage by such sub-contractors as if such sub-contractors were specifically mentioned in the said exceptions." The goods were stowed on the deck of the defendants' vessel, and there was no suggestion of any carelessness in the way they were arranged and protected. No notice was given to the plaintiffs by the defendants that the goods were, or would be, carried on deck. While on the voyage from London to Antwerp the goods were damaged by sea-water through the ordinary perils of the sea. The plaintiffs claimed damages for alleged breach of contract by the defendants in relation to the carriage of the goods. Held, (1) that the plaintiffs were bound by clause 11 of the bill of lading, notwithstanding its unusual character, because they had accepted the booking slip, which provided that the goods were to be shipped under the defendants' special form of bill of lading and clause 11 applied to the goods actually named in the bill of lading ; (2) the defendants were entitled to tow the candles on deck ; (3) there was no implied condition that the defendants should give the plaintiffs notice that the goods in question would be carried on deck and (4) the defendants were therefore not liable for damages. (McCardie, J.) *Armour and Co. Limited* v. *Leopold Walford (London) Limited* 415

29. *Charter-party—Signature by charterers—"As agents" — Effect of signature — Liability of charterers.*—A charter-party stated as follows : "It is this day agreed between Thomas H. Seed and Co. Limited, agents for the owners of the steamship *Ariadne Irene*, and James McKelvie and Co., Newcastle-on-Tyne, charterers." It

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was signed "By authority of owners, for Thomas H. Seed and Co. Limited, A. D. Cadogan, as agents" and "For and on behalf of James McKelvie and Co., as agents, J. A. McKelvie." The plaintiffs as owners sued the defendants as charterers for demurrage which by the charter-party was to be paid by the charterers. Held (Scrutton, L.J. dissenting), that upon the true construction of the charter-party the defendants by their signature had deliberately expressed their intention to exclude any personal liability. Judgment of Bailhache, J. reversed. (Court of Appeal.) *Ariadne Steamship Company* v. *James McKelvie and Co.* 450

30. *Charter-party—Requisitioned ship—Charter T. 99—War risks undertaken by Admiralty—Collision—Negligence—Marine risk—Hospital ship conveying wounded—"Warlike operation."* The suppliants were an Australian steamship company carrying on business in Australia. In Aug. 1915 the suppliants' ship *W.* was requisitioned by the Australian Government for transport service. In the following year, the suppliants' same ship was taken over by the British Admiralty for use as a hospital ship. The British Admiralty took her over on the terms of the well-known charter T. 99, whereby the British Government accepted liability for all war risks, and the suppliants took all the marine risks. In March 1918, while the steamship *W.* was still under requisition to the British Admiralty, she was carrying wounded soldiers from Havre to Southampton. While so doing on a dark and hazy night, and being navigated without masthead lights, and with dimmed sidelights, by order of the British Admiralty, the suppliants' steamer came into collision with another steamer (the steamship *P.*), and both steamers suffered much damage. The suppliants claimed damages from the Crown, on the ground that the collision was a consequence of warlike operations. An action had been brought by the owners of the steamship *P.* against the suppliants, and in that action the collision was held to be due to the negligence of the suppliants' vessel. Held, (1) that the suppliants' vessel was not engaged in a warlike operation, and was not a warship at the time of the collision; and (2) if she were held to be engaged in a warlike operation the loss was due to the suppliants' vessel's own negligence, and the question of negligence being, on the authorities, material, the suppliants could not succeed, and there must be judgment for the Crown. (McCardie, J.) *Adelaide Steamship Company* v. *The King*.... 525

31. *Charter-party—Expense of unloading timber—"Cargo to be taken from alongside at charterers' expense as customary"—Custom of port—Custom inconsistent with term of charter-party.* By a charter-party of the 1st Oct. 1914, it was agreed between the plaintiffs the owners, and the defendants the charterers, that the steamship *T.* should load a cargo of timber at Soroka for carriage to Yarmouth, and delivered there "as ordered, or so near thereunto as he may safely get, always afloat"; and that the cargo should be "taken from alongside the steamer at charterers' risk and expense as customary." The *T.* was ordered to discharge at a part of the quay occupied by the charterers, to which she was "always afloat" unable to get nearer than about 13ft., and the cargo was there discharged by stagings slung from the ship's side to the quay, the stevedore's men working in two gangs, one carrying the timber to the ship's rail, and the other carrying it ashore. It was proved that there was a custom of the port of Yarmouth that the whole of this work should be done by and at the cost of the ship. The shipowners objected that the alleged custom was inconsistent with the terms of the charter-party; and sued the charterers to recover the costs of discharge over and above the rate for delivery at the ship's rail. Held, that the custom was inconsistent with the terms of the charter-party, and that the shipowners were entitled to recover from the charterers the cost of discharge over and above the rate for delivery at the ship's rail.

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Holman v. *Wade* (Times, 11th May, 1877) applied. *Stephens* v. *Wintringham* (3 Com. Cas. 169) overruled. Decision of the Court of Appeal (reported *ante*, p. 184; 125 L. T. Rep. 154; (1921) P. 146) affirmed. (House of Lords.) *The Turid* 538

32. *Charter-party—Broker—Commission on hire paid and earned—Sale of ship during currency of charter by shipowner to charterer—Claim for commission for whole period.*—The appellants carried on the business of shipbrokers, and the respondents were shipowners. By a charter-party made between the respondents and J. H. and Co. as charterers, it was provided that a commission of 2½ per cent. on the hire paid and earned under the charter, and on any continuation thereof, should be payable to the shipbrokers, the present appellants. The charter was a time charter for the period of eighteen months. After four months had expired the owners sold the vessel to the charterers, with the result that the charter came to an end. In an action by the shipbrokers against the shipowners to recover commission in respect of the period subsequent to the sale of the vessel, Held, that if it had been intended on the part of the shipbrokers to provide for the continuance of their commission in any event, they could and ought to have arranged for that in express terms. There was no evidence that the shipowners had sold the ship for the express purpose of relieving themselves from liability for payment of any further commission. The action therefore failed. Decision of the Court of Appeal affirmed. *White* v. *Turnbull, Martin, and Co.* (8 Asp. Mar. Law Cas. 406, 78 L. T. Rep. 726) approved and followed. (House of Lords.) *L. French and Co. Limited* v. *Leeston Shipping Company Limited* 544

33. *Bill of lading—C.i.f. contract—"Through" bill of lading—Goods shipped from Norway to Japan—Transhipment at Hamburg—Tendering "through" bills of lading issued at Hamburg—Rejection by buyer.*—The appellant in Sweden sold to the respondents in London 600 tons of cod guano to be shipped from Norway to Japan c.i.f. Kobe or Yokohama, payment net cash against documents in London. The guano was shipped in April 1920 from three Norwegian ports, and was carried by a local steamer to Hamburg under a bill of lading of the 22nd April 1920, and was there transhipped to a Japanese steamer, the *A.M.*, which carried it to Japan. L., the agent of the *A.M.*, at Hamburg, issued through bills of lading as soon as the goods came into his possession in the following form: "Through bill of lading from Braatvag according to bill of lading on the 22nd April 1920. Shipped in apparent good order and condition by Messrs. Hamel and Horley Limited, on board the steamship *Kiev* lying in or off the port of Braatvag, and bound to Hamburg for transhipment into the . . . *Atlas Maru* 1500 bags cod guano . . . to be delivered . . . at . . . Yokohama unto order." The respondents refused to accept these bills of lading as not fulfilling the conditions of a c.i.f. contract. The Court of Appeal (reversing Bailhache, J.) held without deciding whether the bill of lading would have been a through bill of lading or not had it been issued at the proper time, the fact that it was not issued at a proper time entitled the defendants to refuse to accept it in satisfaction of their c.i.f. contract. Held, that the bills of lading were not a good tender. They were the contract of the subsequent carrier without any complementary promises to bind the prior carrier in the through transit; the buyer being left with a considerable lacuna in the documentary cover to which the contract entitled him. Further, a bill of lading issued thirteen days after the original shipment at a port in another country many hundreds of miles away was not duly procured "on shipment"; and the so-called through bills of lading were too late in point of time. Judgment of the Court of Appeal (*infrà*) affirmed. (House of Lords.) *Hansson* v. *Hamel and Horley Limited*..... 546

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34. *Charter-party—Reference of disputes to arbitration—Unseaworthiness at commencement of voyage—Claim for damage to cargo—Time limit for appointing arbitrator—Effect of arbitration clause.*—By a charter-party it was provided that "all disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators . . . one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. . . . Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred." Held, that that provision did not exclude the cargo owner from such recourse to the courts as was always open, by virtue of the provisions of the Arbitration Act, to a party who had agreed to arbitrate, but that it was unavailable to the shipowner as an answer to a claim for damage caused by unseaworthiness. *Tattersall* v. *National Steamship Company Limited* (5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297) approved and followed. Decision of the Court of Appeal affirmed on other grounds. (House of Lords.) *Atlantic Shipping and Trading Company Limited* v. *Louis Dreyfus and Co.* (First Appeal) 566

35. *Requisition — Charter-party — Loss by enemy action—Compensation—Petition of right—Indemnity Act* 1920 (10 & 11 *Geo.* 5, *c.* 48), *ss.* 1 *and* 2.—In March 1915 a ship was requisitioned by the Admiralty and taken under a charter-party which fixed the rate of hire, gave to the Admiralty the right of purchase at a certain price, and rendered them liable for all risks and expenses of the ship. In Feb. 1916 the ship while so requisitioned was sunk by enemy action. Accordingly the owners, by petition of right, claimed damages against the Admiralty. Before the petition was heard the Indemnity Act received the Royal Assent on the 16th Aug. 1920. The Crown having claimed that by virtue of the Act the petition was discharged, the point of law was set down for hearing. The Indemnity Act 1920 provides by sect. 1 (1) that no action or legal proceeding (including a petition of right) shall be taken in respect of any act done during the war before the passing of the Act, if done in good faith or in the public interest by or under the authority of an official in the service of the Crown, and that if any such proceeding has been instituted before the passing of the Act it shall be discharged and made void: "Provided that, except in cases where the claim for payment or compensation can be brought under sect. 2 of this Act, this section shall not prevent (*b*) the institution of proceedings in respect of any rights under, or alleged breaches of, contract," if the proceedings are brought within the specified time. Sect. 2 (1) provides that "Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person (*a*) being the owner of a ship or vessel which has been requisitioned shall be entitled to payment or compensation for the use of the same and for services rendered during the employment of the same in Government service, and compensation for loss or damage thereby occasioned. Held (Lord Parmoor dissenting), that the case fell within sect. 2, sub-sect. 1 (*a*), of the Act, the general words of which included claims for breach of contract, and that as there was no agreement as to the amount to be paid for total loss compensation must be assessed in the manner provided by that section. The petition of right was therefore discharged under the Act. Decision of the Court of Appeal reversed. (House of Lords.) *Attorney-General* v. *Royal Mail Steam Packet Company* 574

36. *Carriage of goods—Vessel chartered by sellers—"Expected ready to load late September"—Grounds for expectation—Absence of reasonable grounds—Delay—Frustration of contract.*—Sellers, who had

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chartered a steamship which had left Norfolk, Virginia, for Rio de Janeiro, with coal, and was to go on to the River Plate in ballast, contracted on the 20th Sept. 1920 to sell to K. M. and Co. 1000 tons of clipped La Plata oats for shipment from the River Plate. The contract contained the following clause: "Shipment in good condition per first-class steamer *I.*, expected ready to load late September." The steamer experienced engine trouble, and had not arrived at Rio at the date of the contract. She left Rio on the 29th Oct., and the sellers stated that she would arrive in the River Plate about the 12th Nov. The buyers claimed that the delay had frustrated the contract. The matter was referred to arbitration, and the arbitrators found that the statement "expected ready to load late September" was not justified, and that the delay was so great as to frustrate the contract. Held, that the finding of the arbitrators must be taken to mean that the sellers could not have had an honest expectation founded on reasonable grounds that the vessel would be ready to load by late September. The arbitrators were justified in that finding, and their award must be upheld. Decision of McCardie, J. (38 Times L. Rep. 273) affirmed. (Court of Appeal.) *Samuel Sanday and Co.* v. *Keighley, Maxted, and Co* 596

37. *Charter-party—Exceptions clause—Construction—General followed by particular words—"Et cetera"*—Ejusdem generis *rule.*—Where general words in an exceptions clause in a charter-party are followed by particular words, the *ejusdem generis* rule should not be applied. A charter-party contained the following exceptions clause: "Should the vessel be detained by causes over which the charterers have no control, viz., ice, hurricanes, blockade, clearing of the steamer after the last cargo has been taken over, &c., no demurrage is to be charged and lay-days not to count." The chartered vessel was detained for a number of days beyond the lay-days by a strike of dock labourers at the port of discharge. Upon a claim for demurrage, Held, that the governing words of the clause were "causes over which the charterers have no control," the particular causes mentioned being merely instances to which, as they followed the general words, the *ejusdem generis* rule ought not to be applied, and that the words "et cetera" only meant "and so on," and had not the effect of getting rid of the preceding general words. Decision of McCardie, J. reversed. *Herman* v. *Morris* (35 Times L. Rep. 574) not followed. (Court of Appeal.) *Ambatielos* v. *Anton Jurgens Margarine Works* 598

NOTE.—Since upheld in the House of Lords.—ED.

38. *Charter-party—Defence of the Realm—Coal Strike—Detention of ship loading coal—Admiralty orders—Claim by charterers for compensation—Claim against the Crown—Reg.* 39BBB *Defence of the Realm Regulations—Indemnity Act* 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2.—In 1920 the suppliants were engaged in carrying coal from South Wales for the French railways. By a time charter-party they had hired the steamship *N.*, the rate of hire being 279*l.* a day. In Oct. 1920 the steamship *N.* was at Cardiff loading coal for Nantes. She had nearly finished loading when the coal strike broke out. The naval transport officer, acting under Admiralty instructions given by virtue of their powers under Emergency Regulation 39BBB, ordered the *N.* to go out to Barry Roads and lie there and wait for further orders. The vessel was detained in Barry Roads for eighteen days, and was then allowed to proceed on her voyage to France. The suppliants then applied to the shipping controller for compensation for the detention, for bunker coal burnt while waiting for orders, extra wages, and other expenses arising by reason of the detention. The shipping controller replied that, as the vessel had not been actually under requisition, he could not pay any compensation. The suppliants thereupon brought a petition of right claiming

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from the Crown damages for the detention of their vessel. They alleged that they were requested by the Admiralty to let the *N.* lie in Barry Roads and that they assented, and that from such request and assent there arose an implied promise by the Admiralty to indemnify them against loss. On behalf of the Crown it was contended that there was no contract whatever between the Crown and the suppliants. Reg. 39BBB provides for the payment of compensation for a requisitioned ship but not for a ship under orders or detained as the *N.* was. The suppliants were not in possession of the vessel nor had they a lien on her. They had only a contractual right to order her master to perform voyages with her for their benefit and profit. Held, (1) that there was no implied contract with regard to the payment of compensation for the loss due to the detention of the ship; (2) that the suppliants had no right of compensation under reg. 39BBB or at common law, and (3) that if the suppliants were entitled to any compensation under the Indemnity Act 1920 their only tribunal was the one set up by that Act, namely, the Defence of the Realm Losses Commission. (Bailhache, J.) *Federated Coal and Shipping Company Limited* v. *The King.* 604

CARRYING CAPACITY.
See *Carriage of Goods*, No. 12.

CASE STATED BY ARBITRATOR.
See *Arbitration*, No. 3.

CASUALTY, NOTICE BY LLOYD'S.
See *Marine Insurance*, No. 6.

CESSER OF HIRE.
See *Carriage of Goods*, Nos. 7, 14.

CHARGING ORDER.

Enemy-owned vessel—Solicitors Act 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28—*Set off—Loss by submarine action—Treaty of Peace Order in Council* 1919 (*No.* 1517 *of the* 18*th Aug.*), *sub-ss.* 16, 17—*Treaty of Versailles* 1919, *arts.* 296, 297.—English solicitors had, before the war, secured for German clients a judgment against English owners of an English vessel. Upon an application by them for a charging order under sect. 28 of the Solicitors Act 1860, upon the damages recovered by them against the English owners of the vessel on behalf of the German clients: Held, that "assets" in art. 297 (*h*) of the Treaty of Versailles means "net assets," that is, the assets after deducting the expenses of collection and realisation; that there was nothing in the Treaty of Peace or the Treaty of Peace Order in Council to prevent the making of a solicitor's charging order upon the damages. (Hill, J.) *The Marie Gartz* 190

See *Prize*, No. 28.

CHARTER-PARTY.
See *Carriage of Goods*, Nos. 1, 2, 3, 4, 10, 11, 12, 14, 16 17, 19, 21, 25, 29, 30, 31, 32, 34, 35, 36, 37, 38.
See *Marine Insurance*, No. 7.
Requisition, 3.

C.I.F. CONTRACT.
See *Carriage of Goods*, No. 33.

CLAIMS.
AGAINST SHIPOWNER (Bill of Lading): See *Carriage of Goods*, No. 18—BY CARGO OWNERS AND OTHERS (Limitation Suit): See *Limitation of Liability*, No. 4—COMPENSATION, FOR (Against Shipping Controller): See *Practice*, No. 6—PAID ABROAD (Limitation Suit): See *Limitation of Liability*, No. 10—TO BE MADE WITHIN SEVEN DAYS (Bill of Lading): See *Carriage of Goods*, No. 22.

COAL, CARGO, ACCIDENT.
See *Carriage of Goods*, No. 17.

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COLLISION.

1. *Damage—Demurrage—Claim for period beyond that needed to effect repairs—Remoteness of damage.*—The plaintiffs' vessel put into port to repair damage sustained in collision. Whilst she was there her Government issued an order requiring all vessels to be fitted with a gun platform and other apparatus. In assessing damages against the defendants the registrar allowed a claim for demurrage not only for the period occupied in carrying out the repairs, but also for the additional period occupied in fitting the gun platform. The defendants moved that the report be referred back. Held, that the claim for demurrage, whilst the gun platform was being fitted was bad, because the delay was not a result following naturally from the collision, but arose from circumstances unconnected with it. *The London* (12 Asp. Mar. Law Cas. 405; (1914) P. 72) distinguished. (Hill, J.) *The Kafue* 48

2. *Proceedings not commenced within two years—Motion to set aside writ—Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8—In an action brought in 1916 by the plaintiffs to recover collision damage sustained by their vessel, the defendants in that action pleaded (*inter alia*) that the collision was caused by the negligence of the *P. L. M.* 8 (then the *Virginia*), against which vessel they instituted proceedings in Jan. 1918. At the trial of both actions in March 1920 the *P. L. M.* 8 was found alone to blame. The plaintiffs at once instituted the present action to recover damages from the owners of the *P. L. M.* 8. The plaintiffs had had ample opportunities of commencing proceedings against the *P. L. M.* 8 within two years of the collision. The defendants moved to set aside the writ. Held, that the action was not maintainable. Held, also, that in the circumstances the court ought not to exercise the discretion given to it by sect. 8 of the Maritime Conventions Act 1911 for an extension of time. (Hill, J.) *The P. L. M.* 8 51

3. *Collision in a river estuary—Conflict of Rules—Regulations for Preventing Collisions at Sea, preliminary note and arts.* 16 *and* 30 — *Tyne By-laws* 13 *and* 39. — "Where there is a certain rule which deals with the whole scope of the subject, to add parts of the provisions of the sea rules would be to interfere with the operation of the river rules." In a fog a steam vessel, when inside the piers at the Tyne entrance, heard a long blast right ahead. She did not stop her engines, but continued to navigate at a moderate speed; whilst doing so she came into collision. Held, that the collision occurred at a place where both the Collision Regulations and the Tyne By-laws applied. But that by art. 30 of the former the Collision Regulations were not to interfere with the operation of any local rules, and, as in this case the Tyne By-Laws 18 and 39 prescribed the whole duty of a vessel navigating in fog, the Collision Regulations were entirely inapplicable. *The Carlotta* (8 Asp. Mar. Law Cas. 544; (80 L. T. Rep. 664; (1899) P. 223) followed. (Hill, J.) *The Ceylon* 100

4. *Compulsory pilotage—Duty of master and crew to assist pilot—Negligence.*—They who seek to establish the defence of compulsory pilotage, which is of statutory origin, must show that the collision was due solely to the fault of the pilot, and if there is neglect on the part of the master and crew of the ship of which the pilot is in charge which cannot be shown to be unconnected with the collision they do not discharge that onus. A pilot is entitled to the assistance of a look-out and timely reports of material incidents, and if this assistance is not given, it cannot be said that the pilot ought to have known of incidents without being told of them, and therefore that the blame is his alone. Where a pilot was navigating a ship at full speed in narrow waters among

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a large number of vessels and the course taken was such that it must have been obvious to the master either that the pilot did not know of a risk, or that, if he did know, he was undertaking an unwarrantable risk, it was held that the master owed a duty to his owners and to the pilot to call the pilot's attention to the risk, and was not justified in doing nothing. Per Lord Moulton: "A ship guilty of initial negligence is bound to do everything she can to prevent the consequences of the negligence and the burden upon her is to show that she has done so before she can claim that the negligence of the other ship is the sole cause of the accident." (House of Lords.) *Owners of the Steamship Alexander Shukoff* v. *Owners of the Steamship Gothland; Owners of the Steamship Larenberg* v. *Owners of the Steamship Gothland. The Gothland* 122

5. *Tug and tow — Towage contract — Collision between tow and third vessel—Tug to blame—Indemnity due from tow.*—A Dutch shipmaster signed a contract of towage containing conditions which he was unable to read or understand, though he was aware of their existence. One of these conditions cast upon the tow owners responsibility for the acts of the tug. Relying upon this condition, the tug owners claimed in third party proceedings to be indemnified by the owners of the tow for the damages recovered against them in an action by the owners of a third vessel which had been in collision with the tow through the sole fault of their tug. Held, that the tow owners were bound by the contract to indemnify the tug owners. (Hill, J.) *The Luna* 152

6. A ship guilty of initial negligence is bound to do everything she can to prevent the consequences of that negligence, and the burden upon her is to show that she has done so before she can claim that the negligence of another ship is the sole cause of an accident. (House of Lords, per Lord Moulton). *Owners of the Steamship Larenberg* v. *Owners of Steamship Gothland* 242

7. "*Not under command*"—*Keeping course and speed—Regulations for Preventing Collisions at Sea* 1897, *Arts.* 4, 21—*Concurrent findings*—A cruiser not under normal effective control, and with a useless whistle, exhibited two black shapes to indicate that she was from an accident "not under command." She collided with a steamship approaching at a speed of about ten knots on a crossing course, whose duty under ordinary circumstances of navigation would have been to keep course and speed. The steamship saw the cruiser's signal. If the cruiser had been under effective control it would have been her duty to keep out of the way of the steamship. Held (Lord Wrenbury and Lord Phillimore dissenting), that the steamship should have kept out of the way as the cruiser was in fact in such a condition owing to an accident that she could only get out of the way of the steamship after great and unusual delay, and that she was "not under command" within the meaning of art. 4 of the Regulations for Prevention of Collisions at Sea, and that the duty cast upon the officer navigating the cruiser was no more than a common law duty to navigate with such care, caution, and skill as was reasonable under the circumstances. Held also (Lord Wrenbury and Lord Phillimore dissenting), that even though the question whether the cruiser was guilty of negligence leading to the collision was one of extreme difficulty, the facts were not clear enough to justify the House in disregarding the advice of their nautical assessors and setting aside the concurrent judgments of two courts which had each of them the assistance of nautical assessors. (House of Lords.) *Owners of the Steamship Mendip Range* v. *Radcliffe* 242

8. *Both to blame in equal degree—Right of contribution of English shipowners against a French shipowner in respect of life claims by French crew's representative — French law as to shipowners' liability for life claims— French laws of the 29th Dec.* 1905 *and the 15th July* 1915—*Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *ss.* 1, 3,—The *Y. O.* (French owner) and the *C.* (British owners) were held equally to blame for a collision in which the *Y. O.* was sunk and certain of her crew drowned. The registrar found 7131*l.* due from the *C.* to the *Y. O.* The representatives of the said deceased seamen had brought life claims against the *C.*, who admitted liability. The owners of the *C.* claimed a declaration that they were entitled to recover half the amount of the life claims from the *Y. O.* and to set off the same against the 7131*l.* Held (1) that under the law of France, which was admitted to apply, shipowners were not liable to pay life claims except in case of their own personal negligence; (2) that under the law of England the French owner would not be liable under Lord Campbell's Act (the defence of common employment being open to him); (3) that the owners of the *C.* had no right of contribution from the owner of the *Y. O.* in respect of payment by the *C.* on the life claims; and (4) that sect. 1 and 3 of the Maritime Conventions Act 1911 by their provisos did not impose any liability upon any person who is exempted by any provision of law. The owners of the *C.* were therefore not entitled to the declaration asked for. (Hill, J.) *The Cedric* 285

9. *Damage for detention during repairs—Date at which the rate of exchange must be taken for conversion into English currency.*—Where loss has been suffered by the detention of a ship during repairs owing to collision, the damages must be assessed with reference to the actual period of detention. And if those damages are proved in a foreign currency, the tribunal must convert them into English money at the rate of exchange ruling at that time. (Hill, J.) *The Volturno.* [Since affirmed by House of Lords.—See *infrà* No. 13.—ED.] ... 288

10. *Fog—Speed—Signals—Ferry traffic—Local practice as to ferry signals—Breach of art.* 15 (*a*) *of Regulations for Preventing Collisions at Sea.*—A tug with a flotilla in tow of the length of about 500ft. was proceeding up the River Mersey on her wrong side. She collided with the ferry boat *Tranmere.* Both vessels were held equally to blame, the tug for being on her wrong side, the ferry boat for proceeding at excessive speed in fog. Hill, J. found that both the tug and the ferry boat were sounding inappropriate fog signals, and that neither were justified in so doing under the Regulations for Preventing Collisions at Sea. Hill, J. also considered *The Lancashire* (2 Asp. Mar. Law Cas. 202; 29 L. T. Rep. 927; L. Rep 4 A. & E. 198) and refused to lay down any rule of law as to the duty of ferry boats in the Mersey to cease running in dense fog. (Hill, J.) *The Tranmere* .. 290

11. *Navigation of entrance to Montevideo Harbour—Rounding the whistling buoy*—"*Keeping course and speed*"—*Whistle signals—Apportionment of blame—Discretion of Court of Appeal to review apportionment—Regulations for Preventing Collisions at Sea, arts.* 19, 21, 25, 27, *and* 28—*Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57) *s.* 1.—When the judge of the Admiralty Court has apportioned blame under sect. 1 of the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57), and the Court of Appeal agree with him on the facts and in his conclusions as to the actions of the ships, they will not lightly interfere with his apportionment, though they have the power to do so. But if the court differs from the judge in these respects the court will review his decision as to the proportions of blame. The *K.*, when outward bound from Montevideo, sighted the green light of the *H.* on her port bow when the *K.* was nearing the whistling buoy at the entrance to the harbour. The vessels were on crossing courses. When the *K.* had the buoy abeam on her starboard she starboarded to make the turn for the sea, the turn being usually made at the buoy. The *H.*,

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when first sighting the *K.* at a distance of two miles, ported slightly but did not blow her helm signal, although she was altering not only for the buoy but also in order to manœuvre for the *K.*, nor did she at once open her red light. After the *K.* starboarded, the *H.* hard-a-ported to avoid a collision, but did not reverse her engines, and a collision occurred. Hill, J. held that the *K.* was three-fourths and the *H.* one-fourth to blame. Both vessels appealed. Held, that under art. 21 of the Regulation for Preventing Collisions at Sea it was the duty of the *K.* to keep her course and speed; and there were no special circumstances to relieve the *K.* from obeying the rule; and that under art. 19 it was the duty of the *H.* to keep out of the way of the *K.* The *H.* was to blame not only for failing to reverse her engines, but also for not blowing her whistle when she originally ported, as it might have been heard by those on the *K.*, and have acted as a warning to them not to starboard. Art. 28 requires a vessel to sound helm signals when in sight of another vessel; she is only relieved from this obligation under the article when the other vessel is so far distant that she cannot be affected by the manœuvres which the signal indicates. The *H.* and the *K.* held to blame in equal degrees. Judgment of Hill, J. (*infrâ*) (1920) (P. 314) varied. (Court of Appeal.) *The Karamea.* [Since affirmed by House of Lords. —See *infrâ* No. 14.—Ed.] 318

12. *Collision—Steamship coming out of dock—Crossing rule—Porting to counteract ebb tide—Misleading signals—Other vessel not misled—Regulations for Preventing Collisions at Sea, arts.* 19, 21, *and* 28.—The *G.*, leaving the Albert Dock on the Birkenhead side of the Mersey, intended to cross straight to the east side of mid-river and then turn down stream. The *G. S.* was proceeding up river to the west of mid-river, having the *G.* on her starboard bow. The vessels sighted one another at a distance of about half a mile, at the time when the *G.* was leaving the dock entrance; and they came into collision some 700ft. from the Liverpool side. The *G.*, on leaving the dock, ported a little to counteract the effect of the ebb tide on her head, and gave a short blast, and subsequently a second short blast. After the first slight porting to counteract the tide, the helm was steadied, and the second short blast was given, and she continued on straight across the river. The question was whether in the circumstances the crossing rule (art. 19) applied. Held, that the question depended on the distance at which the vessels sighted one another, and that they were just sufficiently far apart for the crossing rule to apply. The *G. S.* was held to blame for not reversing when the *G.* was seen to be continuing to head across the river. In the Admiralty Court the *G.* was also held to blame on the ground that she sounded port helm signals when she was not, in fact, "directing her course to starboard" (art. 28). Held, by the Court of Appeal, that, as she did not, in fact, mislead those on board the *G. S.*, who saw that she was not altering her course to starboard, she ought not to be held to blame. Expressions in *The Albano* (10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193), *The Huntsman* (11 Asp. Mar. Law Cas. 606; 104 L. T. Rep. 464), and *The Ranza* (19 L. T. Rep. 21n) cited and approved. Judgment of Hill, J. varied, the *G. S.* being held alone to blame. (Court of Appeal.) The *Gulf of Suez* 328

13. *Collision—Damage—Loss agreed in foreign currency—Rate of exchange—Date of conversion.*—Held (Lord Carson dissenting), that in an action of negligence causing collision and damage to a ship and consequent loss of the use of the ship during detention for repairs, the damages must be assessed with reference to the actual period of detention. And if those damages are agreed in a foreign currency the tribunal must convert them into English currency at the rate of exchange ruling at the time the detention occurred. Order of Court of Appeal affirming a judgment of Hill, J.

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(reported *ante*, p. 288; 125 L. T. Rep. 191; (1920) P. 447), affirmed. Decision in *Di Ferdinando* v. *Simon and Co.* (124 L. T. Rep. 117; (1920) 3 K.B. 409), applied. (House of Lords.) *Owners of the Steamship Celia* v. *Owners of the Steamship Volturno; The Volturno* 374

14. *Navigation of entrance to Montevideo Harbour—Rounding the whistling buoy—"Keeping course and speed"—Regulations for Preventing Collisions at Sea, arts.* 19, 21, 27, *and* 28.—The *K.*, when outward bound from Montevideo, sighted the green light of the *H.* on her port bow when the *K.* was nearing the whistling buoy at the entrance to the harbour. The vessels were on crossing courses. When the *K.* had the buoy abeam on her starboard she starboarded to make the turn for the sea, the turn being usually made at the buoy. The *H.* when first sighting the *K.* at a distance of two miles, ported slightly but did not blow her helm signal although she was altering not only for the buoy but also in order to manœuvre for the *K.*, nor did she at once open her red light. After the *K.* starboarded, the *H.* hard-a-ported to avoid a collision, but did not reverse her engines, and a collision occurred. Hill, J. held that the *K.* was three-fourths and the *H.* one-fourth to blame. Both vessels appealed. Held, by the Court of Appeal varying the decision of Hill, J., that under art. 21 of the Regulation for Preventing Collisions at Sea it was the duty of the *K.* to keep her course and speed; and there were no special circumstances to relieve the *K.* from obeying the rule; and that under art. 19 it was the duty of the *H.* to keep out of the way of the *K.* The *H.* was to blame not only for failing to reverse her engines, but also for not blowing her whistle when she originally ported, as it might have been heard by those on the *K.* and have acted as a warning to them not to starboard. Art. 28 requires a vessel to sound helm signals when in sight of another vessel; she is only relieved from this obligation under the article when the other vessel is so far distant that she cannot be affected by the manœuvres which the signal indicates. The *H.* and the *K.* held to blame in equal degrees. Held, that the vessels must be held to have been equally to blame. Judgment of the Court of Appeal (15 Asp. Mar. Law Cas. 318; 124 L. T. Rep. 653; (1921) P. 76) affirmed. (House of Lords.) *The Karamea* 403

15. *Collision with submerged wreck—Damage to the wreck—Salvage contractor—Contractor working on the wreck—Possession of the wreck—Bailment of the wreck—Right of contractor as bailee to sue the wrongdoing ship for damage to the wreck.*—By a contract between a firm of salvage contractors and the agents for the underwriters of the *M.*, then lying sunk in Barry Roads, it was agreed that the salvage contractors should endeavour to salve the *M.* on terms of "no cure, no pay." In performance of the contract the salvage contractors used pumps, opened holes, employed divers, fixed apparatus, attended with a salvage steamer on the *M.*, and dealt generally with her as they thought fit. The authorities of the Trinity House, however, continued to light the wreck for some time after the salvage operations began, but by a later agreement between the contractors and the Trinity House the contractors undertook the responsibility for lighting the wreck, the Trinity House reserving the right to retake possession of the wreck if the lighting was not properly performed. In these circumstances the steamer *Z.* negligently collided with the wreck of the *M.*, which was destroyed. No servant of the salvage contractors was present at the *M.* at the time of the collision, nor was the salvage steamer of the contractors present on that night. In an action by the salvage contractors against the owners of the *Z.*, held that the control which the salvage contractors exercised over the *M.* was such as to enable them as bailees in possession to maintain an action against the owners of the *Z.* for damage done to the *M.* *The Okehampton* (110 L. T. Rep. 130; 12 Asp. Mar. Law Cas. 428; (1913) P. 173) and *The Winkfield*

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(85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 249; (1902) P. 42) held to apply. (Hill, J.) *The Zelo* 428

16. *Collision at night—Insufficient lights on sailing ship—Failure of steamship to see loom of sailing ship until about 300ft. away—Look-out—Negligence.* A steamer, making sixteen knots, collided with a sailing vessel at night. The night was "fine, clear, dark, and overcast." The sailer's lights were defective. Those on board the steamship did not see the loom of the sailer until they were within about 300ft. of her. The President found, on the advice of the Elder Brethren, that the loom of the sailer ought to have been seen at a distance of a quarter of a mile. He held, that, although the lights of the sailer were grossly improper, the steamship was alone to blame, because if she had seen the loom of the sailer at a distance of a quarter of a mile, as, he found, she ought to have done, the collision might and ought to have been avoided. The owners of the steamship appealed. On appeal the assessors expressed the opinion that in the circumstances it was very doubtful whether the loom of the sailer could have been seen at a distance of a quarter of a mile, or at a distance appreciably greater than that at which it was first seen by those on the steamship. Held, that the sailer was to blame for carrying improper light, and that she was alone to blame for the collision, as it had not been proved that the look-out on the steamship was in any way defective. Decision of Duke, P. reversed. (Court of Appeal). *The Cumberland Queen* 483

17. *Collision — Contributory negligence — Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1 (*a*) (*b*). The question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. In establishing liability for collision at sea, if a clear line can be drawn between the acts of negligence of two vessels, the subsequent act of negligence is the only one to look to. There are cases where the two acts of negligence come so closely together and the second act of negligence is so mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame under the rule in *The Bywell Castle*, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. A collision occurred between the *V.*, an oil tank vessel, the leading vessel of a convoy, and the *R.*, a destroyer, the escort on the starboard hand. If the *V.* had signalled as she should have done before she ported, there would have been no collision; if the *R.* had not gone full speed ahead after the position of danger brought about by the action of the *V.* arose there would have been no collision. Held, that there was not a sufficient separation of time, place, or circumstance between the negligent navigation of the *R.* and that of the *V.* to make it right to treat the negligence of the *R.* as the whole cause of the collision and that both ships must be held to have been equally to blame. The law of contributory negligence at sea reviewed and applied. Judgment of the Court of Appeal, holding the *R.* alone to blame, and affirming the judgment of the President, reversed. Appeal from the judgment of the Court of Appeal affirming the judgment of Duke, P., who found the *Radstock* alone to blame (House of Lords). *Admiralty Commissioners* v. *Owners of the Steamship Volute; The Volute*..... 530

18. *Action by the Crown—Writ issued after the expiration of period provided by statute of limitation—Crown not expressly included in the statute—Statute of limitation, whether binding on the Crown—Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.—Sect. 8 of the Maritime Conventions Act 1911 provides: "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight . . . caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered. . . . Provided always that any court, having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent, and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs . . . extend any such period. . . . " Held, that this section is not binding on the Crown in an action in which the Crown is plaintiff. (Sir Henry Duke, P.) *The Loredano*.. 565

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See *Limitation of Liability, Prize, No.* 3; *Public Authorities Protection Act*, 11.

MERCHANT SHIP AND WARSHIP, BETWEEN.
See *Carriage of Goods*, No. 30; *Marine Insurance*, No. 11, 13.

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See *Collision*, No. 3.

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See *Collision*, No. 4.

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See *Collision*, No. 7.

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See *Prize*, Nos. 12, 13, 15, 21, 31—CARGO OWNER'S KNOWLEDGE OF: See *Prize*, No. 15—CARRIAGE OF: See *Prize*, No. 22—CONDITIONAL: See *Prize*. Nos. 5, 23.

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See *Prize*, No. 5.

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See *Canada*, No. 1.

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See *Practice*, No. 9.

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See *Appeal, Court of.*

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INTERNATIONAL LAW.
Trinidad — Freight — Agreement to pay rebates on freight—Illegality by foreign law—Performance of contract of carriage—Liability to pay rebates.— Till 1917 the appellants, with other companies trading between Trinidad and the United States, allowed rebates on freights to traders exclusively shipping by their steamers. The appellants' chief office was in London, and they had branch offices in Trinidad and New York. After 1917 they discontinued the rebates, alleging that rebates had been declared illegal by an Act of Congress of the United States. Held, that the agreement to allow rebates could not be repudiated after the goods had been carried and the freight paid, since the *lex loci contractus* was British, and by British law there was no illegality in the rebate agreement, and the refusal to grant the rebate could not be supported even if the rebate

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had been made illegal by Act of Congress. Judgment of the Supreme Court affirmed. (Privy Council.) *Trinidad Shipping and Trading Company Limited* v. *G. R. Alston and Co.* 31

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LIMITATION OF LIABILITY.

1. *Practice—Limitation of liability—Right to limit—Amount of bail—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 503.—In a collision action the defendants gave bail for the amount of their statutory liability under the Merchant Shipping Act 1894, s. 503, and affirmed that the collision occurred without their actual fault or privity. The plaintiffs filed a counter affidavit alleging privity. Held, that the plaintiffs were entitled to bail to the full value of the defendants' vessel. (Hill, J.) *The Charlotte* 98

2. *Reference — Claim statute-barred — Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 503–504 —*Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.—In a reference following a limitation suit, in which the decree was pronounced more than two years after the collision which gave rise to the suit had taken place, a claim was properly filed, but the claimant had issued no writ. Another claimant objected that the claim was statute-barred. Held, following *The Bellcairn* (5 Asp. Mar. Law Cas. 503, 582; 53 L. T. Rep. 686; 10 Prob. Div. 161), that the claimants had against each other the same rights which they had against the limiting shipowner and the same rights which he had against them. One claimant was, therefore, entitled to object that the claim of another was statute-barred, but, if the objection was based on sect. 8 of the Maritime Conventions Act 1911, it was open to the court to exercise the discretion vested in it by that Act, and to allow a writ to issue. Observations on the exercise of this discretion where a writ had been withheld because limitation proceedings were pending. (Hill, J.) *The Disperser* 112

3. *Dock owners—Dock owners also ship-repairers—Damage to ship under repair in dock—Dock not owned by ship repairers—Limitation claimed on repairers' dock—Merchant Shipping (Limitation of Shipowners and Others) Act* 1900 (63 & 64 *Vict. c.* 32), *s.* 2.—The plaintiffs were ship repairers and also owned a dock at Garston. The defendants were the owners of the steamship *C.* and of her cargo, and all other persons claiming to have sustained damage by reason of a fire which occurred on the *C.* on the 27th June 1918, owing to the negligence of the plaintiffs' servants. The fire occurred while the *C.* was lying in a Liverpool dock not belonging to the plaintiffs, and was being fitted by the plaintiffs with mine-defence apparatus. The plaintiffs brought this limitation of liability action under sect. 2 of the Merchant Shipping Act 1900, which provides that: "The owners of any dock or canal or a harbour authority or a conservatory authority, as defined by the Merchant Shipping Act 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . performs any duty or exercises any power." The plaintiffs sought to limit their liability to 30,281*l.*, which was the aggregate amount of 8*l.* a ton on the tonnage of the *B.*, which was the largest registered British ship which within the period mentioned in the section had been within the area over which they performed any duty or exercised any power. Hill, J. held that the plaintiffs had incurred liability as ship repairers and not as dock owners, and not within any dock over which they exercised any power, and that they were not protected by the section merely because they owned a dock elsewhere. The plaintiffs appealed. Held, that, as the plaintiffs' liability was not connected with the fact that they were dock owners, they were not entitled to a decree of limitation of liability. (Judgment of Hill, J. affirmed. (Court of Appeal.) *The City of Edinburgh* 234

4. *Fund—Claims by cargo owners and others—No claim by owners of the damaged ship—Proceedings pending abroad—Unliquidated claims—Rights of plaintiffs against limitation fund—Time for bringing in claims—Discretion—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.—Early in 1917, after a collision between two Norwegian vessels, the *C.* and *K.*, the *C.*

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sank. In March 1917 the owners of the *C.*'s cargo began an action against the owners of the *K.* in the Admiralty Court. In May 1919 both vessels were pronounced to blame, and it was adjudged that the plaintiffs should recover half of the amount of their damage from the defendants. Thereupon the owners of the *K.* commenced a limitation action against the owners of the *C.*, the owners of her cargo, and all persons claiming to have received damage by reason of the collision; and in Feb. 1920 a decree was pronounced limiting the liability of the owners of the *K.* to 8*l.* per ton on the registered tonnage of the *K.*, calculated in accordance with the provisions of the Merchant Shipping Act 1894; and it was ordered that all claims be brought in within three months, and that claims not so brought in would be excluded from sharing in the limitation fund. Claims were filed by the owners of the *C.*'s cargo. The owners of the *C.* entered an appearance, but took no further steps in the limitation proceedings. In Feb. 1919 the owners of the *C.* had commenced an action in Norway against the owners of the *K.*, and in June 1920, when the registrar made his report, the trial of the Norwegian action was still pending. The owners of the *K.* subsequently took out a summons asking that the report be not confirmed, and that they might have leave to file a claim against the fund in respect of any liability they might incur under the Norwegian proceedings. Hill, J. dismissed the summons. The plaintiffs appealed. Before their appeal was heard the Norwegian court had pronounced the *K.* two-thirds to blame, but had not assessed the damages. Held by Bankes and Atkin, L.JJ. (Younger, L.J. concurring on different grounds) (1) that the plaintiffs were not entitled under the limitation sections of the Merchant Shipping Act to have the distribution of the fund stayed; (2) that limitation proceedings do not contemplate claims by plaintiffs, and that the owners of the *K.* could not file a claim against the fund in their own right; (3) (Atkin, L.J. doubting) that if an application had been made in proper form the court would have had a discretion to extend the time before distributing the fund, in order to allow the plaintiffs to ascertain their liability under the pending Norwegian judgment and to apply to the court to adjust the distribution of the fund so that the plaintiffs might obtain credit for the amount to be paid under the Norwegian judgment; (4) but that, having regard to the lapse of time since the collision, the court had rightly exercised its discretion in refusing to postpone the distribution of the fund. Judgment of Hill, J. affirmed. (Court of Appeal.) *The Kronprinz Olav* 312

5. *Tug and tow—Towage contract—Rope cast off by tug during performance of contract—Damage to tow—Breach of towage contract—"Improper navigation or management" of the tug—Limitation of tug owners' liability—Merchant Shipping Act* 1894 (57 & 58 *Vict.* c. 60), *s.* 503—*Merchant Shipping (Limitation of Shipowners' and Others' Liability) Act* 1900 (63 & 64 *Vict.* c. 32).—If a vessel which is being towed under a contract of towage is damaged by reason of the transfer of the towing rope from the engaged tug to another tug, the damage is caused by the improper navigation of the engaged tug, and not by a breach of the contract of towage. The owners of the engaged tug are therefore entitled to limit their liability in accordance with sect. 503 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) (Sir Henry Duke, P.) *The Vigilant* 337

6. *Vessel not equipped with proper ground tackle—Collision — Unseaworthiness — "Actual fault or privity" of owners—Merchant Shipping Act* 1894 (57 & 58 *Vict.* c. 60), *s.* 503.—Sect. 503 of the Merchant Shipping Act 1894 casts the onus upon plaintiffs in limitation actions of showing that what happened occurred without their fault or privity. The *B. C.* was an unfurnished vessel not fully equipped with ground tackle, and not supplied with engine power. The builders (representing her owners) gave instructions that she should be towed from Cardiff to Bristol by two tugs. One tug was late in arriving, and the marine superintendent in charge started the towage with one tug only. The weather, which was not good, became unexpectedly worse, and the tow rope, which was rotten, broke. The *B. C.*, only one anchor on board, and about forty-eight fathoms rope of wire, no cables, no windlass, and no hawse pipes. This equipment failed to hold her and she drifted across the bows of the *J. E.*, a sailing vessel at anchor, doing her much damage. The owners of the *B. C.* claimed, under sect. 503 of the Merchant Shipping Act 1894, to limit their liability. Held, upon the advice of the nautical assessors, that the *B. C.* ought to have been furnished with at least two anchors and proper ground tackle, and that she was not seaworthy, that the collision was due to the lack of equipment, and that the builders (who were also owners of vessels) being aware of the facts as regards the equipment of the vessel, could not establish that the collision took place without their "actual fault or privity," within the meaning of the section, and were not, therefore, entitled to a limitation decree. Judgment of Duke, P. affirmed. (Court of Appeal.) *The Bristol City* 390

7. *Tug and tows — Unregistered lighters — "Not recognised as a British ship"—"Ship"—"Every description of vessel used in navigation not propelled by oars" — Right to limit liability —Tug towing five lighters—Common owner—Damage by tug and one lighter—Negligence—Liability, whether limited on tonnages of tug or her tows, or which of them—Merchant Shipping Act* 1894 (57 & 58 *Vict.*, c. 60), *ss.* 503, 508, 742—*Merchant Shipping (Liability of Shipowners) Act* 1898 (61 & 62 *Vict.* c. 44), *s.* 1—*Merchant Shipping Act* 1906 (6 *Edw.* 7, c. 48), *s.* 85, *sched.* 2.—The owner of an unregistered ship is not deprived of the right to limit his liability under sect. 503 of the Merchant Shipping Act 1894 by reason of the fact that his ship has not been registered. The right to limit liability extended by sect. 1 of the Merchant Shipping (Liability of Shipowners) Act 1898 as amended by sect. 85, sched. 2 of the Merchant Shipping Act 1906 to the owners, builders and other parties interested in any ship built within His Majesty's dominions is an unqualified right, and is not restricted to such period after launching as may be necessary to effect registration. Lighters used for navigation in the transport of goods on the Thames, in tow of tugs and upon the tides, fitted with rudders and managed by their own crews, are ships within the meaning of sect. 742 of the Merchant Shipping Act 1894 *The Mac* (4 Asp. Mar. Law Cas. 555; 46 L. T. Rep. 907; 7 Prob. Div. 126) considered. Where damage is done jointly by several vessels belonging to the same owner—*e.g.*, a tug and her tows, by the negligence of those on board some or one of them, the owner of these vessels is only entitled to limit his liability to an aggregate amount calculated upon the several tonnages of each of the vessels which might have been proceeded against *in rem* in respect of the damage done, since as the employer of all the negligent persons he might be held liable for all the damage, not only in each action *in rem* but in proceedings *in personam*. *The Grayjarth*, *infrâ* p. 517 (126 L. T. Rep. 675; (1922) P. 80) explained. (Sir Henry Duke, P.) *The Harlow* 498

8. *Collision—Damage to ship and cargo—Action by the owners of the ship—"As owners of ship and her cargo"—Bail—Underwriters on cargo invited to join in proceedings—Refusal by some of the underwriters —Rights of those underwriters to share in sum subsequently recovered in the action—Right to intervene—Costs—Order XII., r.* 24—It is the duty of the court, when by its process a sum has been recovered in Admiralty, to see that it goes to the persons entitled to claim, and it should be divided

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pari passu between them. *The Glamorganshire* (6 Asp. Mar. Law Cas. 344; 59 L. T. Rep. 572; 13 App. Cas. 454) considered. Where a person sued as owner of a vessel and cargo and established the liability of the defendant to pay damages in respect of both ship and cargo, and certain of the cargo owners refused to, or elected not to, take their share in the expenses connected with establishing the liability, it was held that the cargo owners were not shut out from any benefit in the judgment. The steamer *W. H.* and her cargo was damaged in collision with the steamer *J. V.* The owners of the *W. H.* commenced an action "as owners of the *W. H.* and cargo," claiming for the damage sustained thereby. The owners of the *J. V.* gave an undertaking for bail in the sum of 100,000*l.*, which exceeded their statutory liability the owners of the *W. H.* giving bail in a like amount. The underwriters on the cargo of the *W. H.* were afterwards invited by the shipowners' solicitors to join the shipowners in the proceedings. Some of the underwriters did not assent to this proposal. Nevertheless, after judgment had been given against the *J. V.* these underwriters instructed the solicitors acting for the owners of the *W. H.*, and those underwriters who had agreed to join with them in the litigation, to put forward claims against the sum obtained from the owners of the *J. V.* The solicitors agreed to do so, and received the documents supporting these claims. The total claims then exceeded the amount for which the owners of the *J. V.* had given bail, and for which they had been held liable. The owners of the *W. H.* and those underwriters who had joined with them in the litigation accordingly took up the position that those underwriters who had not agreed to join were not entitled to share in the fund before the court. At the reference the registrar reported that those underwriters who had refused to join in the litigation were nevertheless entitled to share in the fund on the ground that the writ had been issued in the names of the owners of the *W. H.* and her cargo, and that the solicitors of the owners of the *W. H.* and the other underwriters had agreed and consented to the underwriters who had at first refused to take part in the action subsequently becoming parties to it in its second stage. The owners of the *W. H.* and the underwriters who had joined in the action moved that this report be rejected. Held, on appeal, that all persons having a claim on the fund, including the non-assenting underwriters, were entitled to share in the distribution. Judgment of Hill, J. affirmed. (Court of Appeal.) *The Joannis Vatis* 506

9. *Tug and tow belonging to same owner—Tow navigated by tug—Collision of tow with another vessel—Negligent navigation of tow by tug—Owners liable on tonnage of tow—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 503.—Where a tug and her tow belong to the same owners, and the tow is brought into collision with a third vessel by the negligence of the tug, the liability of the owners of the tug and her tow is not limited to a fund calculated upon the tonnage of the tug alone, notwithstanding that there was no negligence on the part of any person on board the tow. The owners are liable in respect of a sum calculated upon the tonnage of the tow. A barge was damaged in collision with another barge; the latter barge at the time of the collision was being towed by a tug which belonged to her owners. In an action *in rem* against the barge, her owners were held liable *in personam* on the ground that the collision was caused by the negligence of their servants on board the tug. The owners of the tug and tow then claimed to limit their liability under sect. 503 of the Merchant Shipping Act 1894 on the tonnage of the tug alone. Hill, J. held that they were entitled to do so. Held, that the judgment of Hill, J. should have been an ordinary judgment *in rem* against the owners of the tow because of the improper navigation of the tow through the acts of the defendants' servants on the tug and that the tow and not the tug was the vessel in relation to which liability should be limited under sect. 503 of the Merchant Shipping Act 1894. Judgment of Hill, J. reversed. (Court of Appeal.) *The Ran: The Graygarth* 517

10. *Claims settled abroad—Limitation fund—Right of the plaintiff to claim for the amount paid in settlement of claims abroad—"Claims"—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 503.—Where the plaintiff in a limitation suit has settled claims abroad arising out of the collision in respect of which the decree of limitation has been obtained, he is entitled to bring payment of such claims into consideration before the registrar when the administration of the limitation fund is decided upon. Proof of such payment may be brought before the registrar notwithstanding that such payment was made under a foreign system of limitation, or for an amount not limited according to the English rule of limitation. It is not material that the claimants to whom such payments were made were not subject to the jurisdiction of the court. The steamer *D.* and her cargo were sunk in collision with the steamer *C.* After the collision the *C.* put into a French port, where her owners were forced to give bail in order to secure her immunity from arrest at the suit of the owners of the *D.* Bail was given in an amount equal to the value of the *C.* at that time, which was the full amount of the liability of her owners under the law of France. In subsequent proceedings in France the *C.* was held alone to blame, and her owners were condemned on the amount of their bail and costs. The owners of the *C.* discharged the judgment debt and then commenced proceedings to limit their liability in England. A decree of limitation was pronounced and at the subsequent reference a claim was filed by the owners of the cargo laden on the *D.*, and the owners of the *C.* themselves also filed a claim for the amount they had paid under the judgment in France, together with their costs in the French proceedings. The registrar allowed their claim for the amount paid to the owners of the *D.*, *i.e.*, the amount of the statutory liability of the owners of the *C.* in France. Held, on appeal from the registrar, that the claim was properly allowed. *Leycester* v. *Logan* (26 L. J. Ch. 306) and *The Crathie* (8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178), followed. *The Kronprinz Olav* (*inf. à* p. 312; 125 L. T. Rep. 684; (1921) P. 52) distinguished. (Sir Henry Duke, P.) *The Coaster* 560

11. *Docks—Negligence—Collision with gates—Dock-owner's rights of detention—Statutory powers of the Mersey Docks and Harbour Board—Limitation of liability—Priorities—Mersey Dock Acts Consolidation Act* 1858 (21 & 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act* 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3—*Mersey Docks and Harbour Act* 1912 (2 & 3 *Geo.* 5, *c. xii.*), *s.* 7.—The plaintiffs' steamship *C.*, lying in a dock belonging to the defendants, the Mersey Dock and Harbour Board, negligently crashed through the dock gates into the river, carrying with her a number of other craft. The *C.* herself had to be beached by tugs, and the defendants' assistant marine surveyor certified that she was "in a sinking condition" in the river, and, in his judgment, "an obstruction, impediment, or danger," or likely so to become, to the safe and convenient navigation of the port. The defendants then patched, docked, and repaired the *C.* at a cost of 1048*l.* The damage negligently done to the defendants' docks and works amounted to 10,014*l.* The plaintiffs instituted proceedings for limitation of liability. The defendants claimed the right to detain the *C.* under the Mersey Dock Acts Consolidation Act 1858 and the Mersey Docks and Harbour Act 1912 until the plaintiffs had paid the sum of 5000*l.*, the statutory amount of the plaintiffs' liability calculated in accordance with the Merchant Shipping Acts, and in addition the sum of 1084*l.* The plaintiffs issued a writ in detinue, alleging that the detention of the *C.* was wrongful. The

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C. was released on payment of 5000*l.* into court by the plaintiffs. By sect. 94 of the above-named Act of 1858 a vessel negligently doing damage to any works belonging to the Dock Board may be detained until the amount of the damage, or a deposit for the estimated amount has been paid. By sect. 1 of the Merchant Shipping Act 1900 a shipowner's right of limitation of liability under the Merchant Shipping Act 1894 is extended to all cases where, without his actual fault or privity, any loss or damage is caused to property of any kind, whether on land or water, by reason of the improper navigation of the ship; and by sect. 3 the limitation under the Act applies "whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act." By sect. 7 of the Mersey Docks and Harbour Act 1912 the Dock Board may remove the wreck of any vessel or any vessel sunk or stranded within the port which, in the judgment (written and duly recorded) of the marine surveyor or his assistant, is an obstruction, impediment, or danger to the safe use of the port, or likely, in his judgment, so to become, and the Board may sell the wreck or vessel and out of the proceeds retain the expenses to which they have been put. Similar rights are given to harbour and conservancy authorities by sect. 530 of the Merchant Shipping Act 1984. Duke, P. held (*a*) that until a limitation decree was made the detention of the *C.* under sect. 94 of the Act of 1858 was permissible; but (*b*) that afterwards the section did not give the defendants priority over other claimants to the limitation fund; that the fund must be distributed rateably; and that the liability of the plaintiffs to the defendants upon which the lien of the defendants depended was reduced in proportion as the total claims exceeded the plaintiffs' limited statutory liability; and he directed that the 5000*l.* should be transferred to the credit of the limitation action; (*c*) that the *C.* was a vessel "stranded" and "likely to become an obstruction, impediment, or danger to navigation," and that accordingly the defendants were entitled to recover the sum of 1048*l.* under this head. Both parties appealed. Held, by Atkin and Younger, L.JJ. (Lord Sterndale, M.R. dissenting) that, after the limitation of liability decree, the defendants were entitled to hold the deposit only until they were paid their rateable proportion of the amount of the plaintiffs' limited liability; that under the Merchant Shipping Acts the defendants had a lien until they actually received such payment, and that the order of the president transferring this deposit to the credit of the limitation action was wrong. Held, further, by the whole court, that the *C.* was a vessel "stranded" and "likely to become an obstruction, impediment or danger to navigation," that the judgment of the assistant marine surveyor was sufficiently certified so as to comply with sect. 7 of the defendants' Act of 1912; and that, therefore, the defendants were entitled to recover the said 1048*l.* Judgment of Duke, P. (1921) P. 279) affirmed subject to a variation. (Court of Appeal.) *The Countess* [Since reversed by House of Lords.—ED.] 581

LLOYD'S NOTICE OF CASUALTY.
See *Marine Insurance*, No. 6.

LLOYD'S POLICY.
See *Marine Insurance*, No. 1.

LOCAL PRACTICE (FERRY).
See *Collision*, No. 10.

LONG SLIPS.
See *Marine Insurance*, No. 14.

LOOK-OUT.
See *Collision*, No. 16.

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LOSS OF USE.
See *Requisition*, No. 1.

"LUMP SUM" FREIGHT.
See *Carriage of Goods*, No. 23.

MAILS.
See *Prize* No. 30.

MANCHESTER SHIP CANAL.
See *Carriage of Goods*, No. 19.

MARINE INSURANCE.

1. *Lloyd's policy—Total loss—Treaty of Peace—Ratification—Termination of the Present War (Definition) Act* 1918 (8 & 9 *Geo.* 5, *c.* 59), *s.* 1.—On the 2nd Nov. 1918 the defendant agreed by a policy of insurance to make a payment to the plaintiff "in the event of peace between Great Britain and Germany not being concluded on or before the 30th June 1919." By the Termination of the Present War (Definition) Act 1918 (8 & 9 Geo. 5, c. 59), passed before the end of hostilities, it was provided that, for the purpose of construing written instruments, except where the context of the instrument which the Act is invoked to construe "otherwise requires," the date of the termination of the war should be fixed by an Order in Council, and should be as nearly as may be the date on which ratifications of the treaty should be exchanged or deposited by the belligerents. A treaty of peace was signed on the 28th June 1919. On the 1st July 1919 a Royal Proclamation was issued proclaiming that a definite treaty of peace had been concluded. Ratifications were deposited by the 10th Jan. 1920, but no Order in Council had been made at the time of the trial. Held, that the expressions "conclusion of peace" and "termination of the war" refer to the same date, and that, in the absence of any special provisions in the instrument itself, the conclusion of peace contemplated by the parties must mean the exchange or deposit of ratifications, which took place on the 10th Jan. 1920. Held, also, that the plaintiff did not act prematurely in commencing his action on the 21st Aug. 1919, since the Order in Council, when it is issued under 8 & 9 Geo. 5, s. 1, sub-s. 1, must fix approximately the date on which the ratifications were exchanged. (Roche, J.) *Kotzias* v. *Tyser* 16

2. *Perils of the sea—War risks—"Free of capture and seizure" clause—Unascertained cause of loss—Proper inference to be drawn from the facts.*—If no news has been received of the fate of a vessel which set out on a voyage, part of which would take her into an area known to be infested with enemy submarines, the Court of Appeal held that it was to be inferred that she was lost by war perils rather than by the perils of the sea, as on the facts there were no circumstances likely to prevent her from reaching the area where the danger lay. The decision in *Munro Brice and Co.* v. *War Risks Association* (14 Asp. Mar. Law Cas. 312; 118 L. T. Rep. 708; (1918) 2 K. B. 78) overruled on the proper inference to be drawn from the facts. (Court of Appeal.) *Munro Brice and Co.* v. *Martin*; *Same* v. *The King* 45

3. *War risk—Warship on voyage to pick up convoy—Collision with merchant vessel—Absence of navigation lights—"Consequences of hostilities or warlike operations."*—A steamship, which was insured by underwriters against war risks, and by other underwriters against marine risks, was proceeding in a convoy at night, on the 23rd July 1917, without lights by orders of the Admiralty, when she came into collision with a warship also proceeding without lights. The warship was on her way to a port to take up duty as an escort to another convoy. The war risks policy covered "all consequences of

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hostilities or warlike operations by or against the King's enemies." The arbitrator found that neither vessel was guilty of negligence; and he awarded that the war risks underwriters must bear the loss. Bailhache, J. held that the warship was at the time of the collision engaged in a warlike operation, and that the loss was a consequence of the operation. Held, on appeal, that the case was covered by *Ard Coasters* v. *The King* (36 Times L. Rep. 555) and *British Steamship Company* v. *The King* (14 Asp. Mar. Law Cas. 121; 118 L. T. Rep. 640; (1918) 2 K. B. 879); and that therefore the war risks underwriters were liable. Decision of Bailhache, J. affirmed. (Court of Appeal) *Owners of the steamship Richard de Larrinaga* v. *Admiralty Commissioners* 46

4. *F.c. and s. clause—Warlike operations—War or marine risk.*—Appeals from Court of Appeal in the cases of the vessels *P.* and *M.* The owners of the *P.*, which vessel was sunk by collision with another merchant vessel when both ships were navigating without lights in obedience to war emergency regulations, claimed compensation from the Admiralty Commissioners to whom the *P.* was chartered. Under the charter-party the Admiralty assumed liability for the losses excepted from the usual marine policy by the f.c. and s. clause. In the case of the *M.* the vessel was insured against war risks in addition to her usual marine policy. The dispute was in substance whether a loss sustained whilst the vessel was sailing in convoy, accompanied and controlled by warships, was a loss excepted by the f.c. and s. clause of the marine policy. Held (Lord Cave and Lord Shaw dissenting in the case of the *M.*), that the loss of neither vessel was approximately caused by hostilities or warlike operations, and that the loss in both cases was due to a marine, not to a war risk. Sects. 30 and 31 of the Naval Discipline Act 1866 and the relationship between convoy and escort considered. The nature of warlike operations discussed. Decisions of the Court of Appeal (reported 14 Asp. Mar. Law Cas. 507, 513; 121 L. T. Rep. 553, 559; (1919) 2 K. B. 670) affirmed. (House of Lords.) *Britain Steamship Company Limited* v. *The King* (*The Petersham*); *Green* v. *British India Steam Navigation Company Limited*; *British India Steam Navigation Company Limited* v. *Liverpool and London War Risks Insurance Association Limited* (*The Matiana*) 58

5. *Undisclosed risk—P.p.i. policy—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 4—*Principal and agent—Employment to make a void contract—"Void as against public policy"—Nominal damages.*—The plaintiffs were warehousemen, and employed the defendants, who were insurance brokers, to obtain for them a policy of insurance against loss by the non-arrival of certain cargoes which the plaintiffs were to receive into their warehouse. The defendants effected a policy, but failed to disclose to the underwriter that one of the risks against which the plaintiffs desired insurance was the diversion of the cargo by the order of the Government. On a slip attached to the policy there appeared a p.p.i. clause. The cargo was diverted by the Government, and the plaintiffs suffered substantial loss. In an action by the plaintiffs against the underwriter it was held that there was non-disclosure by the plaintiffs' agent, and the plaintiffs failed to recover on the policy. They accordingly commenced the present proceedings against the defendants for negligence and breach of duty. The defendants pleaded, *inter alia*, that the policy which they were instructed to procure was void under sect. 4 of the Marine Insurance Act 1906 by reason of the p.p.i. clause, and by reason of the fact that the plaintiffs had no insurable interest. Held, by McCardie, J., (1) that the defendants were negligent in failing to disclose the risk; (2) that the plaintiffs must, or ought, to have understood the nature of the p.p.i. clause; (3) that sect. 4 of the Marine Insurance Act 1906 must be taken to mean that a policy containing a p.p.i. clause is

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void, even if the party has an insurable interest; (4) therefore, in this case, it was unnecessary to inquire whether the plaintiffs possessed any insurable interest; (5) although it was probable that the underwriter, had the full risks been disclosed to him, would have honoured the policy notwithstanding the p.p.i clause, the plaintiffs were not entitled to recover nominal damages, since a contract to procure a contract "void as against public interest" could not give rise to such a claim. The plaintiffs were not entitled to substantial or nominal damages. The plaintiffs appealed. Held, by the Court of Appeal, that sect. 4 of the Marine Insurance Act 1906 rendered void as against public policy a policy of insurance containing a p.p.i. clause, even though the insured might have a legal insurable interest, and that although the clause appeared on a detachable slip, in accordance with a commercial practice, it must nevertheless be taken to form part of the contract. Decision of McCardie, J. affirmed. *Semble*, that apart from statutory enactments a policy containing a p.p.i. clause may be had on grounds of public policy generally. *Semble*, also, if the contract had been to procure a void, and not illegal, contract the plaintiff might have been entitled to some damages. (Court of Appeal.) *Thomas Cheshire and Co.* v. *Vaughan Brothers and Co.* 69

6. *Cargo—Lloyd's notify casualty—Notice ignored by insurers—Reinsurance policy effected after loss—Non-disclosure of material facts—Insurers deemed to have known of the loss—Loss not known to reinsurers—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 6, *sub-s.* 1; *s.* 18, *sub-ss.* 1, 3; *s.* 19.—Where the plaintiffs, who had insured a cargo (lost or not lost) effected through their brokers a reinsurance of the same cargo some hours after both parties had received from Lloyd's the usual casualty slips notifying them that the cargo had sustained damage by a peril insured against, which slips both parties had overlooked, it was decided by Bailhache, J. that a fire in the steamship was a circumstance which the plaintiffs ought to have disclosed to the defendants if they had known it, and, if the casualty slip had been duly attended to as it ought to have been, the plaintiffs must be deemed to have known of the fire in time to have communicated the information to their brokers and to the defendants before the latter wrote the risk; and that therefore the action failed. The plaintiffs appealed. Held, that the decision of Bailhache, J. was right and must be affirmed. (Court of Appeal.) *London General Insurance Company Limited* v. *General Marine Underwriters' Association Limited* 94

7. *Marine risks—War risks—Ship chartered by Admiralty—Partial loss by marine risks—Unrepaired damage—Total loss by risk not covered by policy—Liability of marine underwriters.*—When a vessel insured against perils of the sea is damaged by one of the risks covered by the policy and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, then the insurer is not liable for such unrepaired damage. The respondents' steamship *E.* was insured against marine risks only (including particular average) with the appellants, under a time policy dated the 16th 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 25th Jan. 1918, during the currency of the time policy with the appellants. The steamship, before she was lost, had sustained some damage by risks insured against during the currency of the same policy, which had depreciated her value at the date of her total loss 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 risk underwriters must make good that sum. The under-

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writers 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. Bailhache, J. decided that the underwriters were not liable for such unrepaired damage, but his decision was reversed by the Court of Appeal. Held, that the judgment of Bailhache, J. was right and should be restored. *Livie* v. *Janson* (1810, 12 East, 648) approved and followed. Decision of the Court of Appeal, which court sought to distinguish *Livie* v. *Janson* (14 Asp. Mar. Law Cas. 578; 122 L. T. Rep. 615; (1920) 2 K. B. 643), reversed. (House of Lords.) *British and Foreign Insurance Company Limited* v. *Wilson Company Limited* 114

8. *Insurance upon hull and machinery—Dangerous cargo — Material circumstances — Disclosure—Waiver—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 18.—Sect. 18, sub-sect. 1, of the Marine Insurance Act 1906, provides: "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract." Sub-sect. 2: "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." Sub-sect. 3: "In the absence of inquiry the following circumstances need not be disclosed, namely:— . . . (*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (*c*) Any circumstance as to which information is waived by the insurer." Policies of insurance were effected upon the hull and machinery of the vessel *E. R.* at and from ports in the United States to ports in France and back to ports in the United States. The *E. R.* was an American wooden four-masted motor schooner, built in 1918, of 784 tons gross and 695 tons net registered tonnage, and of 1461 dead-weight capacity. Her certificate of registry described her as a gas screw auxiliary schooner. At the date of the insurance the owners had contracted for the vessel to carry 100,000 gallons of petrol in 2500 iron drums from New Orleans to Bordeaux; but the owners did not disclose this circumstance to the insurers. She had also on board large quantities of oil fuel for her own use. The cargo was carried safely to Bordeaux, where it was discharged; but on the voyage back to the United States the ship was totally lost by a peril insured against. Petrol in drums is a frequent cargo for vessels crossing the Atlantic. The insurers pleaded that the policies were voidable by reason of the non-disclosure of the contract to carry the 2500 drums of petrol. Held, that the insurers could not avoid the policies because under the circumstances they had waived disclosure of the freight contract by not making inquiry. Query, whether on the facts of the case the freight contract was a material circumstance requiring disclosure. Judgment of Greer, J. reversed. (Court of Appeal.) *Mann, MacNeil, and Steeves Limited* v. *Capital and Counties Insurance Company Limited*; *Same* v. *General Marine Underwriters Limited* 225

9. *Time policy on houseboat at anchor—Liberty to shift—"Including all risk of docking"—Houseboat lost while being towed to dock—Abandonment of insured adventure.*—The respondent 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 gridirons, or graving docks, as may be required during the currency of this policy." During the currency of the policy he 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 up the Itchen, and on arrival it was found that some of the side seams above the water-line were defective, and the bow wave made by the tug raised the water to the level of the defective seams, with the result that water entered and she sank. The respondent did not know that the seams were defective, and the towage was performed in the manner usual in Southampton Water. At the time when the houseboat left the Hamble the respondent did not intend to take her back during the currency of the policy, but to lay her up in the Itchen. On an action on the policy brought by the respondent: Held, that the taking of the houseboat to the yard was authorised by the docking clause in the policy, and therefore the vessel was covered when the loss occurred; that the vessel was lost through peril of the sea; and the respondent had not at the time of the loss abandoned the insured adventure. Decision of the Court of Appeal (reported 14 Asp. Mar. Law Cas. 534; 122 L. T. Rep. 300; (1920) 1 K. B. 477) affirmed. (House of Lords.) *Mountain* v. *Whittle* 255

10. *All risks—"Casualty"—Bales of wool damaged by water—Deck cargo—Usage—"In the absence of any usage to the contrary"—Proof—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 55, *sub-s.* 2 (*a*); *s.* 78, *sub-s.* 4; *sched.* 1, *r.* 17.—Under an "all-risk policy" it is sufficient for the plaintiff to prove that the loss was caused by some fortuitous circumstance or casualty without proving the exact nature of the accident or casualty which, in fact, occasioned the loss. The expression in rule 17 of the rules in the first schedule to the Marine Insurance Act 1906 "in the absence of any usage to the contrary" deck cargo must be specifically insured and not under the general denomination of goods contemplates a usage in a trade and not a usage in the insurance business, and the rule is not intended to alter, and has not altered, the common law on the subject. Therefore, where there is a usage to carry goods of a particular kind on deck, the insurer is liable to the insured although deck cargo is not specifically insured. Decision of the Court of Appeal (14 Asp. Mar Law Cas. 560; 122 L. T. Rep. 406; (1920) 1 K. B. 903) affirmed. (House of Lords.) *British and Foreign Marine Insurance Company* v. *Gaunt* 305

11. *War risk—Collision between merchant ship and warship—No navigation lights—"Consequences of hostilities or warlike operations."*—Two merchant vessels, while navigating at night without lights, in accordance with Admiralty orders, were sunk in collisions, the one by a patrolling destroyer and the other by an armoured cruiser on her way to take up the duty of escorting a convoy. The question in each case was whether the loss was due to a "war" risk, which, in the case of the *A.*, was a risk undertaken by the Admiralty, who had requisitioned the ship; and in the case of the *L.* was a risk accepted by the appellant insurance company. Both merchant ships were insured against ordinary marine risks, and also by their policies against "consequences of hostilities and warlike operations." Bailhache, J. decided that both the destroyer and the cruiser were engaged in "warlike operations," and therefore that the ships were not lost by ordinary marine risks but as the consequence of warlike operations, and that the war risk underwriters were liable. The Court of Appeal affirmed that decision. Held, that the orders appealed from were right, and both appeals must be dismissed on the grounds stated by Bailhache, J. and endorsed by the Court of Appeal. Decision of the Court of Appeal, in the first case reported 36 L. T. Rep. 555, and in the second case reported 15 Asp. Mar. Law Cas. 46;

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123 L. T. Rep. 485; (1920) 3 K. B. 65, affirmed. (House of Lords.) *Attorney-General* v. *Ard Coasters Limited*; *Liverpool and London War Risks Insurance Association Limited* v. *Marine Underwriters of Steamship Richard de Larrinaga*.. 353

12. *Loss of ship—Discovery of documents—Ship's papers—Action on policy by mortgagee—Duty to disclose documents and to obtain documents for disclosure—Affidavits by owner and other persons interested.*—The mortgagees of a ship sued on a policy insuring the ship against war risks. The ship was alleged to have been lost at sea off the east coast of Spain in Feb. 1921 by striking a mine. She was insured against war risks to an amount greatly exceeding the amount of the mortgages. The defence was that the ship had been wilfully lost by her master and crew with the connivance of her owner. Held, that the action should be stayed until the plaintiffs should make a proper affidavit of ship's papers, and should procure an affidavit from persons interested, and especially from the owner; or should satisfy the court that they had employed all possible means to procure such affidavits. In an action upon a policy of marine insurance, a plaintiff must disclose every material document in his possession and in the possession of other persons interested; or else he must show that he has made every effort to obtain these documents and failed. He must also account on oath for the disappearance of any material documents which have been in the possession of himself or of other persons interested. Otherwise the action will be stayed. *Fraser* v. *Burrows* (1877, 2 Q. B. Div. 624) overruled. (Court of Appeal.) *Graham Joint Stock Shipping Company Limited* v. *Motor Union Insurance Company Limited* 445

13. *Requisition—War risk—Vessel requisitioned by Australian Government—Collision—Loss of vessel—Colliding vessel carrying ambulance wagons from one military base to another—Warlike operation—War risk or marine risk.*—In 1916 the claimants' vessel *G.*, which had been requisitioned by the Australian Government under a charter-party by which the Government accepted war risks usually excluded by the f.c. and s. clause, collided with another vessel, which had also been requisitioned. The latter vessel at the time of the collision was carrying ambulance wagons between two war bases. Both vessels were travelling without lights in accordance with Admiralty instructions. The *G.* was not at the time of the loss engaged in hostilities or warlike operations. Held (affirming the decision of Bailhache, J.), that having regard to the circumstances surrounding the date at which the collision occurred (of which the court took judicial notice) the colliding vessel was carrying out an operation of war at the time of the collision, and that the loss of the claimants' vessel was due to a war risk and not to a marine risk. (Court of Appeal.) *Peninsular and Oriental Branch Service* v. *Commonwealth Shipping Representative* 522

14. *Marine insurance—Policy—Gaming or wagering—Loss in event of peace not being declared by date named—P.p.i. clauses—Insurable interest—P.p.i. clauses detached and not detached at time of claim—Short slips—No mention of p.p.i.—Instructions for insertion of in long slips—Rectification—Life Assurance Act* 1774 (14 *Geo.* 3, *c.* 48)—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 4.—The risk insured against by certain policies of insurance or re-insurance issued on marine insurance forms and containing the p.p.i. and f.i.a. clauses, meaning "policy proof of interest" and "full interest admitted," was a total loss in the event of peace not being declared on or before a certain date. The company also issued policies of marine insurance or re-insurance to which were attached at the date on which they were signed the detachable p.p.i. clause which at the time at which the claims were made on the policies were in some cases detached and in other cases not detached. The short slips for these marine policies contained no mention of p.p.i., but the long slips or

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concluding instructions did contain instructions for the insertion of the p.p.i. clause. On the question being raised by the voluntary liquidator of the company as to the validity of these policies, Held, that though the provisions of the Marine Insurance Act 1906 were not applicable to the peace policies they were insurances within the meaning of the Life Assurance Act 1774 and insurances on an event in which the assured had no interest or insurances by way of gaming or wagering within the meaning of sect. 1 of the Act of 1774 and therefore illegal and no premiums paid on them were recoverable. The fact that the policies were re-insurance policies and that the re-assured had paid under the policies which they had issued did not enable the claims to be substantiated. Held also, that the marine insurances were void under sect. 4 of the Marine Insurance Act 1906, being policies which at the time of issue had the detachable p.p.i. clause attached, and whether such clause was detached or not detached at the time the claim was put forward made no difference; the court would not rectify such policies as the long slips contained instructions for the insertion of the p.p.i. clause, and therefore the policies contained the real terms agreed upon. (P. O. Lawrence, J.) *Re London County Commercial Re-insurance Office Limited* 553

See *Carriage of Goods*, No. 30.

MARINE WAR RISKS.

See *Carriage of Goods*, No. 30—*Marine Insurance* Nos. 2, 3, 4, 7, 11, 13.

MARTIAL LAW.

See *Carriage of Goods*, No. 2.

MASTER.

UNDERTAKING BY SHIPPER TO INDEMNIFY.

See *Carriage of Goods*, No. 20.

MATERIAL CIRCUMSTANCE.

See *Marine Insurance*, No. 8.

McCARDIE, J.

See *Carriage of Goods*, Nos. 7, 8, 16, 28, 30

MEASURE OF DAMAGES.

See *Carriage of Goods*, No. 4; *Requisition*, No. 1.

MERSEY DOCKS AND HARBOUR BOARD.

See *Limitation of Liability*, No. 11.

MERSEY FERRYBOAT.

See *Collision*, No. 10.

MILITARY AND NAVAL JOINT OPERATIONS.

See *Prize*, Nos. 36, 38.

MIS-COUNT (BILL OF LADING).

See *Carriage of Goods*, No. 18.

MONTEVIDEO HARBOUR.

See *Collision*, Nos. 11, 14.

MUTUAL EXCEPTION.

See *Carriage of Goods*, No. 3.

NATIONALITY.

CHANGE OF, IMPLIED WARRANTY.

See *Carriage of Goods*, No. 26.

NAVAL PRIZE FUND.

See *Prize*, No. 28, 38; *Naval Prize Tribunal*.

NAVAL PRIZE TRIBUNAL.

1. *Prize Claims Committee—Sums paid by Treasury on recommendation of committee not recoverable against Naval Prize Fund—Naval Prize Act* 1918 (8 & 9 *Geo.* 5, *c.* 30), *Part II. of Schedule, par.* 4.—The Treasury, having, on the recommendation of the Prize Claims Committee, paid

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various claims made in respect of ships condemned as prize and declared to be droits of the Crown, claimed to be repaid out of the Naval Prize Fund None of the claims could have been established in the Prize Court. Held, that the sums paid were not repayable out of the Naval Prize Fund, as they were not claims which could have been established in a Prize Court. (Naval Prize Tribunal.) *The Adolph and other vessels* 192

2. *Joint capture—Co-operation and joint expedition of land and sea forces—Droits of Admiralty—Droits of the Crown—Naval Prize Act* 1918 (8 & 9 *Geo.* 5, *c.* 30).—During the final campaign in German East Africa, in pursuance of a concerted operation by naval and military forces, the port of Dar-es-Salaam was captured by naval forces, military forces entering the town some four or five hours after its surrender. The German steamship *F.* was at Dar-es-Salaam at the time. Held (Sir Guy Fleetwood Wilson dissenting), that the facts proved a joint enterprise; but that the capture of the *F.* was a capture by naval forces alone, not a joint capture by naval and military forces. Held, by the whole tribunal, that the law applicable to the division of the proceeds of joint captures was that that part which ought to be appropriated to the navy is a droit of the Crown and therefore will be directed to be paid to the Naval Prize Fund under the Naval Prize Act 1918; and that that part which ought to be appropriated to the army is a droit of the Admiralty, and therefore will be paid to the Exchequer to be dealt with as the Crown may be pleased. (Naval Prize Tribunal.) *The Feldmarschall* 299

3. *Naval Prize Fund—Neutral ship ordered into port for examination—Loss of ship and cargo—Ship and cargo not liable to condemnation—Negligence of the prize crew—Negligence of the ship's master—Claims by the owners—Admission of liability by the Admiralty—Money paid in settlement—Amount chargeable on the Naval Prize Fund—Naval Prize Act* 1918 (8 & 9 *Geo.* 5, *c.* 30), *sched. part II., par.* 5.—The *C.*, a neutral vessel, was stopped by a British cruiser and sent into port under a prize crew for examination. By an error of the navigating officer she was lost before reaching the examination port. It subsequently appeared that the cargo on board the *C.* was not contraband, that the *C.* had not committed any un-neutral act, and that if she had reached port she would have been released after examination. Claims by the neutral owners for the loss of the *C.* and her cargo were eventually admitted by the Government, and certain sums were paid to them in compensation. The Treasury claimed to have these sums charged on the Naval Prize Fund under part II. (5) of the schedule to the Naval Prize Act 1918 (8 & 9 Geo. 5, c. 30), which provides that there shall be charged on and payable out of the Naval Prize Fund "costs, charges, expenses and claims which the tribunal consider may reasonably be treated, having regard to the principles any practice heretofore observed by prize courts, as being costs, charges, and claims which, had there been a grant of prize to captors, captors would have been liable to pay." At the hearing it appeared that the loss of the *C.* was due to her speed having been inaccurately given to the Prize officer by her master, and not to the negligence of the Prize officer. Held, that an unconditional admission of liability by the Government did not constitute binding and unrebuttable evidence that there was a liability, nor relieve the Naval Prize Tribunal of determining for themselves whether a claim was to be treated as one which the captors would have been liable to pay having regard to the principles and practice heretofore observed by prize courts. But in view of the difficulty of defending the case in the Prize Court, and of the fact that the admission of the Government had perhaps saved the fund from an adverse decision, such sum as might reasonably have been paid to effect a settlement ought to be charged on the Prize Fund. Half the sums paid ordered to be charged on the Prize Fund. (Naval Prize Tribunal.) *The Canadia* 606

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NECESSARIES.

1. *Necessaries—Action* in rem—*Payments in respect of the cargo—Liability of the ship—Necessaries to the ship.*—The agents at New York of a steamship made payments in connection with her discharge at New York. In an action against the steamship *in rem* to recover these disbursements as necessaries it was contended that they were made in respect of the cargo only, and were not necessaries to the ship. Held, that payments though made in respect of the cargo were necessaries to the ship if she could not go on her business without them. As the business of the ship consisted in entering the port of New York, discharging her cargo, and leaving the port, payment of charges which, being unpaid, would prevent her from doing any of these things was necessary to the ship, notwithstanding that the amount disbursed did not become due, nor was the disbursement made, until after the ship had left New York. Quay rent for cargo, and the cost of destroying putrid cargo, were necessaries to the ship, since by the law of New York she was liable for these charges, and could have been prevented from sailing had they not been paid. (Hill, J.) *The Arzpeitia* 426

2. *Necessaries—Master's wages—Master also part owner—Priorities—Foreign law—Sale of ship abroad—Right of foreign government to tax proceeds—Sale by order of the court—Practice—Judgment by default—Payment out of court.*—The claim for wages and disbursements of a master who is also part owner of a ship ranks after the claims of persons who have supplied necessaries to that ship, since the master is personally liable to such persons. *The Jenny Lind* (1 Asp. Mar. Law Cas. 294; 26 L. T. Rep. 591; L. Rep. 3 A. & E. 529) considered and followed. A foreign government which is by foreign law entitled to a percentage on the sale price of ships voluntarily sold out of its national registry is not entitled to claim such percentage when the ship is sold by the marshal in a default action *in rem.* When a party has obtained judgment in a default action, he is entitled to move for payment out, but must give notice of that motion to any person who has intervened or entered caveats against payment out. If any other claimants to the fund want to be in a position to resist payment out they must, to entitle them to be heard, intervene or enter caveats. (Hill, J.) *The Eva* 424

See *Bottomry.*

NEGLIGENCE.

See *Carriage of Goods*, Nos. 25, 30—*Collision*, No. 4, 16—*Limitation of Liability*, Nos. 5, 6, 9, 11—*Prize*, Nos. 3, 29—*Tug and Tow.*

NEGLIGENCE IN THE PERFORMANCE OF A PUBLIC DUTY.

See *Public Authorities Protection Act.*

NEUTRAL.

See *Prize*, Nos. 1, 6, 7, 8, 29, 31, 33, 35, 37, 38—AGREEMENT WITH, TO TRADE IN CONDITIONAL CONTRABAND: See *Prize*, No 23—STATE, RIGHTS OF: See *Prize*, No. 8.

NON-DISCLOSURE OF MATERIAL FACTS.

See *Marine Insurance*, No. 6.

NOTICE OF CASUALTY IGNORED BY INSURERS.

See *Marine Insurance*, No. 6.

ONUS OF PROOF.

See *Carriage of Goods*, No. 18; *Prize*, No. 19.

ORIGIN.

See *Prize*, No. 4.

PARTIAL LOSS.

See *Marine Insurance*, No. 7.

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PARTY AND PARTY COSTS.
See *Practice*, No. 5, 9.

PASSING OF PROPERTY AFTER SEIZURE.
See *Prize*, No. 2.

PEACE TREATY.
See *Marine Insurance*, No. 1.

PERILS OF THE SEA.
See *Marine Insurance*, No. 2.

PERISHABLE GOODS.
See *Carriage of Goods*, No. 5.

PETITION OF RIGHT.
See *Docks*, No. 1—*Carriage of Goods*, No. 35.

PILFERAGE.
See *Carriage of Goods*, Nos. 6, 13.

POLICY.
See *Marine Insurance*, No. 12—*Sale of Goods*, No. 4.

PORT OF REFUGE.
See *Carriage of Goods*, No. 24.

POSSESSION OF WRECK.
See *Collision*, No. 15.

POSTAL CORRESPONDENCE.
See *Prize*, No. 4.

"P.P.I." CLAUSE.
See *Marine Insurance*, Nos. 5, 14.

PRACTICE.

1. *Lump sum tender to separate salvors in consolidated action—Costs—Separate representation of master and crew.*—The owners of two salving vessels issued a writ for salvage whilst the masters and crews of the same vessels issued another against the same defendants. On the actions being consolidated, the conduct was given to the owners and not to the masters and crews. The defendants tendered 400*l.* to all the plaintiffs. The owners delivered a reply putting the sufficiency of this tender in issue, but no reply was delivered by the masters and crews. The defendants supplied no affidavit of value to the plaintiffs until the day of the trial. Held, (1) that the tender in the present case was sufficient; (2) that in a consolidated salvage action tender of a lump sum to separate salvors is a good tender; (3) that, having regard to the time when the affidavit of values was handed to the plaintiffs, they acted reasonably in continuing the action after the tender was made, and should have the whole of their costs; (4) that the masters and crews, whose interests were in this case identical with those of their owners, were not entitled to the costs of separate representation; (5) that if any conflict should arise in any future case between tug owners and the masters and crews of tugs, it could only be a conflict as to apportionment in which defendants are not interested. The proper course for masters and crews to adopt in such a case was not to ask for an apportionment at the hearing, and then afterwards, failing agreement with their owners as to apportionment, to take proceedings for apportionment. (Hill, J.) *The Crete Forest* 48

2. *German claimants—Judgment entered before the war—Rights of claimants to proceed to reference after ratification of peace—Treaty of Peace between Allied, &c., Powers and Germany* 1919, *arts.* 296–297.—*Treaty of Peace Order* 1919, *s.* 1, *sub-ss.* 16 *and* 17.—Before the war the defendants, who were German shipowners, recovered judgment against the plaintiffs, who were British, condemning the plaintiffs in damages for collision and ordering a reference for assessment of the said damages. The defendants had not filed their claim before the outbreak of war. The claim and vouchers were ultimately filed a few days before the ratification of the Treaty of Peace, but it was agreed that they should be taken as filed on a subsequent date. The plaintiffs then took out a summons to set aside the claim and vouchers on the ground that under the Treaty and the Order applying its provisions the parties were not entitled to litigate the claim, but must submit to settlement by the clearing houses. Held, that the defendants' claim was not a debt under arts. 296 of the Treaty, but was a right under art. 297, which was to be "retained and liquidated in accordance with the law of the Allied State concerned." There was nothing in art. 297, nor in the Treaty of Peace Order, s. 1, sub-ss. 16 and 17, to prevent the defendants from proceeding to a reference, although they might not touch the proceeds, nor to prevent the plaintiffs from paying money into court. (Hill, J.) *The Marie Gartz* 98

3. *Maritime Conventions Act* 191. *s.* 8—*Motion to set aside writ—Proceedings commenced within two years—"Reasonable opportunity of arresting" defendant vessel.*—The plaintiffs obtained leave, on an *ex parte* application, to issue a writ in March 1920 against the steamship *L. L.* claiming damages in respect of a collision which took place on Sept. 1917. At the time of the collision the *L. L.* was under requisition and no effective arrest could have been made. She ceased to be under requisition on the 21st March 1919, and from the 25th March 1919 until the 4th April 1919 she might have been arrested by the plaintiffs, but the plaintiffs could not have arrested her again until Feb. 1920, when she came within the jurisdiction of the court. Hill, J., holding that the plaintiffs had had no reasonable opportunity to arrest before Feb. 1920, granted leave in accordance with sect. 8 of the Maritime Conventions Act 1911. The owners of the *L. L.* moved to set aside the writ. Held, that leave had been properly granted. (Hill, J.) *The Largo Law* 104

4. *Limitation of actions—Unconditional appearance to writ, whether waiver—Discretion—Writ* in rem—*Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.—Services, alleged to be salvage services, were rendered in Dec. 1916 to a requisitioned vessel, subsequently lost in July 1918, by the master and crew of a tug. A writ *in rem* was issued on the 2nd April 1919, and service thereof was accepted by defendants' solicitors, who in the subsequent pleadings raised a defence under sect. 8 of the Maritime Conventions Act 1911. Held, that the unconditional appearance did not waive the defence under the statute. (Hill, J.) *The Llandovery Castle* 153

5. *Costs—Party and party costs—Witnesses—Seafaring witness detained on shore pending trial—Order LXV., r.* 27.—Where a seafaring witness has been detained on shore pending trial, the amount which he would otherwise probably have earned on a voyage is a guide to, but is not the sole basis of, determining what allowance for his attendance should be made on a party and party taxation, especially in the case where the voyage contemplated was risky or speculative in its nature. Reasonable compensation should be allowed, regard being had (*inter alia*) to the wages which a person of his class was earning at the time, to the value of his evidence, and to the question whether it could properly have been taken on commission. The fact that the witness could have been called to attend on subpœna and paid only a nominal sum should not be wholly ignored. (Court of Appeal.) *The Ibis VI.* 237

6. *Diversion of ship by direction of Shipping Controller—Claim for compensation—Loss of use and expenses of diversion—Shipping Controller sued as individual—Practice—Government not bound by judgment against official as individual—Action*

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misconceived.—The steamship *H.* was in Sept. 1919 on a voyage from Newport to Alexandria with a cargo of coal. On the 30th Sept. 1919 she received a wireless message from the Shipping Controller, directing her to proceed with her cargo to Port Said. She arrived at Port Said on the 3rd Oct., and on the 7th Oct. the master was informed by the senior naval officer at Port Said that the Shipping Controller's direction to proceed to Port Said had been cancelled and that the vessel might proceed on her voyage to Alexandria. The vessel arrived at Alexandria on the 8th Oct., six days later than she would have done but for the Shipping Controller's direction to proceed to Port Said. The plaintiffs, the owners of the vessel, brought this action against the defendant, the Shipping Controller, claiming a declaration that they were entitled to compensation for the loss of the use of the vessel for the six days, and the expenses incurred by them in consequence of the direction given by the defendant under the Defence of the Realm Regulations, and that the amount of compensation should be referred for assessment. It was not disputed that the defendant was authorised by law to give the direction in question. By his defence the defendant pleaded that he was not rightly made a party to the action, and that no cause of action was disclosed in the statement of claim either against him personally or as Shipping Controller. Held, that the action was misconceived. The defendant could not be sued, either as an individual or as Shipping Controller. The Crown could not be bound by any judgment obtained in the action. The defect could not be regarded as trivial, and an application to cure the defect by substituting the Attorney-General as defendant could not be entertained. (Rowlatt, J.) *Bombay and Persia Steam Navigation Company* v. *Maclay* 283

7. *Writ* in rem—*Issue of, when* res *not within jurisdiction—Renewal of writ after twelve months by leave—Extension of time—Order VIII., r.* 1—*Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.—The master of a vessel lost his life in a collision with the *E.* on the 25th Feb. 1917. A writ *in rem* was issued by his widow on the 13th Dec. 1918, but was not served, as the *E.* had left the jurisdiction, and was not renewed within twelve months under Order VIII., r. 1. On the 19th March 1920 the *E.* was again within the jurisdiction; leave was granted on an *ex parte* application, and writ served. On motion to set aside writ: Held, (1) that a writ can be issued although at the time of the issue the *res* is not within the jurisdiction; (2) that the "commencement of proceedings" in sect. 8 of the Maritime Conventions Act 1911 means commencement by issue of writ, not by arrest; (3) that, in general, leave to renew will not be granted if, but for the enlargement of time, the plaintiff's claim would be barred by a statute of limitations. But when an application is made to extend the time for the renewal of a writ in an action which comes within sect. 8 of the Maritime Conventions Act 1911—which is a limitation section of a very peculiar kind—the application must be considered on its merits, and the court must inquire whether the circumstances are such that the court would give leave to issue a writ notwithstanding that the time had expired. (Hill, J.) *The Espanoleto* ... 287

8. *Action* in rem—*Bail—Solicitors undertaking to provide bail—Purported withdrawal from undertaking—Arrest of ship—Amount of bail—Nature of bail in Admiralty.*—A solicitor who indorses upon the writ in an action *in rem* an undertaking to give bail, thereby securing the immunity of the ship from arrest, undertakes to provide bail in a sum equal to the value of the ship at the time when he enters into the undertaking. This obligation is not affected by subsequent fluctuation in the value of the ship. A solicitor who has given such an undertaking cannot afterwards withdraw from it, and invite the plaintiff to arrest the ship, and although the plaintiff does so, the solicitor will not necessarily be released from his obligation to provide bail. Nature of bail in Admiralty considered and contrasted with that of bail given in criminal proceedings. *Miller* v. *James* (8 Moore C. P. 208) held not to apply. (Sir Henry Duke, P.) *The Borre* 334

9. *Costs—Seafaring witnesses—Proper allowance for a witness detained on shore.*—A. B., the mate of the plaintiffs' trawler, was detained on shore from the 8th Nov. to the 3rd Dec. 1918, by the plaintiffs to give evidence against the steamer *I. VI.* which had damaged their trawler in collision. The *I. VI.* was held to blame, and the damages were agreed at 300*l.* Had A. B. not been detained he would have sailed on a fishing voyage on the 9th Nov., on which he would have earned 280*l.* 11*s.* 3*d.* (which sum was actually earned by the mate who took A. B.'s place). The plaintiffs had paid this amount to A. B., and claimed to recover it on taxation. The assistant registrar allowed the item, and his decision was upheld by the President on appeal. The defendants appealed to the Court of Appeal, who held that the amount which A. B. would have received had he not been detained was not necessarily the measure of the sum which the plaintiffs should have paid him, though it was a factor to be considered in determining the sum properly payable to him. The case was sent back to the assistant registrar for reconsideration, and after further consideration he allowed 250*l.* The defendants appealed. Held, that, the assistant registrar having applied the true measure of damage indicated by the Court of Appeal, the court would not consider the accuracy of his application of that measure in point of amount. Decision of the Court of Appeal (*The Ibis VI., sup.* p. 237; 125 L. T. Rep. 378; (1921) P. 255) considered and explained. (Sir Henry Duke, P.) *The Ibis VI.* (*No.* 2) 427

10. *Practice—Interpleader—Summons issued to the Crown—Power to make the Crown a claimant in interpleader proceedings—Register of shipping—"Government ships"—Registered owner—"His Majesty represented by the Shipping Controller"—Evidence of ownership—Interpleader Act* 1831 (1 *&* 2 *Will* 4., *c.* 58)—*Judicature Act* 1873 (36 *&* 37 *Vict. c.* 36), *s.* 25 (11)—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 1, 11, 64, 695, 741—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 80—*Order in Council, the* 29*th Sept.* 1917.—The Crown cannot be summoned to appear upon an interpleader summons or made a party to an interpleader issue. Under a writ of *fi. fa.* the sheriff seized in satisfaction of a judgment debt two vessels owned by a foreign corporation. The Crown then intimated that the vessels had been requisitioned and were the property of the Crown. The register showed that the registered owner of the vessels was: "His Majesty, represented by the Shipping Controller, London, sixty-four shares." There was no evidence that the ships were in the active service of the Crown, and they were in fact laid up. The judgment creditors disputed that the vessels were the property of the Crown, and the sheriff accordingly took out an interpleader summons calling upon the judgment creditors and the Crown to appear and state their claims. Hill, J. held that the vessels had been registered under sect. 80 (1) of the Merchant Shipping Act 1906, and the Order in Council of the 29th Sept. 1917 made thereunder. They were not ships to which sect. 741 of the Merchant Shipping Act 1894 applied, and therefore sect. 695 of that Act was applicable to them. By sect. 695 the entry in the register was evidence of the facts stated therein. In this case the facts so stated indicated no more ownership in the Crown than was described by sect. 80 (3) of the Act of 1906, which might amount to no more than a holding "by the Shipping Controller on behalf of or for the benefit of the Crown." Having regard to the fact that foreign owned ships and ships detained by the Prize Court under the *Chile* form of order were registered under sect. 80 of the Act of 1906

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no certain inference could be drawn from the register as to the Crown's ownership whether legal or otherwise. On the objection that the Crown cannot be summoned to answer an interpleader, Hill, J. held that as the Crown did not consent to submit to the jurisdiction of the court the court had no power to order the Crown to do so. Interpleader proceedings, though they may not amount to maintaining an action against the Crown, come within the wider principle that the King cannot against his will be made to submit to the jurisdiction of the King's courts. Sect. 25 (11) of the Judicature Act 1873 (36 & 37 Vict. c. 66) does not make the old equity rule prevail, or apply to alter the rights of the Crown. The passage of Blackstone at vol. 1, chap. 7, par. 1 (quoted and approved by Brett, L.J. in *The Parlement-Belge*, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197) applied and followed. The Court of Appeal upheld the decision of Hill, J. (Court of Appeal) *The Mogileff* (*No.* 2)..... 476

11. *Interrogatories—Information sought on matters not alleged—Admissibility.*—Interrogatories which aim at furnishing a plaintiff with proof of a cause of action not alleged in the pleadings, or with knowledge of the defendants' information on matters not required to be pleaded by them, are bad and will not be allowed. The plaintiffs were the owners of the steamship *S.* The defendants were two firms of ship repairers who were employed by the plaintiffs to repair the *S.* Whilst repairs were being carried out by the defendants a fire broke out on board, and the *S.* was damaged. In an action by the plaintiffs to recover for the damage to the *S.* it was alleged in the statement of the claim that the fire was caused by unscreened candles used by the defendants' workmen. By their defence defendants admitted that the *S.* was in their hands and under their control for repairs. They also admitted that the fire took place and denied negligence, but put forward no explanation of the cause of the fire. The plaintiffs obtained leave to deliver interrogatories relating to the alleged use of the candles, but the registrar refused leave to deliver the following interrogatory: "What do you say was the cause of the fire?" Held, that as the interrogatory appeared to be framed with the object of compelling the defendants to set up an affimative case, or, alternatively, to disclose their defence to the plaintiffs' case, it was properly disallowed. Decision of the President affirmed. (Court of Appeal.) *The Shropshire* 603

See *Arbitration*, Nos. 2,3—*Necessaries*, No.2.

PRACTICE OF PRIZE COURT.

See *Prize*, No. 25.

PREMIUMS.

See *Prize*, No. 10.

PREROGATIVE.

See *Requisition*, No. 2.

PRESCRIBED ROUTE.

See *Carriage of Goods*, No. 1.

PRINCIPAL AND AGENT.

See *Marine Insurance*, No. 5.

PRIORITIES.

See *Bottomry; Necessaries*, No. 2.

PRIORITY OF SOLICITORS' COSTS.

See *Prize*, No. 26.

PRIZE.

1. *Neutral ship—Enemy stowaway—Unneutral service—Absence of facts justifying condemnation.*—A German, who was a qualified third officer in the German mercantile marine was taken on board a Swedish ship at Pernambuco bound for a Danish port with the connivance of the captain. The stowaway was discovered at Halifax (Nova Scotia), after the captain made some attempt to conceal his presence on board. There was no evidence that the stowaway was carried at the expense of the German Government or that he intended to go to Germany. The captain had on board two bags of rubber which was contraband and was carried as a venture of his own. The Prize Court at Halifax condemned the vessel. Held, that on the facts of the case as proved there was no evidence of an unneutral service to support the decree of condemnation of the ship. Judgment of the Prize Court reversed. (Privy Council.) *The Svithiod* 9

2. *Enemy goods — Cargo — Passing of property after seizure—"Sale" of draft to bankers.*—On the 22nd July 1914 the appellant, a British subject carrying on business in Texas, sold 32,000 bushels of wheat to a German firm at Hamburg, payment to be made at Hamburg against shipping documents. The wheat was shipped on the 24th July in a British steamship, delivery to the order of the appellant, who indorsed the bills of lading in blank. The appellant drew on the buyers for the price in reichmarks and sold the draft, with the bill of lading and policy attached, through brokers to a bank in New York for dollars, with a special indorsement to that bank. The vessel sailed for Hamburg before the outbreak of the war, but was diverted to Liverpool, where the wheat was seized on the 22nd Aug. 1914. The New York bank indorsed the draft to bankers in Hamburg and forwarded it, with the documents, to them to collect, the documents being received in Hamburg about the 25th Aug. 1914. The draft, unpaid and unaccepted, was eventually returned to the bank. A writ claiming condemnation was issued on the 18th Sept. 1914, and the bank, and afterwards the present appellant, claimed the goods. Held, that the wheat could not be condemned as enemy goods since at the date of its seizure in prize it was not enemy property, and this general rule applied, although the property in the wheat had passed to an enemy before the issue of the writ claiming condemnation. Judgment of the Prize Court reversed. (Privy Council.) *The Orteric* 10

3. *Negligence in effecting capture—Ship sunk after collision—Loss of goods—Action against Procurator-General — Responsibility — Prize Court Rules* 1914, *Order II., r.* 3.—A neutral vessel, upon which the goods of the respondent, who was also a neutral, were laden, was lost owing to a collision with an English warship whilst the latter was effecting her capture. The Procurator-General subsequently instituted proceedings in prize against part of the cargo laden on the neutral, but it was admitted that the respondent's goods, and the vessel herself, were not liable to be condemned. The respondent sued the Crown and the Procurator-General, and obtained an order for the restoration of the value of his lost goods. Held, that under the Prize Court Rules 1914, whereby the Procurator-General was substituted for the actual captors, he was liable in such damages and costs as under the old procedure the actual captors were subject, and that the rules were not *ultra vires* so far as they imposed that liability. Observations in *The Zamora* (13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77) followed. Judgment of Prize Court affirmed. (Privy Council.) *The Oscar II.* 14

4. *Securities—Seizure from letter mail—"Goods" — "Postal correspondence" — "Enemy property"—"Enemy origin"—Reprisals Order in Council of the 11th March* 1915—*Hague Convention, No.* 11, *art.* 1.—The detention, under the Peprisals Order in Council of the 11th March 1915, was claimed of certain bearer bonds and coupons which had been seized from Dutch vessels in which they had been shipped by letter

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mail from Holland to ports in the United States. All the securities had been recently purchased in Germany. Some were being forwarded to American buyers by Dutch agents; others had been bought by Dutch dealers for prompt resale in America, or for delivery in respect of sales already made there. Held, that the securities were not exempted from seizure as "postal correspondence" under Hague Convention No. 11, but, as documents of title, were "goods" within the intention of the Reprisals Order. Further, that, although they were not "enemy property," they must nevertheless be regarded as of "enemy origin" within the meaning of the Order, since they had recently formed part "of the common financial stock of Germany's holding in foreign securities." They were therefore liable to detention under the Order, but there was nothing to prevent a proper application being made for their release to the respondents. Judgment of the Prize Court varied. (Privy Council.) *The Noordam No. 2 and other ships* 27

5. *Conditional contraband—Consignment of selling agent—Advances by agent—"Consignee to the goods"—Order in Council of the 29th Oct.* 1914, *cl.* 1 (*iii.*).—By the Declaration of London Order, No. 2, of the 29th Oct. 1914, conditional contraband is liable to capture on board a vessel bound for a neutral port "if the ship's papers do not show who is the consignee of the goods." Held, that an ordinary agent for sale who had not the real control of the destination of the goods was not a consignee of the goods within the meaning of the above order, even if he had advanced a large percentage of the value of the goods, and therefore goods so consigned could properly be condemned. *The Louisiana* (118 L. T. Rep. 274; (1918) A. C. 461, 471) applied. Judgment of the Prize Court affirmed. (Privy Council.) *The Urna* 32

6. *Enemy vessel—Capture in neutral territorial waters—Impossibility to bring captured vessel into British port—Sinking of vessel—Unintentional violation of territorial rights—Claim by neutral Power—No order for restitution or damages—Hague Conference* 1907, *Convention XIII., art.* 3.—An enemy vessel was captured in neutral territorial waters, the captors acting *bonâ fide* and without negligence. Subsequently the vessel was sunk by the captors. On a claim by the neutral Government for restitution of the value of the ship and for damages and costs, it was held that, since the captors acted reasonably, honestly, and without negligence, the claim for restitution of value and for damages and costs failed, although a claim for the restitution of the ship, had she still been afloat, would have succeeded. (The President, Sir Henry Duke.) *The Valeria* 55

7. Bonâ fide *sale to neutral of enemy cargo—Effect of option to reject in contract—Completed voyage.*—A German steamship had been lying in refuge at Lisbon, laden with certain goods, since the outbreak of war. The goods were owned by a company registered and carrying on business in Holland, though ninety-eight of its hundred shares were owned by Germans domiciled in Germany. On the 14th Feb. 1916 a contract of sale of the goods was made by the company with Dutch manufacturers who were buying *bonâ fide* for their own needs. On the 9th March 1916 Portugal declared war, as an ally, and later the German steamship was requisitioned and the goods landed on the quay. On the 14th March 1916 the ninety-eight shares in the company owned by the German subjects were assigned to a citizen of the Netherlands. In Nov. 1916, in pursuance of the contract of sale, the goods were shipped from Lisbon for delivery at Amsterdam in three vessels under three bills of lading, consigned as by the Dutch consul at Lisbon to the Netherlands Oversea Trust. Under the original bills of lading, which were two in number, the goods were consigned by the company for delivery to their

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order at Rotterdam. Held, following *The Baltica* (11 Moore P. C. 141), that claimants, the Dutch manufacturers, might at the date of their contract have acquired a good title to the goods which would have defeated the right of capture. But that as the contract made contained a clause enabling the buyer to refuse acceptance of the goods whereupon the seller should take back the goods and repay the purchase price there was no such absolute disposal of the goods by the vendor as would defeat the right of capture. *The Bawean* (14 Asp. Mar. Law Cas. 255; 118 L. T. Rep. 319; (1918) P. 58) considered. *The Baltica* (*sup.*) followed. (Sir Henry Duke, P.) *The Naxos and other ships* 53

8. *Territorial waters of neutral country—Rights of neutral State—Expenses of removal of vessel improperly seized*—Restitutio in integrum.—The German steamship *D.* was captured, through an error of judgment in computing the three-mile limit, by a British man-of-war, in Norwegian territorial waters, and proceedings were taken in the Prize Court for her condemnation. The vessel was released by the Prize Court, but the Norwegian Government claimed from the British Government, in addition to the delivery up of the ship and her cargo or its proceeds, all costs fees, and expenses incidental to her removal and restitution, and an account of the profits made during the period of her requisition. The Prize Court rejected the demand on the ground that the violation of neutral waters was unintentional and the result merely of an error of judgment. The Norwegian Government appealed from so much of the order of the President as rejected their claim to costs and damages. Held, that the claimants were entitled to such expenses of removing the vessel from British to other waters as might fall or would ultimately fall on them, but they were not entitled to the costs and fees payable to the Marshal of the Prize Court or to any sum for the requisition of the ship. Decision of Lord Sterndale (14 Asp. Mar. Law. Cas. 478; 122 L. T. Rep. 237; (1919) P. 245) varied. (Privy Council.) *The Dusseldorf* 84

9. *Enemy vessel—Capture in neutral territorial waters—Requisition by Admiralty—Claim for restitution by neutral Government—Prize Court Rules* 1914, *Order XXIX.—Treaty of Peace with Germany, art.* 297, *and Annex* 3 *to Part* 8.—Two German merchant vessels were captured by British warships in July 1917 after a chase which ended in Dutch territorial waters. Lord Sterndale held in subsequent proceedings (*The Pellworm*, 14 Asp. Mar. Law Cas. 490; 121 L. T. Rep. 488) in prize that there had been an unintentional violation of Dutch neutrality, and he therefore dismissed the claim of the Crown for condemnation and that of the Netherlands Government for damages and costs. Further consideration was adjourned, as the vessels had been requisitioned by the Admiralty under Prize Court Rules 1914, Order XXIX., upon the usual undertaking for payment of appraised values. Two of the vessels were subsequently sunk by enemy submarines. The Netherlands Government claimed release of the vessels and compensation. Held, that the capture created no proprietary right in the Netherlands Government, and that the claim was a claim in the right of the disseised enemy owners; that the requisition by the Crown was effectual to vest the property in the vessels in the Crown; that the claim was therefore for restitution in value by the payment of the appraised values of the vessels to a neutral Sovereign for the use of German owners; that such sums were within art. 297 of the Treaty of Peace with Germany, and must be retained to be dealt with pursuant to the Treaty. The claim of the Netherlands Government dismissed. (Sir Henry Duke, P.) *The Pellworm and other vessels* 101

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10. *Goods in Crown custody—Insurance by Marshal—Release—Owners' liability for premiums.* — The Admiralty Marshal insured against fire, aircraft, and bombardment goods which had been seized as prize. The respondents were neutral owners of goods laden on two captured vessels. Subsequently, release of the goods was ordered, but they remained in the Marshal's custody for some time as the owners were unable to obtain shipment for them. The Marshal claimed a proportion of the premiums from the cargo owners as expenses chargeable against them. Held, that the proportion of the insurance premiums could not be recovered as part of the expenses of detention by the Marshal on delivery of the goods. Decision of Sir Henry Duke, P. (reported (1920) P. 209), affirmed. (Privy Council.) *The Cairnsmore and The Gunda* 162

11. *Damages against the Crown—Right of search—Misconstruction of Orders in Council by naval officers—Diversion of ships in danger area—Order in Council of the 16th Feb.* 1917.—Two Dutch vessels trading between French colonial territory and Holland were stopped by a British cruiser just outside the area declared by Germany to be a prohibited area in which any neutral vessel would be liable to be sunk by German submarines. The vessels had all the requisite documents of clearance from the French port, including an "*acquit à caution*"—a document permitting the export of the cargo—but had not got the "green clearances" which were given to vessels that had called at a British port. The naval officer ordered that the vessels should proceed to Kirkwall to be searched, and they were being taken there when they were torpedoed by a German submarine. In a suit for damages by the owners the Prize Court held that as there was no ground for detaining the vessels, or reasonable ground for thinking that they might prove subject to detention, the Crown was liable. Held, dismissing the appeal, that the Order in Council of the 16th Feb. 1917 did not require a vessel which had started from a British or Allied port to call at a British port for a clearance certificate. In the absence of anything connected with the ship or cargo which could give rise to suspicion that they might be liable to condemnation, the captors, whose action in this case was prompted by doubts as to the meaning of the Order in Council, not as to the character of the ship or her cargo, were liable in damages and costs. Judgments of Lord Stowell in *The Oostzee* (1855, 9 Moo. P. C. 150) and in *The Luna* (1815, 2 Dods. 48) considered. (Privy Council.) *The Bernisse and The Elve* 167

12. *Contraband—Doctrine of infection—Transfer of ownership* in transitu.—The law of prize contains two settled rules, one which refuses to recognise transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods; and the other (known as the rule of infection) which condemns as if contraband any goods which, though not condemnable in themselves, belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband. It is strictly with owners that these rules deal. The rule of infection does not rest on the personal culpability or complicity of the owner of the goods. "Infection" is not a quality of the goods themselves, but is an incident of the owner's position when the seizure is made and the captor's right arises. The rule as to infection has not been abrogated by the Declaration of Paris. The Declaration of London Order in Council (No. 2) dated the 29th Oct. 1914, was revoked by the Declaration of London Order in Council dated the 30th March 1916. (Privy Council.) *The Kronprinsessan Margareta, The Parana, and other ships* 170

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13. *Seizure of contraband goods — Evidence of reasonable suspicion—Detention and refusal to release—Disclosure of documents—Discontinuance of proceedings—Licence required to remove goods—Interest on proceeds.*—It is not a general rule that whenever the Crown has had the benefit of goods seized the claimant is entitled to interest if the goods are released to him. In 1915 tanning materials belonging to the appellants, a Swedish firm, were seized on board certain vessels on their way from America to Sweden as absolute contraband with an enemy destination. The matter was eventually settled and the Procurator discontinued his proceedings in 1919. The appellants claimed damages for the capture and detention of the goods and for the inaction of the Procurator-General after the appellants had disclosed their documents to him and had satisfied his requisitions. Held, that as there were reasonable grounds for the original seizure, and subsequent proceedings, and as there had been no delay for indirect objects or from mere neglect, and there were materials proper to be examined judicially, the Procurator-General was not liable to the appellants for damages for the seizure and detention. A decree for the release of goods does not warrant actual ability to remove them from the realm, and the Procurator-General is not liable for a loss on the goods owing to a statutory restriction upon their export. Judgment of the Prize Court affirmed. (Privy Council.) *The Falk and other ships* 180

14. *Enemy cargo—Sale* in transitu—*Contract of sale—Enemy vendor to "take back" the goods—Delivery under the contract—Title of a neutral purchaser.* — A German steamer bound for Rotterdam took refuge in Lisbon on the outbreak of war. She had on board a non-contraband cargo which was the property of a company of enemy character. The cargo was subsequently sold to a Dutch company. The Dutch company, who acted in complete good faith, shipped the cargo in three neutral vessels to Amsterdam. The contract of sale gave the purchasers the right to reject the goods if they found them to be unsuited to their manufacturing business, and provided conditions upon which the vendors were to "take back" the goods in this event. The three ships were captured on the way to Amsterdam and the cargo seized as belonging to enemies of the Crown at the time of the seizure. Held, that the clause in the contract did not render the sale ineffective as a transfer of the goods to the purchasers. The provisions of the contract under which the vendors agreed to "take back" the goods contemplated a new transaction, not a failure of the sale. The appellants having got actual delivery of the cargo after a genuine sale, the condemnation was not in the circumstances justified. Decision of Sir Henry Duke, P. (reported *sub nom. The Naxos and other ships, sup.* p. 53; 123 L. T. Rep. 556; (1920) P. 385) reversed. (Privy Council.) *The Vesta and other vessels* 194

15. *Conditional contraband—Application for release of goods seized—Evidence of ownership—Documents not put in evidence in court below by an oversight—Admission of documents on appeal.*—The onus of proving an innocent destination of goods seized as conditional contraband rests upon the owners under the Declaration of London Order in Council, No. 2, of the 29th Oct. 1914. Receipts of prior payment for such goods by the claimants on their own behalf and not as sale agents for consignors are evidence which would have a material bearing on the question; and therefore an opportunity should be allowed the claimants of putting in such receipts on the hearing of an appeal which were not put in at the trial in the court below, such documents having been in existence and disclosed before the trial, and the omission to put them in being the result of a mistake. (Privy Council.) *The Kim and other vessels (Part cargoes ex)* 210

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16. *Property found to be enemy property under Reprisals Order in Council of the 11th March 1915—Subsequent sale by enemy owner to neutral purchaser—Treaty of Versailles, art.* 297.—In 1915 the *O. II.*, a neutral vessel, carrying (*inter alia*) 350 bags of clover seed consigned to Copenhagen, touched at a British port, when the seed was ordered to be seized as prize. The *O. II.*, however, was allowed to proceed upon the undertaking of her owners that the seed should be returned. In 1917 the claimant, with knowledge of these facts, purchased the interest in the seed at Copenhagen from the agent of the enemy owner for 42,000 (odd) kronen, and paid into court 52,000 (odd) kronen as a condition of the release of the goods and as representing their proceeds. On the 10th Jan. 1920 the Treaty of Versailles was ratified. By art. 297 (*b*) this country reserved "the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present treaty to German nationals. . . " Held, that, the effect of the Reprisals Order in Council of the 11th March 1915 not being to divest the original German owner of the seed of his right of disposal thereof, the fund was not within art. 297 (*b*), and must be paid out of court to the claimant, the neutral purchaser. (Privy Council.) *The Oscar II. (No 2)(a)* 215

17. *Enemy ship — Capture of German vessel in Norwegian waters—Subsequent loss of ship—Claim for restoration in money.*—Restitutio in integrum.—On the 19th March 1918 a British cruiser captured the *V.*, a German steamship, in Norwegian territorial waters. The cruiser was unaware that she was within the territorial limit. On the way to Lerwick, under escort, the *V.* had to be abandoned owing to very bad weather, and as she would have been dangerous as a derelict she was sunk by gunfire. The Norwegian Government claimed restoration of the vessel in money. Held, that, though the Norwegian Government might be entitled to have the *V.* released to them had she been in existence, because the sovereignty of the King of Norway had been wronged by her capture in territorial waters, it did not follow that if she was not in existence her value in money must be restored to them. The principle of redress was *restitutio in integrum*, not reparation. The Government of Norway had no property or interest in the ship nor possession, nor did it appear that the Government had come under any liability or incurred any expense, except for costs in respect of the capture. Payment of the value of the ship would either leave in the hands of the Norwegian Government a profit on the whole transaction or would constitute the Government a trustee for the enemy owners, and in neither case would the payment come within the principle of an indemnity. *The Dusseldorf* (14 Asp. Mar. Law Cas. 478, 15 Asp. Mar. Law Cas. 123; L. T. Rep. 732; (1920) A. C. 1034) distinguished. Judgment of Sir Henry Duke, P. (reported 122 L. T. Rep. 751; (1920) P. 81) affirmed. (Privy Council.) *The Valeria* 218

18. *Contraband—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.*—Certain bales of wool, absolute contraband of war, were shipped in two Swedish vessels from Buenos Ayres in 1916. 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 purposes 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. Without deciding whether there were any circumstances in which goods sent to be worked upon in an enemy country and returned to their neutral owners would be exempt from condemnation: Held, that on the facts of this case there were no grounds shown for the contention of the claimants, and that the wool was good and lawful prize. Decision of Evans, P. (14 Asp. Mar. Law Cas. 150; 117 L. T. Rep. 412; (1917) P. 234) affirmed. (Privy Council.) *The Axel Johnson, The Drottning Sophia* 221

19. *Contraband—Enemy destination—Onus of proof—Order in Council of the 29th Oct.* 1914.—When goods declared conditional contraband are seized proof of an intention to submit the goods to public auction in the neutral country to which they are shipped does not necessarily discharge the onus upon the claimants of establishing that they were not destined for an enemy Government or an enemy base of supply. Judgment of the Prize Court affirmed. (Privy Council.) *The Norne* 222

20. *Neutral ship—Purchase from enemy—Claim for damages for deterioration while commandeered by Crown—Validity and competency of sale—Declaration of London* 1909, *art.* 56.—Prior to the outbreak of war with Germany in 1914 a vessel which was registered in a neutral country N. was transferred to a company in a neutral country M., and registered in M. She was in fact of German character, and rendered services to a German cruiser in the supply of coal and in other respects. She, however, took no direct part in hostilities, and was not in the employment of the German Government nor under the control of an agent placed on board by that Government. In Oct. 1915 she was bought *bonâ fide* and paid for by a neutral firm and her name changed. She was seized during her new ownership by a British cruiser and afterwards requisitioned by the Crown. Held, that the purchase was valid and complete, as the vessel could not be regarded as having been an auxiliary to the German Fleet so as to be subject to the disability of transfer attaching to warships. Held, further, on a cross-appeal, that the captors were not liable for damages or costs in respect of the seizure, since there was substantial ground for questioning the neutral character of the ship, and the claimants' case had been supported by flagrantly false affidavits which rendered a judicial inquiry necessary; and that in any case the claimants were not entitled to an account of profits earned by the vessel while under requisition. Judgment of Lord Sterndale, P. (reported 14 Asp. Mar. Law Cas. 443; 121 L. T. Rep. 281; (1919) P. 157) affirmed. (Privy Council.) *The Edna* 260

21. *Neutral ship—Contraband cargo—Condemnation of ship and entire cargo—Knowledge of owner.*—Where the owner of a neutral ship knowingly carries a cargo which is in whole or in part contraband, he is liable to forfeit his ship, but there can be no confiscation of the vessel unless there is evidence from the shipowner's conduct and other circumstances that the owner or possibly the charterer or master knew of the true nature of the cargo. Lord Parker's observations on the evidence of knowledge on the part of the shipowner which would establish the liability of the cargo to condemnation, in *The Hakan* (14 Asp. Mar. Law Cas. 161; 117 L. T. Rep. 619; (1918) A. C. 148), discussed. Judgment of Lord Sterndale, P. affirmed. (Privy Council.) *The Zamora (No. 2)* 266

22. *Carriage of contraband—Allowances of freight—Discretion and jurisdiction.*—The Prize Court has jurisdiction to award freight in respect of the carriage of contraband goods which have been condemned, but the exercise of the discretion to allow it is very rare, and depends upon the particular circumstances of each case. Held, in the present case that the ignorance of neutral shipowners as to the enemy destination of contraband goods, their conduct in informing the

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British authorities of the proposed shipment, and their services in carrying the goods from a neutral port did not provide a sufficient foundation upon which a discretion to allow freight could properly be exercised. Decision of Sir Henry Duke, P. (reported 1920 P. 216) reversed. (Privy Council.) *The Prins der Nederlanden*.... 274

23. *Agreement by allies with neutral country conceding right to trade in conditional contraband —Cargo of conditional contraband destined for German base of supplies—Seizure during Armistice.*—On the 30th April 1918 an agreement was made between the U.S.A. and Norway, and was assented to by the United Kingdom, under which Norway agreed not to export to Germany foodstuffs except fish in quantities not to exceed 48,000 tons per annum. This quantity was duly exported by Norway under Norwegian governmental licence, the monthly total exported being reported by Norway to the United Kingdom. The *R.* during the Armistice under such licence and within such condition was on a voyage to Stettin, admittedly a German base of supplies, and both ship and cargo were taken as prize by H.M.S. *V.* Held, (1) that the cargo was contraband, the Norwegian trade with Germany in fish provided for by the agreement being that trade only which was consistent with neutrality; (2) that as the Armistice did not reopen German trade it gave no immunity; (3) that both ship and cargo were liable to condemnation. (The President.) *The Ranneveig* 292

[Since affirmed by Privy Council.—ED.]

24. *Practice—Prize Court—Investment of proceeds of sale pending action for condemnation—Terms of bail bond upon release to claimant of goods unsold pending action for condemnation—Prize Court Rules* 1914, *Order I., r.* 2; *Order XI., r.* 2; *Order XXVI., r.* 1—*Supreme Court Fund Rules* 1915, *rr.* 73, 74, 74 (*a*).—Claimants to goods seized as prize had obtained orders from the registrar (1) that the proceeds of sale of certain of the goods should be placed on deposit in the joint names of the claimants and of the Procurator-General, or, alternatively, be invested in Government funds; and (2) that unsold parcels should be released on bail. The Procurator-General contended as to (2) that the costs and charges of seizure and detention already incurred should be paid unconditionally as a condition of release. Held, that the proceeds of goods sold pending the hearing of an action for condemnation should not be placed on deposit or invested. Held, further, that where goods are released on bail the claimant should not be required as a condition of the release to pay unconditionally the costs and expenses already incurred; and a claimant who pays costs and charges of seizure and detention upon receiving delivery of such goods ought to have credit for the payment as against the security which represents the full value of the goods in the event of his failure in the litigation, and that the bail bond should be expressed in terms which will evidence this right. (The President.) *The Drottning Sophia* 294

25. *Ships on time charter not amounting to demise carrying contraband—Degrees of knowledge of owners, charterers, and masters — Liability to condemnation.*—A German subject carrying on business since 1900 in New York, and president of an American steamship line, chartered in 1912 and 1913 on behalf of that line on time charters for terms of nine or ten years three Norwegian vessels. The Norwegian owners retained (*inter alia*) the right to appoint and dismiss the master. At the outbreak of war the ships were directed to New York, and the president organised a regular service of vessels from the U.S.A. carrying foodstuffs consigned to agents of the packers in Copenhagen, in which service the three vessels were engaged when captured. It was found by inference by the court that the service was organised as a means of furnishing to the German Government through Copenhagen necessary supplies. At the time of capture one of the vessels had on board a small quantity of rubber falsely described as gum. Two of the owners were proved to have and the third did not disclaim, knowledge of the voyage. Held, on the broad facts as to the whole undertaking, the knowledge of the master, and the knowledge of the charterers, the ships were liable to condemnation. (The President.) *The Kim; The Björnstjerne Björnson; The Alfred Nobel* 296

26. *Reprisals Order in Council of the 11th March* 1915—*Terms of release of goods—Incidence of* (a) *insurance and* (b) *detention expenses.*—Goods seized on a neutral ship bound from Copenhagen to New York were decreed to be of enemy origin and to be enemy property and ordered to be detained till peace or further order. The Attorney-General, on a claim by American claimants, now waived the rights of the Crown in respect of such decree, but claimed that orders for release should be subject to payment of insurance and detention expenses incurred by the marshal. Held, that the seizure and detention being rightfully made in the course of a voyage begun after the publication of the Reprisals Order and consequent upon shipment presumably made with knowledge thereof, the proper order was for restitution to claimants subject to payment of expenses of discharge, detention, or sale properly incurred, including costs of insurance. (Sir Henry Duke, P.) *The United States* (*No.* 2) 344

27. *Security for costs of appeal—Charging order upon —Priorities—Payment out—Solicitors Act* 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—Claimants having paid 500*l.* into court as security for costs of their appeal to the Privy Council and having then abandoned the appeal, applied for payment out thereof. The Procurator-General then applied for a charging order upon the said 500*l.* on the ground that the security ordered in the proceedings before the Prize Court was inadequate and that the costs of those proceedings and of the abandoned appeal would fully absorb both securities. The claimants' solicitors contended that they had in any event a prior claim for their own costs under sect. 28 of the Solicitors Act 1860. Held, (1) that the charging order should be granted as prayed; (2) that the solicitors had no prior claim upon the fund as it had not been "recovered or preserved" by them. (Sir Henry Duke, P.) *The Dirigo* 343

82. *Bounty—Battle of Jutland—Joint and common enterprise—Naval Prize Act* 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of the 2nd March* 1915.—By Order in Council No. 226 of the 2nd March 1915, His Majesty made a declaration pursuant to sect. 42 of the Naval Prize Act 1864 (27 & 28 Vict. c. 25) of his "intention to grant prize bounty" and that "such of the officers and crews" (of His Majesty's ships of war) "as are actually present at the taking or destroying of any armed ship" (of any of His Majesty's enemies) "shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement." In the Battle of Jutland on the 31st May and the 1st June 1916, The British Grand Fleet, consisting of 151 ships, destroyed eleven enemy ships, having on board 4537 persons, but it was impossible to contend that any one British ship or squadron was responsible for the destruction of any one of the destroyed German ships. Decreed, counsel for the 151 British ships agreeing, that the battle should be treated as a joint and common enterprise, and, the Procurator-General consenting, that the Battle of Jutland was the common engagement and enterprise of the 151 British ships, and that the prize bounty due under the regulations was 22,685*l.* (Sir Henry Duke, P.) *In the Matter of the Battle of Jutland*..... 345

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29. *Neutral ship and cargo—Barratrous design of master to take ship to enemy port—Absence of overt act in prosecution of design—Absence of consent by crew—Absence of knowledge of owners of ship and cargo.*—A Dutch vessel, the *T. A.*, having sailed under auspices of Netherlands Overseas Trust Company, from Dutch East Indies with cargo of coffee consigned to representatives in Amsterdam of the Dutch planters and owners, her master disclosed when ship in port of Freetown, Sierra Leone, that he intended criminally, without authorisation of owners, to take her to Stettin and had unsuccessfully invited the crew to assist. Held, (1) that, the crew having refused to assist, the master was not "in a position to control the destination" within the meaning of *The Louisiana* (14 Asp. Mar. Law. Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461); (2) that no overt act having brought the *T. A.* into the prosecution of an unneutral undertaking, she was at Freetown still on her authorised voyage with Rotterdam as her destination in intention and in fact on the part of the only persons who had the power to carry out their intentions; (3) that ship and cargo should be released. (Sir Henry Duke, P.) *The Twee Ambt* 347

30. *Mails of a neutral State—Seizure—Transmission of mails by rail for examination—Damage by fire during transmission—Liability of captor—Duty to insure—Order in Council of the 11th March* 1915.—Certain parcels of goods of enemy origin and enemy property were consigned per the Swedish parcels mails to the claimants who were domiciled in New York. The postal bags containing these packages were seized at the port of K. under the provisions of the Order in Council of the 11th March 1915. Eventually the bags came into the hands of the post office authorities at K., who sent them by rail to the censor of parcel post in London, there being no facilities for the examination of the postal bags at K. On the railway journey some of the goods were destroyed or injured by fire. Those packages which were delivered in London were seized and in due course sold, the net proceeds being subsequently paid to the claimants. The claimants sought to recover from the Procurator-General the loss of that part of the consignment which had been affected by the fire, contending that the captors had failed to exercise due care in the control of the goods; in sending them to London they had caused a deviation in the voyage which avoided the existing insurances upon them, and they had failed to hand them over to the Marshal, as provided by the Order in Council of the 11th March 1915, by whom they would have been insured. Held, that the decision in The United States (No. 2) (*ante*, p. 344; (125 L. T. Rep. 446; (1920) P. 430) does not imply in the duty of the captors to take reasonable care, an obligation to insure. The captors did not fail in their duty to take care of the goods in their custody when they forwarded the mail bags to London, as there were no facilities for examining mails at K. The Order in Council of the 11th March 1915 does not require that seized goods should be placed in the custody of the Marshal as soon as they are brought into port, nor at any particular time. In the present case, it could not have been done until after examination, whether the goods were subject to seizure or not. In so far as this Order in Council is concerned, it is doubtful whether any breach of duty on the part of public officers as between themselves and the Crown, concerning a matter of administrative instruction, will give a cause of action to foreign owners of goods. (Sir Henry Duke, P.) *The New Sweden.* [Since affirmed by Privy Council.—ED.] 351

31. *Agreement by allies with neutral country conceding right to trade in conditional contraband—Cargo of conditional contraband destined for German base of supplies—Seizure during Armistice.*—On the 30th April 1918 an agreement was made between the U.S.A. and Norway, and was assented to by the United Kingdom, under which Norway agreed not to export to Germany food stuffs except fish in quantities not to exceed 48,000 tons per annum. This quantity was duly exported by Norway under Norwegian Governmental licence, the monthly total exported being reported by Norway to the United Kingdom. During the Armistice the *R.* was on a voyage to Stettin under such licence and within such condition. Stettin was admittedly a German base of supplies. The *R.* and her cargo were taken as prize by H.M.S. *V.* Held, that reading the agreement as a whole, each contracting party undertook certain specified obligations, namely, on the part of the United States, to furnish to Norway certain supplies, and on the part of Norway, to place restriction on her exports to the Central Powers. Norway neither obtained nor acquired a right for her subjects to ship and carry contraband; neither did the belligerent powers release their right to capture contraband. Held, further, that since the conditions of the Armistice were quite consistent with the maintenance of the German organisations in view of a possible renewal of hostilities, and since the ship-owners carried a complete cargo of conditional contraband bound to an enemy base of supplies, both ship and cargo were subject to condemnation. Judgment of Sir Henry Duke, P. (reported *sup.* p. 292; 124 L. T. Rep. 635; (1920) P. 177) affirmed. (Privy Council.) *The Rannveig* 382

32. *Jurisdiction—Third party procedure—Indemnity.*—In Oct. 1915, a Japanese firm, as owners, obtained from the Prize Court, Egypt, an order for the release of certain goods seized in the German steamship *L.* The goods were in the appellants' warehouse, who held them as agents for the marshal. A large portion of the goods were in error forwarded to England instead of to Japan as the owners of the goods had directed. They issued a writ in the Prize Court, Egypt, against the marshal claiming damages for negligence. The marshal served on the appellants a third party notice claiming to be indemnified. The appellants disputed the jurisdiction of the Prize Court, but on a preliminary hearing the judge dismissed the objection, the appellants not appearing. The case was subsequently tried and judgment was given for the owners against the marshal, and for the marshal against the appellants. This appeal was brought against the latter part of the judgment, which it was contended was made without jurisdiction. Held, that there was no jurisdiction in the Prize Court to decide, as between parties some of whom were not parties to the Prize proceedings, disputes not involving the consideration of the *jus belli* and arising out of facts which occurred after an effective release of the goods to a claimant. Further, there was nothing in the Prize Court Rules nor in Order XLV., which privided for the calling in of third parties against whom the right of indemnity is claimed. (Privy Council.) *Egyptian Bonded Warehouse Company Limited* v. *Yeyasu Goshi Kaisha and another* 384

33. *Mails of state—Seizure—Transmission of mails by rail for examination—Damage by fire during transmission—Liability of captor—Duty to insure—Order in Council of the 11th March* 1915.—Certain parcels of goods of enemy origin and enemy property were consigned per the Swedish parcels mail to the claimants, who were domiciled in New York. The postal bags containing these packages were seized at the port of K. under the provision of the Order in Council of the 11th March 1915. Eventually the bags came into the hands of the post office authorities at K., who sent them by rail to the censor of parcel post in London, there being no facilities for the examination of the postal bags at K. On the railway journey some of the goods were destroyed or injured by fire. Those packages which were delivered in London were seized and sold in due course, the net proceeds being subsequently paid to the claimants. The claimants sought to recover from the Procurator-General the loss of that part of the consignment which had been affected by the fire,

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contending that the captors had failed to exercise due care in the control of the goods; in sending them to London they had caused a deviation in the voyage which avoided the existing insurances upon them, and they had failed to hand them over to the Marshal, as provided by the Order in Council of the 11th March 1915, by whom they would have been insured. Held, that for unreasonable action for negligence and for wilful wrongdoing the captors were liable from the time of seizure to the time when the *res* was placed in the custody of the Prize Court. There was neither principle nor authority for placing the responsibility of those who exercised a lawful right of search or who acted in accordance with the terms of a reprisals order any higher than that of actual captors. As far as the Marshal was concerned the question of insurance did not arise as the loss occurred before the bags were placed in his custody at all. Held, further, that as the Order in Council provided for detention and for sale of the chattels detained, it was the net cash proceeds which were to be restored. If the court made an order just in itself, with regard to the disposal of such net proceeds as the Marshal had in his hands, so as to discharge him in accordance with its ordinary principles and refused to hold liable either its own officers or the officials who detained, forwarded, and searched the parcels mail prior to the seizure in prize of the goods in question, no default having been proved against them, it was strictly adhering to the terms and sense of the Order in Council, and if neutral rights of property suffered, that result could be justified under the terms of the Order of the 11th March 1915. Decision of Sir Henry Duke, P. (reported *sup.* p. 351; 126 L. T. Rep. 31; (1921) P. 473) affirmed. (Privy Council.) *The New Sweden* 439

34. *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.—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 the captures of property made inland by military forces did not subject such property to condemnation as maritime prize, and it was immaterial that the property thus seized might subsequently be used under conditions which would subject it, if so used, to condemnation as maritime prize. Judgment of Lord Sterndale, P. (reported 14 Asp. Mar. Law Cas. 538; 122 L. T. Rep. 249; (1919) P. 329) affirmed. (Privy Council.) *The Anichab and other vessels* 441

35. *Preliminary question*—Res Judicata—*Production of record—Rights of neutral trader.*—The plea of *res judiçata* cannot be entertained unless the record of the act of the court on which it was founded is forthcoming, or some valid reason is given why it cannot be produced. Decision of Sir Henry Duke, P. affirmed. (Privy Council.) *The Annie Johnson* 443

36. *Ships owned by Danzig corporation—Seizure in British port on outbreak of war—Requisition—Owners' right to release—Applicability of Hague Convention—Delinqencies of German forces—Hague Convention No. VI., arts.* 1, 2, 6—*Treaty of Versailles, Part VIII., annex III., art.* 1, *Part X., art.* 297.—Three merchant ships, each

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of which was under 1600 tons gross, the property of a German corporation which had its head office in Danzig, were in British ports at the commencement of hostilities, and were accordingly detained there. Under Order XXIX. of the Prize Court Rules 1914 they were then requisitioned for the service of His Majesty. While thus requisitioned one of the ships was lost by stranding, and another was sunk by enemy action. By a decree of Sir Henry Duke, P. the three vessels had been condemned. The owners appealed. Held, that the Sixth Hague Convention having been recognised as binding upon Great Britain, and was not possible in regard to the general delinqencies of the German forces during the war, to find juridical grounds for releasing His Majesty's Government from their obligations under the convention when once they had attached and the provisions under art. II. against the confiscation of enemy merchant ships coming under the convention were therefore obligatory. Further there was no evidence of any conduct on the part of the German Government down to the Armistice which put it out of her power to return ships which had been detained. Where a requisitioned ship had been lost the owners were entitled to the appraised value of the ship, even although she had been sunk by German forces. As regards the Treaty of Versailles, while part VIII., annex III., art. 1 operated to transfer the property in all ships of 1600 tons gross and upwards, it made no such transfer in the case of ships of less tonnage, at least until they had been selected for surrender as part of those which under the Treaty were to be handed over. By part X., art. 297, the Treaty did not modify or annul the obligation which arose under the Hague Convention. Under any order of release the *res* shoud not be removed out of British territory for a reasonable time, lest otherwise the treaty right might be defeated. In the result, therefore, the appeal succeeded; and an order was advised that the appraised value of the two lost ships, and the ship remaining in specie be released to the custodian of enemy property to be delivered up to the owners if after the lapse of six months no proceedings had been begun for an order for delivery up to the Crown. Decision of Sir Henry Duke, P. reversed (1921) P. 155). Further advised on the petitions that the ships, all of which were over 1600 tons gross, and in respect of which orders for detention had been made, should be released to the Crown. (Privy Council.) *The Blonde and other ships* 461

37. *Enemy vessels—Capture in neutral territorial waters—Test of capture—Requisition of captured ships by Admiralty—Requisitioned ships sunk by enemy submarines—Appraised value—Restitution—Rights of neutral government—Prize Court Rules* 1914, *Order XXIX.—Treaty of Versailles, Part VIII., annex III., arts.* 1, 297, *and* 440.—Capture consists in compelling the vessel captured to conform to the captor's will. Hauling down the flag by an enemy merchant vessel, taken in conjunction with stopping the engines, is not an unequivocal act of submission. Four German merchant ships were captured by British warships on the 16th July 1917, the chase beginning outside and ending inside Dutch territorial waters. The ships were on the 31st July 1917 requisitioned for the use of the Crown upon the usual undertaking to pay the appraised values into the Prize Court. Two of the ships while under requisition were sunk by German submarines. By the Treaty of Versailles, Germany recognises the validity of the orders of the Prize Court, and made certain cessions of German ships in the territories of the Allied Powers. The Dutch Government claimed the restoration of the ships to Dutch waters, or their appraised values, and compensation for the use of them. Held, that the Dutch Government were entitled to have the two existing ships restored to Dutch waters, and to receive the appraised values of the two ships sunk, but not to compensation for the past use of them. The terms of the treaty, to which the Dutch Government was not a party, as regards

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the cession of German ships did not affect the rights of the Dutch Government in the British Prize Court. A requisition order is not a judgment *in rem*, and does not affect the property in a ship. *The Dusseldorf* (15 Asp. Mar. Law Cas. 84; 123 L. T. Rep. 732; (1920) A. C. 1034) and *The Valeria* (15 Asp. Mar. Law Cas. 218; 124 L. T. Rep. 806; (1921) A. C. 477) applied. Judgments of the Prize Court (15 Asp. Mar. Law Cas. 101; 123 L. T. Rep. 685; (1920) P. 347) varied. (Privy Council.) *The Pellworm and other ships* 470

38. *Prize bounty—Operations in Mesopotamia—Gunboats on the Tigris—Co-operation with land forces—Capture of armed enemy vessels—Claim for prize bounty—Joint operations of sea and land forces—Naval Prize Act* 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of the 2nd March* 1915.—H.M.S. *T.*, *Ma.*, and *Mo.* took part in the advance along the Tigris in the course of the British operations in Mesopotamia in 1917. In these operations which were planned under the direction of the General Officer Commanding in Mesopotamia, the ships co-operated generally with the land forces in fighting which took place between the 23rd and 25th Feb. at S., where the passage of the river, which had been blocked by Turkish forces, was effected. The flotilla was then able to pass up the river, and on the 26th Feb. the General Officer Commanding directed it to "push on and inflict as much damage as possible." On the same day the flotilla was again held up at N. K. by the Turkish rearguard, and the passage of the river was again opened by the land forces operating with cavalry and field guns. The flotilla then again advanced, overtook the vessels of the Turkish river service, and made the capture. It then anchored for two days near the furthest point reached by the operations, and sent the prizes down the river. At some time before the 25th Feb. one of the captured vessels had been bombed by an army aeroplane. The officers and crews of the flotilla claimed prize bounty. It was contended by the Treasury that the operation constituted a joint naval and military operation. Held, that the fact that the flotilla and the land forces were engaged in a joint scheme of operations did not establish a joint capture; it was necessary to show that both forces were in fact participating in the operation of capture. As the troops in fact took no part in the operation of capture, as they were in fact out of reach when the capture was made, and as the flotilla got far enough up the river to be able to act effectually for itself, without requiring or receiving help from the land forces in the immediate enterprise, the prizes were made by the flotilla alone. Judgment in favour of the claim. (Sir Henry Duke. P.) *The Sulman Pak and other vessels* 504

PRIZE BOUNTY.
See *Prize*, No. 38.

PRIZE CLAIMS COMMITTEE.
See *Naval Prize Tribunal*, No. 1.

PRIZE COURT RULES 1914.
Order II., r. 3: See *Prize*, No. 3; Order XXIX.: See *Prize*, Nos. 9, 37.

PROCEEDINGS PENDING ABROAD.
See *Limitation of Liability*, No. 4.

PROCEEDS OF SALE, INVESTMENT PENDING TRIAL.
See *Prize*, No. 24.

PROCURATOR-GENERAL.
See *Prize*, No. 3.

PROPERTY FOUND TO BE ENEMY PROPERTY UNDER REPRISALS ORDER IN COUNCIL OF THE 11th MARCH 1915.
See *Prize*, No. 16.

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PUBLIC AUTHORITIES PROTECTION ACT 1893 (56 & 57 Vict. c. 51).

Limitation of actions—Servant of the Crown—Negligence in the performance of a public duty—Implied repeal of a statute by a subsequent statute—Public Authorities Protection Act 1893 (56 & 57 *Vict. c.* 51)—*Maritime Conventions Act* 1911 (1 & 2 *Geo. 5, c.* 57).—The Public Authorities Protection Act 1893 protects servants of the Crown in the performance of a public duty in the same manner as it protects the servants of public authorities who can themselves be sued. In an action to which the Maritime Conventions Act 1911 applies, sect. 8 of that Act, which limits the period for commencing an action to two years, does not repeal the Public Authorities Protection Act by implication. Thus a party whose vessel has suffered damage from the negligent navigation of a Government tug by an officer of the Royal Naval Reserve acting in the course of his duty must commence an action against the officer within six months of the day upon which the cause of action arose. Consideration of the circumstances under which the provisions of one statute may by implication repeal the provisions of another. *The Caliph* (12 Asp. Mar. Law Cas. 244; 107 L. T. Rep. 274; (1912) P. 213) considered. Decision of Hill, J. (*infrà*) affirmed. (Court of Appeal.) *The Danube II.* 187

PRIVY COUNCIL.
See *Docks*, No. 1—*Canada*, No. 1—*Carriage of Goods*, Nos. 15, 22—*Prize*, Nos. 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 31, 32, 33, 34, 35, 36, 37.

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RATE OF EXCHANGE.
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RATIFICATION.
See *Marine Insurance*, No. 1.

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See *Carriage of Goods*, No. 28.

REBATES.
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RECTIFICATION.
See *Marine Insurance*, No. 14.

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See *Marine Insurance*, No. 6.

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RELEASE, TERMS OF.
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See *Carriage of Goods*, No. 25; *Collision*, No. 1; *Requisition*, No. 1.

REPRISALS ORDER.
See *Prize*, Nos, 4, 16, 26, 30, 33.

REQUISITION.

1. *Barge under construction—Increase in cost of materials and labour—Inevitable delay in constructing duplicate—Loss of service—Measure of compensation—Remoteness.*—The claimants in 1914 made a contract with builders, at an agreed price, for the construction of a hopper barge, which was to be the property of the claimants at all stages of its construction. In Feb. 1917 the Admiralty requisitioned the barge, which was then still unfinished. But for the requisition it would have been finished in April 1917. The Admiralty also instructed the builders to make alterations, which deprived the barge of the essential character of a hopper barge, and these alterations were carried out. Owing to the war it was impossible for the claimants to replace the barge within less than three years from the date of the requisition, and between that date and the earliest date at which a contract for a similar barge could have been placed prices of materials and labour rose enormously. In these circumstances the claimants claimed from the Admiralty: (1) The difference between the contract price for the construction of the barge and the price which would have to be paid for a duplicate; and (2) compensation for the loss of the use of the barge during the three years from April 1917 to the date of completion of the duplicate. Held, that the claimants were entitled to recover the difference between the contract price and the cost of replacing the barge, regard being had to the fact that replacement was impossible at the date of the requisition and continued to be impossible for several years, but that they were not entitled to compensation for the loss of the use of the barge during the three years above mentioned. (Crown Paper.) *Mersey Docks and Harbour Board* v. *Lords Commissioners of the Admiralty* 24

2. *Requisition — Proclamation — Prerogative — Earning of freight by Admiralty—Urgent national necessity.*—A steamer belonging to the claimants was requisitioned by the Admiralty in Jan. 1916 under a Proclamation issued in Aug. 1914, and after a first voyage she was sent with a cargo of ore and pyrites to a firm of American munition makers whose contract provided that they should be bound to supply munitions only if the ore was sent to them at a certain rate of freight. The ship was sent at this rate of freight, which was lower than the current market rate. On the voyage the ship was severely damaged by marine risks, and in an arbitration between the owners and the Admiralty, the arbitrators found that the owners were bound by the form of charter known as T. 99, which expressly threw the burden of marine risks on the owners. The arbitrators were ordered to state a case for the opinion of the court on the following questions: (*a*) Whether the Admiralty had the right to employ the ship on a voyage earning freight payable to the Admiralty, and whether the claimants were entitled to receive any and what extra payment and compensation in respect thereof; (*b*) whether the Admiralty were liable to compensate the owners for damage received on the voyage; and (*c*) whether marine risks should be deemed to be borne by the Admiralty or by the owners. Held, (1) that the Admiralty had a right to requisition the ship under the Proclamation in the national emergency which existed in Jan. 1916 and to employ her on the voyage in question, and the owners were not entitled to extra compensation as the fact that freight was payable to the Admiralty was not material; (2) that there was evidence to support the arbitrators' finding that the owners agreed to bear the marine risks; and (3) that consequently the Admiralty were not liable to compensate the owners for damage received on the voyage. Nature of prerogative right at times of national emergency considered. (Divisional Court. Reading, C.J., Darling, J., Salter, J.) Crown of Leon, *Owners of the Steamship* v. *Admiralty Commissioners* 145

3. *Undertaking to pay market rate of hire—Limitation order effect—Indemnity—Limitation of Freights (French) Ports Order* 1918—*Indemnity Act* 1920 (10 & 11 *Geo.* 5, *c.* 48), *ss.* 1, 2.—At the outbreak of the war with Germany, in 1914, a number of ships, British and neutral, were in the Baltic Sea, and owing to the risk of capture and destruction in attempting to escape from the Baltic these vessels remained there. But after a time the scarcity of shipping became greater, and it was decided to make every effort to get these ships out of the Baltic. Accordingly, in July 1916 the Board of Trade made a general offer, which was addressed to the Baltic Exchange and communicated to the public, as an inducement to the owners of such vessels to attempt to escape, to the effect that the Admiralty had informed the Board of Trade that they were prepared to guarantee that any British vessel escaping from the Baltic up to March 1917 would either not be requisitioned, or if through some special emergency they had to be requisitioned, they would be paid market rates and not Blue Book rates. The guarantee was to apply also to ships bought by British owners from neutrals. The rates, known as Blue Book rates, on which the Admiralty began to requisition ships in Aug. 1914, were much lower than the current market rates. B., the suppliant, was a shipowner, and, relying on the Board of Trade guarantee above mentioned, purchased two ships at prices far in excess of the value of such ships if they were requisitioned at Blue Book rates, and he took the risk of getting the ships out of the Baltic. In Feb. 1918 the two ships were requisitioned on the express terms that the rate of hire to be paid should be in accordance with the undertaking of July 1916. The Government, however, only paid the suppliant at Blue Book rates, and the suppliant, by a petition of right, claimed the difference between the Blue Book rates paid by the Government and the full market rate of freight. The Crown, by their answer, admitted the undertaking, but relied on the Limitation of Freights (French Ports) Order of the 5th Feb. 1918, and said that that Order fixed the market rate and that the suppliant had been paid the full rate allowed by such Order. They also relied on the Indemnity Act 1920. Held, that the Limitation of Freights Order did not fix a market rate. The meaning of the undertaking of July 1916 was that the Government would not impose a rate of their own, but would pay what could be obtained in a free market. Held, also, that the defence of the Indemnity Act 1920 failed, and that the suppliant was entitled to be paid hire at the market rate. (Roche, J.) *Brooke* v. *The King* 205

4. *Emergency legislation—Charter-party—Requisition of ship by Admiralty—Compensation—Claim by*

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charterers—Direct loss—Interference with business—Injury to ship—Indemnity Act 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *ss.* 1 (*b*), 2 (*iii.*) (*b*) : *schedule, part II.*—By sect. 2, sub-sect. 1 (*b*) of the Indemnity Act 1920, any person not being the owner of a ship, who has "incurred or sustained any direct loss or damage by reason of interference with his . . . business . . . through the exercise . . during the War of any prerogative right of His Majesty or of any . . . power under any enactment relating to the defence of the realm . . . shall be entitled to payment of compensation in respect of such loss or damage." By sub-sect. 2 (*iii.*) (*b*), if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in part II. of the schedule to the Act. A towage and salvage company hired the use of a tug for the purposes of their business by a charter-party which entitled them to the services of the tug for as long as they pleased with the right to terminate the hiring by a fourteen days' notice. During the currency of the charter-party the tug was requisitioned by the Admiralty. Held, by the whole court, that, apart from the Indemnity Act 1920, the charterers would not have had any legal right to compensation. Held, by Bankes and Warrington, L.JJ. (Scrutton, L.J. dissenting) that the loss of the average net earnings of the tug while requisitioned was "a direct loss or damage" by reason of the interference with the charterers' business within sect. 2 (1) (*b*) of the Act, and that they were entitled to compensation, which must be assessed as directed in part II. of the schedule to the Act. (Court of Appeal.) *Elliott Steam Tug Company Limited* v. *Shipping Controller* ... 406

See *Prize*, Nos. 37, 38—*Carriage of Goods*, Nos. 4, 8, 17, 30, 35—*Marine Insurance*, No. 13.

OF TUG BY ADMIRALTY.

See *Salvage*, No. 2.

RES JUDICATA.

See *Prize*, No. 35.

RESPONSIBILITY.

See *Prize*, No. 3.

"*RESTITUTIO IN INTEGRUM.*"

See *Prize*, Nos. 8, 17.

RESTITUTION.

See *Prize*, No. 37.

CLAIM FOR, BY NEUTRAL GOVERNMENT.

See *Prize*, No. 9.

RIGHT OF SEARCH.

See *Prize*, No. 11.

ROCHE, J.

See *Carriage of Goods*, No. 11—*Requisition*, No. 1—*Marine Insurance*, No. 1.

ROUND VOYAGE.

See *Seaman*.

ROWLATT, J.

See *Carriage of Goods*, Nos. 4, 6, 13, 26: *Practice* No. 6.

RULES AND ORDERS.

DEFENCE OF THE REALM REGULATIONS, REG. 39BBB: See *Carriage of Goods*, No 38—MARINE INSURANCE ACT 1906 (RULES), R. 17 : See *Marine Insurance*, No. 10—ORDER IN COUNCIL OF THE 29TH OCT. 1914: See *Prize*, Nos. 5, 19—ORDER IN COUNCIL OF THE 2nd MARCH 1915: See *Prize*, Nos. 28, 38—ORDER IN COUNCIL OF THE 11TH MARCH, 1915 (Reprisals): See *Prize*, Nos. 4, 16, 26, 30, 33—ORDER IN COUNCIL OF THE 16TH FEB. 1917: See *Prize*, No. 11—ORDER IN COUNCIL OF THE 5TH FEB. 1918 (French Ports) : See *Requisition*, No. 3—ORDER IN COUNCIL OF THE 18TH AUG. 1919 (Treaty of Peace) : See *Practice*, No. 2—PRIZE COURT RULES 1914, O. I., R. 2, O. XI., R. 2, O. XXVI., R. 1 : See *Prize*, No. 24.

SALE.

See *Prize*, No. 2—CHARTER-PARTY. DURING CURRENCY OF, See *Carriage of Goods*, No. 32—COURT. BY ORDER OF: See *Necessaries*, No. 2—ENEMY OWNER, TO NEUTRAL PURCHASER, BY. : See *Prize*, No. 16—IN TRANSITU : See *Prize*, No. 14—MARSHAL, BY. : See *Bottomry*—NECESSITY, BY. : See *Carriage of Goods*, No. 5.

SALE OF GOODS.

1. *Goods to be shipped during stated period—Declaration—Cancellation*—A contract for the sale of pepper at sellers' risk until delivery required the sellers to declare in writing to the buyers with due dispatch "the name of the vessel or vessels, marks, and full particulars," and continued: "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." The contract contained a marginal note, headed "Loss of Transhipment," to the following effect: "Should the vessel or vessels and the goods or any portion thereof be lost, this contract to be cancelled for the whole or such portion; but should the vessel or vessels be lost and the goods or any portion thereof be transhipped to some other vessel or vessels and arrive on account of the original importer, the contract to stand good for the whole or such portion." The pepper (which under the contract was to be shipped between Dec. 1917, and Feb., 1918, by a steamer or steamers from the East to Liverpool) was shipped on a steamer which sailed on the 21st Jan. 1918 and was lost with her cargo on the 26th Feb. A declaration in due form was made on the 27th March 1918 by the defendants, at a time when the loss of the vessel was known to both parties, and contained a note, in these terms: "Owing to the vessel having been lost by enemy action, this contract is now cancelled." The plaintiffs refused to accept this declaration, and brought an action for failure to deliver under the contract. Held, that the sellers, having shipped the goods and made the requisite declaration with due despatch, were not liable for non-delivery if the vessel and the goods were lost either before or after the declaration was made, and that the knowledge of the loss was not material. The plaintiffs' action therefore failed. *Olymphia Oil and Cake Company, Limited* v. *Produce Brokers Company Limited* (12 Asp. Mar. Law Cas. 570; 13 Asp. Mar. Law Cas. 71, 393; 111 L. T. Rep. 1107; (1915) 1 K. B. 233) distinguished and on one point doubted. Decision of Bailhache, J. affirmed. (Court of Appeal.) *Clark (trading as Wright, Crossley, and Co.)* v. *Cox, McEwen, and Co.* 5

2. *Goods in lighters—"Ex store"—"Ex warehouse"*—The defendants agreed to sell and the plaintiffs to buy certain cases of tinned meat "ex-store Rotterdam." The goods had arrived in Rotterdam some months earlier and had been landed on the quay, but, owing to great congestion at the port, they could not be put into a warehouse, but were stored in lighters, where they were at the date of the contract, and afterwards. Held, that the goods being in lighters could not properly be described as "ex store," and that the buyers were entitled to repudiate the contract. Judgment of Bailhache, J. (1920) 2 K. B. 329) reversed. (Court of Appeal.) *Fisher, Reeves, and Co. Limited* v. *Armour and Co. Limited* 91

3. *Sale of goods—Delivery—Interruption of discharge—Buyer's right to reject—Sale of Goods Act* 1893 (56 & 57 *Vict. c.* 71), *s.* 30.—If a ship which has begun to discharge a parcel of cargo

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at the port of delivery leaves the port to deliver other cargo elsewhere before the discharge of that parcel is complete, her action, in the absence of special stipulations to the contrary, is a breach of the contract to deliver, notwithstanding that she subsequently returns and offers the balance of the parcel. Although the buyer is not entitled to continuous delivery, yet if the vessel leaves the port before the whole of his parcel is discharged he may reject the whole consignment, or the part undelivered when the ship sailed, as provided by sect. 30 of the Sale of Goods Act 1893. (Bailhache, J.) *Behrens and Co. Limited* v. *Produce Brokers' Company Limited* 139

4. *Contract—Sale of soda ash on c.i.f. terms—Validity of shipping documents tendered as bill of lading and policy of insurance respectively—Buyer's right to reject—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 21, 22, 50 (*sub-s.* 3), 90.—A contract provided for the sale of goods to be shipped from American seaboard c.i.f. Gothenburg. Under the contract the sellers tendered, with the invoice for the goods, two documents purporting to be a bill of lading and a policy of insurance repectively. The material part of the bill of lading was as follows: "Received in apparent good order and condition from . . . to be transported by the steamship *Anglia*, now lying in . . . or failing shipment by said steamer in and upon a following steamer, 280 bags dense soda." The policy of insurance was represented by a certificate of insurance issued by an American insurance corporation, which, as declared by the certificate, "represents and takes the place of the policy and conveys all the rights of the original policy holder . . . as fully as if the property was covered by a special policy direct to the holder of this certificate." Held, that the buyers were entitled to reject the goods under the contract on the ground that proper documents had not been tendered by the sellers. The bill of lading did not contain an acknowledgment that the goods had been shipped and was therefore not a good bill of lading under a c.i.f. contract; no document of insurance is good tender in England under a c.i.f. contract unless there is an actual policy which complies with the provisions of the Marine Insurance Act 1906. (Court of Appeal.) *Diamond Alkali Export Corporation* v. *H. Bourgeois* 455

SALVAGE.

1. *Property of sovereign State—Ship emplgyed by sovereign State in ordinary commerce—Arrest—Immunity.*—A sovereign State may not be impleaded in the courts of this country, either by a suit *in personam* or by a suit *in rem*, notwithstanding that the property is being used at the time of arrest for the purpose of ordinary trading,, and is not being employed on public national service. Decision of Hill, J. (*infrà*) affirmed, the Court of Appeal taking the view that they were bound to follow the decision in *The Parlement Belge* (4 Asp. Mar. Law Cas. 234). (Court of Appeal.) *The Porto Alexandre*,..... 1

2. *Tug requisitioned by Admiralty—Demise of tug to Crown—"Ship belonging to His Majesty"—Right of Admiralty to salvage remuneration—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping* (*Salvage*) *Act* 1916 (6 & 7 *Geo.* 5, c. 41), *s.* 1.—Where a tug is requisitioned by the Admiralty upon terms which amount to a demise of the tug to the Admiralty, the latter and not the owners of the tug are entitled to salvage remuneration subsequently earned by the tug. By sect. 557, sub-sect. 1, of the Merchant Shipping Act 1894, "Where salvage services are rendered by any ship belonging to His 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 any other expense or loss sustained by His Majesty by reason of that service. . . ." By sect. 1 of the Merchant Shipping (Salvage) Act 1916, "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." A tug belonging to the appellants was requisitioned by the Admiralty upon terms which amounted to a demise of the tug to the Admiralty, the tug rendered salvage services to another vessel, and the Admiralty Commissioners claimed a declaration that they were entitled to the remuneration so earned. Held, that the tug was a "ship belonging to His Majesty" within the meaning of sect. 1 of the Merchant Shipping (Salvage) Act 1916, and therefore the Admiralty Commissioners and not the owners of the tug were entitled to claim the salvage moneys. Decision of the Court of Appeal (reported 14 Asp. Mar. Law Cas. 394; 120 L. T. Rep. 137; (1919) 1 K. B. 299) affirmed. (House of Lords.) *Page and others* v. *Admiralty Commissioners; Elliott Steam Tug Company* v. *Same*..... 81

3. *Ship belonging to His Majesty and specially equipped with salvage plant—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 577 (1)—*Merchant Shipping* (*Salvage*) *Act* 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.—The Admiralty, owners of a ship fitted with a wireless installation, a powerful searchlight, grappling ropes, and other salvage gear and specially constructed for laying and repairing submarine telegraph cables, claimed salvage in respect of her services. Held, that the ship was not "specially equipped with salvage plant" within the meaning of the Merchant Shipping (Salvage) Act 1916, s. 1, and that the claim of the Admiralty was, therefore, barred by sect. 557 (1) of the Merchant Shipping Act 1894. (Hill, J.) *The Morgana*..... 160

4. *Benefit arising from the services—No pecuniary benefit to the owner—Request services—Tug and tow—Life salvage claimed by tug.*—A steamer, whilst being towed in the Mersey, was damaged by collision with another vessel, for which the other vessel was subsequently held to be alone to blame. The master of the steamer, which was sinking rapidly, asked the tug, which had been towing at the time of the collision, to tow his vessel in shore. The tug endeavoured to do so, but the steamer grounded on the Pluckington Bank, at some distance from the shore. In this position she became a constructive total loss. Some of her cargo was, however, recovered, and a substantial sum remained in the hands of the cargo owners after the expenses of recovery had been met. At the trial it appeared that, had the services never been rendered by the tug, cargo of no less net value would have been recovered than was, under the circumstances, restored to the cargo owners. Held, that since the cargo had still to be saved in the position in which the tug left it, and as it was then worth no more than it would have been if the tug had done nothing, no salvage service had been rendered, and the tug was entitled to no award. Held, on the facts, that the requested services had not been performed, and that the lives of the steamer's crew were in no danger. *Semble*, if the lives of the crew had been in danger, an engaged tug, in taking the crew off the steamer which she is towing, is not acting outside the scope of her towage contract in such a manner as to earn a salvage award. The action therefore failed. (Hill, J.) *The Tarbert*..... 423

5. *King's ship—Ship's agent—Salvage claim by the ship's officers and crew—Instructions to agent to prosecute the claim—Settlement—Authority of the agent—Naval Agency and Distribution Act* 1864 (26 & 27 *Vict.* c .116). The authority of an agent for the officers and crew of a King's ship, under the Naval Agency Act 1864 (26 & 27 Vict. c. 116) is not wider than that of a solicitor, and does not

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therefore extend to the settlement of claims by the ship's officers and crew without their express authority. Thus a ship's agent who settles a claim by the officers and crew of a King's ship for salvage reward without the consent, express or implied, of the commanding officer, is liable in damages to the extent of the award which the officers and crew would have received if the salvage claim had been duly prosecuted, less the amount received under the terms of settlement. The agent has no authority to settle the claims of the officers (other than the commending officer) and crew without their instructions when the commanding officer has been giving instructions on their behalf as well as his own, notwithstanding that the commanding officer takes an exaggerated view of their claims. (Hill, J.) *The Hermione*.. 493

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SEAMAN.

1. *Workmen's Compensation—Seaman—Round voyage — Accident — Partial incapacity—Rejoining ship while on unfinished voyage—Subsequent desertion during voyage—"Liability" to maintain seaman—Claim to immediate compensation—Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 34 (1)—*Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58), *s.* 7 (1) (*e*).—The respondent, a Mohammedan seaman, was engaged by the appellants for a round voyage from Bombay to the United Kingdom and back to Bombay within a year. On the voyage he met with a rather severe accident to his right hand. He was treated in hospital at Marseilles, and then brought by the appellants in one of their steamers ta Liverpool and thence by train to Glasgow, where he rejoined the ship. Shortly afterwards he deserted. The Workmen's Compensation Act 1906 provides by sect. 7 (1) (*e*): "The weekly payment shall not be payable in respect of the period during which the owner of the ship is under the Merchant Shipping Act 1894 as amended by any subsequent enactment or otherwise liable to defray the expenses of maintenance of the injured seaman, or apprentice." Held (Lord Sumner dissenting), that when the seaman deserted, the liability of the shipowners, under sect. 34 of the Merchant Shipping Act 1906 to maintain him, ceased and the seaman was then entitled to put forward his claim for compensation under the Workmen's Compensation Act 1906. Judgment of the Court of Session affirmed. (House of Lords.) *Anchor Line Limited* v. *Mohad* 434

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63 & 64 Vict. c. 32 (Merchant Shipping, Liability of Shipowners and others).

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6 Edw. 7, c. 41 (Marine Insurance).

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6 Edw. 7, c 48 (Merchant Shipping).

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TUG AND TOW.
Contract for towage—Loss of tow—Negligence—Exceptions clause—"Default of the steam tug-owner"—Tug-owner not sending assistance to tow while in danger—Liability of tug-owner.—The defendant contracted to tow the plaintiffs' motor-schooner *Cap Palos* on a round voyage. The contract contained an exceptions clause, which relieved the defendant from liability for "the acts, neglect, or default of the masters, pilots, or crews of the steam tugs, or of consulting engineers, ships' husbands, or other persons in his employment . . . or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, . . . through collision or otherwise, whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug-owner, or any of his servants or employees, or by any defect or imperfections in the steam tugs. . . ." The towage contract was carried out with interruptions until the 24th Oct. 1919 the tugs left the tow at anchor in a position of some danger. The defendant knew of the danger, and ordered a tug to go to the assistance of the *Cap Palos*, but countermanded the order upon the ground that assistance was being sent by the Salvage Association. No assistance reached the *Cap Palos*, and on the 26th Oct. she was driven on the rocks and became a constructive total loss. Held, that the exceptions did not protect the defendant from liability, as they were limited to a time when the defendant was doing, or omitting to do, something in the actual performance of the contract and did not apply to a time when he had ceased, even though temporarily, to do anything at all, and had unjustifiably left the performance of his contractual duties to others. Decision of Hill, J. reversed. (Court of Appeal.) *The Cap Palos* .. 403
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See *Carriage of Goods*, Nos. 3, 4.

"SHALLOW RIVERS, HARBOURS, OR PORTS WHERE THERE ARE BARS" (Charter-party).
See *Carriage of Goods*, No. 14.

"SHIP" (Merchant Shipping Act, 1894, s. 742)
See *Limitation of Liability* No. 7.

"SHIPPED IN GOOD ORDER AND CONDITION" (Bill of Lading).
See *Carriage of Goods*, No. 20.

"THROUGH" (Bill of Lading).
See *Carriage of Goods*, No. 23.

VENDOR TO "TAKE BACK GOODS" (Contract).
See *Prize*, No. 14.

"VOID AS AGAINST PUBLIC POLICY" (Marine Insurance Act).
See *Marine Insurance*, No. 5.

"WARLIKE OPERATION."
See *Marine Insurance*, No. 13.

"WEAKENED, LESSENED, OR AVOIDED" (Statute, by Bill of Lading. Fiji Ordinance, No. XIV. of 1906, s. 4).
See *Carriage of Goods*, No. 22.

"WEIGHT, QUALITY, CONDITION UNKNOWN" (Bill of Lading).
See *Carriage of Goods*, No. 20.

"WHOLE REACH AND LAWFUL BURDEN OF THE SHIP" (Charter-party).
See *Carriage of Goods*, No. 12.

WORKMEN'S COMPENSATION.
See *Seaman*.

WRECK COMMISSIONER'S COURT.
See *Canada*, No. 2.

WRECK, SUBMERGED.
See *Collision*, No. 15.

WRIT.
See *Bottomry—Collision*, No. 2—*Practice*, Nos. 4, 7,—*Limitation of Liability*, No. 2.

YARMOUTH. CUSTOM OF PORT OF,
See *Carriage of Goods*, No. 9.

YORK-ANTWERP RULES 1890, R. 17.
See *Carriage of Goods*, No. 24.

REPORTS

OF

Cases Argued before and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 10, 1919.

(Before Bankes, Warrington, and Scrutton, L.JJ.)

The Porto Alexandre. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Salvage—Property of sovereign State—Ship employed by sovereign State in ordinary commerce—Arrest —Immunity.

A sovereign State may not be impleaded in the courts of this country, either by a suit in personam *or by a suit* in rem, *notwithstanding that the property is being used at the time of arrest for the purpose of ordinary trading, and is not being employed on public national service.*

Decision of Hill, J. (infrà) *affirmed, the Court of Appeal taking the view that they were bound to follow the decision in* The Parlement Belge (infrà).

Motion to set aside the writ and all subsequent proceedings, in an action of salvage brought against ship and freight, on the ground that the ship and freight were the public national property, and in the possession and public use and service, of the Government of an independent sovereign State.

The plaintiffs were the owners, masters, and crews of the steam tugs *Nora*, *Expert*, and *Torfrida*.

The defendants were the owners of the Portuguese steamship *Porto Alexandre*, her cargo and freight.

While on a voyage from Lisbon to Liverpool with cargo, the *Porto Alexandre* got into difficulties in the Crosby Channel, River Mersey, on the 13th Sept. 1919, and services were rendered to her by the plaintiffs' tugs. On the 16th Sept. the plaintiffs issued a writ in this action claiming salvage, and the ship was arrested. An appearance under protest was entered on behalf of the owners of the ship and her freight, but subsequently, on a summons taken out on behalf of the Portuguese Government, who were stated to be the owners of the vessel and her freight, the release of the *Porto Alexandre* was ordered by the Liverpool District Registrar. The salvors thereupon appealed to the Vacation judge, who set aside the order of the district registrar, but without prejudice to the present motion, which was brought on the following grounds:—

(1) That the said steamship and freight were and are the public national property of, and (or) requisitioned by, and in the possession and public use and service of the Portuguese Government.

(2) That the steamship has been properly and lawfully condemned as prize of war by a decree of a court of competent jurisdiction of the said Portuguese Government.

(3) That the court has no jurisdiction to entertain this suit, or, alternatively, that it ought in its discretion to refuse to entertain this suit.

Miller, K.C. and *W. Procter* for the defendants.

Dunlop, K.C. and *J. B. Aspinall* for the plaintiffs.

Oct. 27. — Hill, J. — I have come to my decision in this case with very great reluctance, and if I am wrong, I shall be glad if the Court of Appeal sets me right. The writ in the action is *in rem* against the owners of the Portuguese steamship *Porto Alexandre*, her cargo and freight, in a claim for salvage services said to have been rendered by three tugs to the ship at the entrance to the River Mersey. The writ was followed by the arrest of the ship, freight, and cargo. On the 2nd Oct. 1919 the present notice of motion was served to set aside the writ and all subsequent proceedings, and it is expressed to be by the owners of the *Porto Alexandre* and her freight. The notice does not state that it is given on behalf of the Portuguese Government, but counsel, who appears in support of the motion, says he appears on behalf of the Portuguese Government, and evidence has been brought before me, including a communication from the Portuguese *Chargé d'Affaires* to Lord Curzon, and communicated by the Foreign Office to this court. The grounds of the motion are, "That the steamship and freight were, and are, the national property of, and (or) requisitioned by, and in the possession and public use and service of the Portuguese Government."

First, it is to be noted that there is no motion in respect of the cargo. The writ is against the owners of the cargo, which was arrested, and therefore the writ against the cargo and the arrest of the cargo must stand. The only question I have to consider is whether I am bound to set aside the writ and arrest with reference to the ship and freight. On the original motion the only affidavits filed were by the Portuguese Consul and Vice-Consul at Liverpool. That was clearly not sufficient. A claim to immunity which is a claim by a sovereign State,

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

must be made by the properly accredited representative of that State in this country. It has now been properly made by the Portuguese *Chargé d'Affaires*. The affidavits by the Consul and Vice-Consul, apart from the objection that they were not made by the proper persons to put forward the claim, were themselves insufficient. The affidavit of the Vice-Consul states that the *Porto Alexandre* was requisitioned by the Portuguese Government "for the service of the State and is enployed under the orders of the said Government." The affidavit does not state that the ship was the property of the State, or that it was at the time of the arrest being used in the service of the State. The ship was, in fact, carrying a cargo of cork shavings, under a bill of lading which shows that the goods were consigned to the Portuguese Import and Export Company Limited; and I take it that the shippers mentioned in the bill of lading are only the agents of the consignees. At the time of the arrest there was no evidence that the ship was being used by the Portuguese Government for State purposes, or was their property. There was a further affidavit by the Portuguese Consul, who produced the ship's passport, dated the 11th Aug. 1916, which shows that the ship, being a German ship, had been requisitioned by the Portuguese Government and was administered by the Commission of Maritime Transports, and that later on, on the 31st Jan. 1917, she had been condemned as a prize.

This shows that the ships had been condemned to the Portuguese Government in 1917, but it does not show that the ship was the property of the Portuguese Government at the date of the arrest, a most important date. There has been sent and communicated to the court, however, a letter from the Portuguese *Chargé d'Affaires* in this country, who informs the Foreign Office that the *Porto Alexandre* is a public vessel belonging to the Government of the Portuguese Republic. Again, that does not state that the ship was being used in the public service, or being used for public purposes; but counsel, who moves to set aside the writ, says he is not concerned with that. He says that the ship was the property of the Portuguese Government at the time of the arrest and still is, and that this court cannot exercise any jurisdiction over it or, through it, over the Portuguese Government.

I must take it that the *Porto Alexandre* is, as she is stated to be, a public vessel belonging to the Portuguese Republic. In my view this court cannot permit the arrest of a ship which is the property of a foreign sovereign State, for it cannot compel that State—the Portuguese Government—to submit to the jurisdiction of this court, and it cannot so compel it, either directly by suing the Portuguese Government in person, or indirectly by arresting the property of the Portuguese Government in a suit *in rem*. That I conceive to be the law, unless it be the law that the foreign Government waives that immunity if it employs the ship, which is its property, in commerce. Here, upon the facts, I should be quite prepared to find that this ship was being used in ordinary commerce, and that the only interest of the Portuguese Government in the ship at this time, and on this voyage, was in earning freight.

Therefore the question comes to this: Is it a principle of law that a foreign State, which owns a ship, loses its immunity from being proceeded against by the arrest of the ship, if it is at the time employing the ship in ordinary commerce? That point has, I think, been determined by none of the cases dealt with during the war. Most were cases of requisitioned ships, and in every one of them, upon the facts, the ship was being employed for purposes which were undoubtedly national. I have looked into a good many of the cases, and it is within my recollection that I am accurately stating what the effect of those cases was. In the case of *The Messicano* (1916) W. N. 218) the ship was carrying war material for the Italian Government; in *The Erissos* (Lloyd's List, Oct. 23, 1917) the ship was carrying coal for the Italian State Railways; in *The Esposende* (Lloyd's List, Feb. 18, Feb. 25, 1918) the vessel was carrying goods for the French Government; in *The Crimdon* (35 Times L. Rep. 81) the ship was engaged in transport work; in *The Koursk* (Lloyd's List, June 19, 1918) the ship was carrying goods for the British Government for State purposes; in *The Broadmayne* (13 Asp. Mar. Law Cas. 356; 114 L. T. Rep. 891; (1916) P. 64), the ship was carrying a cargo of oil, which was the property of the British Government. Therefore, I do not find the question now before me is decided by any of those cases which have arisen during the war, although counsel has called my attention to *obiter dicta* which I used, and which, if sound, show that where the ship is the property of the State, then the immunity arises in whatever manner the ship is being employed by that State. I nearly, in fact, decided *The Esposende* (*sup.*) upon that ground, and I am deciding this case as I am deciding it because my view is that the law, as it now stands and as laid down in *The Parlement Belge* (42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 Prob. Div. 197), is that a sovereign State cannot be impleaded, either directly by being served in person, or indirectly by proceedings against its property, and that in applying that principle it matters not how the property is being employed.

No doubt before *The Parlement Belge* (*sup.*) there is a good deal of authority in this court to support the proposition that it is an exception to that principle if the sovereign State is using the ship in the ordinary way of commerce, and certainly that was the view of Sir Robert Phillimore in *The Charkieh* (29 L. T. Rep. 404; 2 Asp. Mar. Law Cas. 121; L. Rep. 4 A. & E. 59) and in *The Parlement Belge*, but it is true that this particular point did not arise for immediate decision upon the facts of the case as found by the Court of Appeal in *The Parlement Belge*, for, after the proposition of law had been stated, the facts made it unnecessary to decide the law in precise terms, because it was found that the ship was mainly used for carrying mails, and only in a subservient degree for the purpose of trade. It is quite true that throughout *The Parlement Belge* frequent use is made of expressions such as "a public ship used for public purposes;" but if the principle be that it is contrary to international comity to implead a Sovereign either directly or indirectly, that appears to me to apply whether the ship is employed in commerce or not. To arrest a Sovereign's ship is to implead him, and that, I conceive, is what the courts of this country will not do. It is quite clear that you cannot implead the Crown indirectly by arresting its property. (*Young* v. *Steamship Scotia*, 89 L. T. Rep. 374; 9 Asp. Mar. Law Cas. 485; (1903) A. C. 501). The immunity of the Crown rests upon the principle that the King cannot be

impleaded in his own courts, and, as I understand the law, international comity requires that a corresponding immunity should be granted to a foreign sovereign State.

I therefore think that this motion succeeds upon the ground that it is established that this ship, the *Porto Alexandre*, was the property of the Portuguese Government; and it follows that so far as the owners of the ship and freight are concerned, the writ and all subsequent proceedings must be set aside, but the writ and all subsequent proceedings, so far as the cargo is concerned will remain good.

I have already, in previous cases, pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn from the Courts, but I am only asserting now what I conceive to be the law.

The plaintiffs appealed.

Nov. 10.—*C. R. Dunlop*, K.C. and *J. B. Aspinall*, for the appellants.

D. Stephens, K.C. and *A. Wallace Grant*, for the defendants, the respondents, were not called upon.

Bankes, L.J.—This is an appeal from the decision of Hill, J., who made an order that the writ and warrant for arrest, and all subsequent proceedings, against the *Porto Alexandre* and freight be set aside, but that the proceedings against the cargo should stand. The learned judge was only concerned with the question of the ship and freight, and so is this appeal.

The vessel was on a voyage from Lisbon to Liverpool, when she ran aground in the Mersey, and three tugs were engaged to get her off. An action was brought, and the ship was arrested in respect of the services rendered by these tugs. The application was founded upon the contention that the ship was the property of a sovereign State, the Republic of Portugal, and, that she was thus exempt from arrest. The conclusion of fact at which the learned judge arrived was that it had been established that the ship was the property of the Portuguese Government at the time of the arrest and is still their property, and on that ground he made the order.

It is now contended that it is not sufficient for a sovereign or a sovereign State to allege that a vessel is the property of such Sovereign or sovereign State, and that the allegation must go further and say the vessel is employed in the public service or on public service.

The facts with regard to the vessel are as follows: She was formerly a German vessel, and in Aug. 1916, was requisitioned by the Portuguese Government. On 11th Aug. what is called a passport was issued, which authorised the employment of the ship, and certain notes upon it, indicating that during the period that vessel was at the service of the Portuguese Government, for which she was requisitioned, her port of register should be Lisbon. There is also an indorsement on the passport stating that on the 30th Jan. 1917, she was adjudged a lawful prize of war. Counsel for the appellant has pointed out that the statement that she was adjudged a lawful prize of war leaves it doubtful whether she has become the actual property of the Portuguese Government, or was merely detained pending the conclusion of peace. It would rather appear that the latter is the proper conclusion, because there is an affidavit by the Portuguese Vice-Consul at Liverpool, who says that the vessel is, and has been, requisitioned by the Portuguese Government for the service of the State, and is employed under the orders of the Government. There is a further statement in writing by the Portuguese Consul at Liverpool, in which he says, in reference to this particular voyage, that the freight on the cargo was paid before shipment and belongs solely and entirely to the Portuguese Government. In addition, there is a letter from the Portuguese *Chargé d'Affaires*, in which he states definitely that the *Porto Alexandre* is a public-service vessel belonging to the Portuguese Government.

There is no reason to doubt the accuracy of the statements that have been made on affidavit—that the vessel has been requisitioned under the order of the Portuguese Government, and that, on the particular voyage, she was carrying freight for that Government. It is, however, contended that that is not sufficient because it is shown that she was engaged in what the counsel for the appellants says was an ordinary commercial undertaking, as an ordinary trading vessel carrying goods for a private individual or company. The question is whether it is possible to distinguish this case from *The Parlement Belge* (*sup.*), a decision of this court and binding upon us.

I gather from the judgment of Hill, J., and from what has been said by counsel, that this question is becoming one of increasing importance. In the days when the early decisions were given, no doubt, what were called Government vessels were limited almost entirely to vessels of war. But in modern times, Sovereigns and sovereign States have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. The fact of itself indicates the growing importance of the particular question, if vessels so employed are to be deemed free from arrest.

The function of this court is to decide whether this particular case is covered by *The Parlement Belge*. I think that it is, and it is therefore not necessary or desirable that the court should enter upon a discussion of the wider question at this stage, or consider the importance of other views that may be taken. There is very little difference between the material facts in *The Parlement Belge* (*sup.*) and in the present case, and in my opinion *The Parlement Belge* covers this case. It is quite true that in many of the earlier cases the claim put forward, with regard to a particular ship, was that she was on public service and employed in the public service, and no doubt the statement so made was applicable to the particular case, and was made because it was applicable to the particular case, and the judgments were delivered in reference to the facts so stated. But in this case the court is bound by *The Parlement Belge* (*sup.*), and the appeal must be dismissed with costs.

Warrington, L.J.—I am of the same opinion. I think the case is clearly covered by *The Parlement Belge* (*sup.*), and we have therefore no alternative but to dismiss the appeal.

The facts proved appear to me to amount to this: First, that the ship in question is a public vessel, the property of the Portuguese Government; next, it is proved by the affidavits that she is in the possession for the service of the State; and, thirdly, that she is employed under the orders of the Government. I will refer to one passage in the judgment of Brett, L.J. in *The Parlement Belge* in which he is expressing what he considers to be the result of the judgment in *Briggs* v. *Light Boats* (1865,

93 Mass. 157), an American case, of which he obviously approves and on which he founds his own conclusion. He says: "The ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the courts of either its own or any other state, and that the ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public movable property of a State, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a Sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State." And then again, when he is summing up the principle which he thinks is to be deduced from all the cases he says, "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 of every other sovereign State, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or"—and these are the material words—"over the public property of any State which is destined to its 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." Whatever may be the actual use to which the ship is put, I think the evidence is quite sufficient to show that she is the property of the State, and is destined to public use; and therefore, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge* (*sup.*).

Scrutton, L.J. stated shortly the facts and continued:—This and other States proceed in their jurisprudence on the assumption that sovereign States are equal and independent, and that, as a matter of international courtesy, no one sovereign independent State will exercise any jurisdiction over the person of the Sovereign or the property of any other sovereign State; and now that the Sovereigns move about more freely than formerly, and Sovereigns and States do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent States and their Sovereigns. I think it has been well settled, first, as to the Sovereign, that there are no limits to the immunity which he enjoys. His private character is as free as his public character. If he chooses to come into this country under an assumed name and to indulge in privileges not peculiar to Sovereigns, of making promises of marriage and breaking them, the English courts still say, on his appearing in his true character of Sovereign and claiming his immunity, that he is wholly free from the jurisdiction of our courts: (*Mighell* v. *Sultan of Johore*, 70 L. T. Rep. 64; (1894) 1 Q. B. 149). It has been held, as counsel admits in *The Parlement Belge* (*sup.*) that trading on the part of a Sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador coming here as an ambassador of the Sovereign may engage in private trading, but it has been held that this immunity still protects him even from proceedings in respect of his private trading. Jervis, C.J. in *Taylor* v. *Best* (1854, 18 Jur. 402; 14 C. B. 487, 519): " . . . if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public Minister, during his residence in this country, violates the character in which he is accredited to our court, by engaging in commercial transactions, that may raise a question between the Government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons fulfilling that high character—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy." There being no limitation in the case of the Sovereign, nor of the ambassador, is there any in the case of the property? Counsel has argued that in the case of property of the State there is a limitation and that, as I understand him, if the property is employed in trading, that cannot be for the public service of the State.

We are concluded in this court by *The Parlement Belge* (*sup.*). Sir Robert Phillimore took the view that trading with the property of a State might render that property liable to seizure; but the Court of Appeal overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the court. Brett, L.J. said: "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 of every other sovereign State, each and every one declines to exercise by means of any 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 its public use. . . ." One of the reasons given seems to me conclusive. The moment property is arrested in the Admiralty Court a proceeding is instituted against the person, and he is compelled to appear if he wants to protect his property; and by seizing his property the personal rights of the Sovereign or the personal rights of the State are infringed. The position seems to me to be very accurately stated in the seventh edition of Hall's International Law at p. 211, where, after dealing with the warships and public vessels so called, Mr. Hall goes on to deal with other vessels employed in the public service and property possessed by the State within foreign jurisdiction, and says: "If in a question with respect to property coming before the courts a foreign State shows the property to be its own and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign State."

I quite appreciate the difficulty and doubt which Hill, J., felt because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many States are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult. But while it seems to me that *The Parlement Belge* (*sup.*) excludes remedies in court, there are practical commercial remedies. If ships of the State find themselves left on the mud because no

one will salve them, when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, there may be found a difficulty in finding cargoes for national ships. These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other States, contrary to the principles of international courtesy which govern the relations between independent and sovereign States. I think it is clear that we must in this court support the decision of Hill, J., and dismiss the appeal.

Appeal dismissed.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool; for the defendants, *Botterell* and *Roche*, for *Weightman, Pedder*, and *Co.*, Liverpool.

Thursday, Nov. 20, 1919.

(Before Lord Sterndale, M.R. and Atkin and Younger, L.JJ.)

Clark (trading as Wright, Crossley, and Co.) *v.* Cox, McEwen, and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Sale of goods—Goods to be shipped during stated period—Declaration—Cancellation.

A contract for the sale of pepper at sellers' risk until delivery required the sellers to declare in writing to the buyers with due dispatch "the name of the vessel or vessels, marks, and full particulars," and continued: "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."

The contract contained a marginal note, headed "Loss or Transhipment," to the following effect: "Should the vessel or vessels and the goods or any portion thereof be lost, this contract to be cancelled for the whole or such portion; but should the vessel or vessels be lost and the goods or any portion thereof be transhipped to some other vessel or vessels and arrive on account of the original importer, the contract to stand good for the whole or such portion."

The pepper (which under the contract was to be shipped between Dec. 1917 *and Feb.* 1918 *by a steamer or steamers from the East to Liverpool) was shipped on a steamer which sailed on the* 21*st Jan.* 1918 *and was lost with her cargo on the* 26*th Feb.*

A declaration in due form was made on the 27*th March* 1918 *by the defendants, at a time when the loss of the vessel was known to both parties, and contained a note in these terms: "Owing to the vessel having been lost by enemy action, this contract is now cancelled."*

The plaintiffs refused to accept this declaration, and brought an action for failure to deliver under the contract.

Held, that the sellers, having shipped the goods and made the requisite declaration with due dispatch, were not liable for non-delivery if the vessel and the goods were lost either before or after the declaration was made, and that the knowledge of the loss was not material. The plaintiffs' action therefore failed.

Olympia Oil and Cake Company Limited *v.* Produce Brokers Company Limited (12 *Asp. Mar. Law Cas.* 570; 13 *Asp. Mar. Law Cas.* 71, 393; 111 *L. T. Rep.* 1107; (1915) 1 *K. B.* 233) *distinguished and on one point doubted.*

Decision of Bailhache, J. affirmed.

The plaintiffs claimed damages for breach of contract to deliver a quantity of Muntok white pepper, which was to be shipped from the East to Liverpool at the seller's risk. The pepper was shipped in a vessel which sailed in Jan. 1918. The vessel and her cargo were lost at sea on the 26th Feb. 1918. On the 27th March 1918 the defendants declared the shipment, but both plaintiffs and defendants knew by then that the ship and her cargo had been lost at sea and the plaintiffs therefore refused to accept the declaration.

The facts are fully stated in the judgments.

On the 19th June 1919 the action came on for trial in the Commercial Court before Bailhache, J.

G. D. Keogh for the plaintiff.

Barrington-Ward, K.C. and *Maurice Gwyer* for the defendants.

The following cases were referred to during the arguments:

Mambre Saccharine Company v. *Corn Products Company*, 120 L. T. Rep. 113; (1919) 1 K. B. 198;

Olympia Oil and Cake Company Limited v. *Produce Brokers Company Limited*, 12 Asp. Mar. Law Cas. 570; 13 Asp. Mar. Law Cas. 71, 393; 111 L. T. Rep. 1107; (1915) 1 K. B. 233.

Cur. adv. vult.

June 20, 1919.—Bailhache, J. read the following judgment:—In this case the plaintiffs sue the defendants for failure to deliver ten tons of Muntok white pepper sold to them under a contract of the 11th Dec. 1917. By its terms the pepper was to be shipped from the East from Dec. 1917 to Feb. 1918, and was to be delivered to the buyers in Liverpool. Until delivery the pepper was to be at the seller's risk. The contract required the sellers to declare the name of the vessel, marks and full particulars in writing with due dispatch.

The plaintiffs were the last of a string of buyers. The pepper was shipped in the *Eumaeus* under a bill of lading dated the 17th Jan. 1918, and the *Eumaeus* sailed four days later. So far everything was in order. On the 13th Feb. the defendants, having received a provisional declaration from their sellers, passed it on to the plaintiffs. The provisional declaration did not comply with the terms of the contract and was not, and was not meant to be, the declaration required by the contract. It was sent as an act of courtesy.

On the 26th Feb. 1918 the *Eumaeus* was lost at sea with her cargo. On the 27th March the defendants received a declaration in due form of the pepper from their sellers, and on the same day made a declaration to the plaintiffs, also in due form, adding these words: "Owing to the vessel having been lost by enemy action this contract is cancelled."

Upon this state of facts two questions arise: first, were the defendants entitled to make a declaration of goods known to them to be lost at sea before the declaration was made and did such loss excuse non-delivery under this contract? And

(*a*) Reported by T. W. Morgan and E. A. Scratchley, Esqrs., Barristers-at-Law.

secondly, was the declaration of the 27th March made with due dispatch?

The answer to the first question depends on the construction of two clauses in the contract. One clause has a marginal note "Declaration of shipment," and it reads thus;

The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing, with due dispatch, but 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 of lading or other satisfactory proof of shipment by sellers as soon as fairly practicable after the loss is ascertained.

The other clause has the marginal note "Loss or transhipment," and it reads thus:

Should the vessel or vessels and the goods or any portion thereof be lost this contract to be cancelled for the whole or such portion, but should the vessel or vessels be lost and the goods or any portion thereof be transhipped to some other vessel or vessels and arrive on account of the original importer, this contract to stand good for the whole or such portion.

These two clauses are largely redundant and certainly might be more happily worded. In my opinion their meaning and effect is that a seller who duly ships the contractual goods and makes the requisite declaration with due dispatch, is excused from liability for non-delivery if the vessel and goods are lost whether before or after declaration, and knowledge of the loss at the time of making the declaration is immaterial.

The contract as regards goods so shipped and declared is cancelled. I think it immaterial, but it is satisfactory to note that the provisional declaration appropriating this particular shipment to this contract was sent to the plaintiffs before the *Eumaeus* was lost. This shows that the formal declaration was not an afterthought and incidentally gave the plaintiffs an opportunity to insure their profit had they been so minded.

The second question is whether the declaration of the 27th March was made with due dispatch. It was rather more than two months after shipment but it was made as soon as the defendants received the declaration from their sellers and, as I understand, as soon as the necessary details reached this country. I do not see any duty on the shipper to cable these details, and in 1918 the post from the East was irregular. It is true that the defendants themselves wrote a letter expressing the view that the declaration was too late, but commercial men are astute, and that expression of opinion would have been useful in any claim over against their sellers in the event of the success of the plaintiffs' contention. In my opinion, the declaration was made with due dispatch.

In the result both questions in the case must be answered in favour of the defendants. There will be judgment for the defendants, and with costs.

From that decision the plaintiff now appealed.

Disturnal, K.C. and *G. D. Keogh* for the appellant.

Barrington-Ward, K.C. and *Mitchinson* for the respondents.

Lord Sterndale, M.R.—This is an appeal from the decision of Bailhache, J., and it is not an easy question which has to be determined, because the terms of the contract are, as he said, in some ways rather inconsistent one with the other.

It was a sale upon the form of Arrival Contract, Landed Terms, of the General Produce Brokers' Association of London. It was a sale of 10 tons of Muntok white pepper at 1*s.* 8*d.* per lb., landed terms, to be shipped during the months of Dec. 1917 and Jan. or Feb. 1918, per steamer or steamers from the East *via* canal to Liverpool.

Then there was a provision that the buyers should take a sea-damaged part of the cargo with an allowance. Then there was also a provision as to the terms of landing, the result, in my opinion, being that Bailhache, J. was right when he said that the goods remained at the risk of the sellers until arrival and until after arrival, the length of time which is mentioned in the contract. It has no analogy to a c.i.f. contract at all.

Then there follow the two clauses upon which the whole question turns. The first of them proved that: "The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing with due dispatch, but 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 the sellers, so soon as fairly practicable after the loss is ascertained."

With the marginal note "Loss or transhipment" the other clause provided that: "Should the vessel or vessels and the goods or any portion thereof be lost, this contract to be cancelled for the whole or such portion, but should the vessel or vessels be lost, and the goods or any portion thereof be transhipped to some other vessel or vessels and arrive on account of the original importer, this contract to stand good for the whole of such portion."

The vessel declared was a vessel called the *Eumaeus*. She sailed on the 21st Jan. 1918, and she was lost some time in Feb. 1918, and in that month certain letters passed between the parties, the first being from the brokers, Messrs. Laird and Adamson, to Messrs. Wright, Crossley, and Co., saying: "Against your contract dated 11th Dec. 1917 for 10 tons Muntok white pepper. Sellers have received cable advice of shipment above. Per steamer 19th Jan. 1918, which information we pass on to you under the usual reserves and subject to mail confirmation which please note."

It was argued at one time that that was an appropriation of the goods upon that vessel to this contract, although the vessel was not named. I do not think that it was. There is no identification of the vessel at all. It was not contended that it was a declaration of the contract, but it was said that it was an appropriation of the goods upon the vessel to the contract. I do not think that it was for the reason which I have given, that the vessel is not identified at all.

The declaration that was given was on the 27th March, some considerable time after the loss, and at a time when the loss was known to both parties. At any rate it was known to the sellers, and I think that it was known to both parties. Again, it is from Messrs. Laird and Adamson: "Against your contract, dated 11th Dec. 1917, for 10 tons M.W. pepper the sellers declare in fulfilment," then they give the marks and numbers of the bags—"this contract is cancelled owing to

the vessel having been sunk by enemy action. Bill of lading, dated 17th Jan., which please note."

The sellers were in a chain and they had received from their sellers a similar declaration. They did not accept the contention of their sellers that the contract was cancelled, and there was an arbitration with regard to the matter, with which we need not concern ourselves at all. The plaintiffs here, the buyers, took the same position as their sellers had done and refused to accept the cancellation of the contract, and an arbitration was held, which terminated, I think, before the arbitrators in their favour.

The defendants, the sellers, wished to appeal to the council of the association. The council declined to hear the appeal because the parties were not members of the association. That award was afterwards set aside and the case came before Bailhache, J., who decided that the contract was cancelled and therefore that the defendants were discharged from their obligations under it.

These are the facts and it is upon those facts that the question arises whether the decision of the learned judge was right or not.

His decision certainly seems at first sight to be in conflict to some extent with the decision of the Divisional Court in the case of *Olympia Oil and Cake Company Limited* v. *Produce Brokers Company Limited* (12 Asp. Mar. Law Cas. 570; 13 Asp. Mar. Law Cas. 71, 393; 111 L. T. Rep. 1107; (1915) 1 K. B. 233) although in my opinion the contracts were not the same, and although certainly one of the learned judges in that case treated the matter as though he had a c.i.f. contract before him, which was not the case.

However, that case has certainly been observed upon in some subsequent judgments, especially in *Produce Brokers Company Limited* v. *Olympia Oil and Cake Company Limited* (12 Asp. Mar. Law Cas. 570; 13 Asp. Mar. Law Cas. 71, 393; 112 L. T. Rep. 744; 114 *Ibid.* 94; (1916) 1 A. C. 314) by Scrutton, L.J. All I think that it is sufficient to say about that case is that it was upon a different contract, and therefore I do not think it is necessary for me to consider whether it was right or whether it was wrong.

But on one point I do respectfully dissent from the opinion expressed in that case, and that point is this: The learned judges seem to me to have held, and in fact they did hold, that although a clause of this kind might operate as a cancellation of the contract where the loss was not known to the party making the declaration, it could not do so if that loss was known to the party making the declaration.

With respect, I do not think except as a matter of *bona fides* or *mala fides* (and no *mala fides* is suggested here) that the knowledge makes any difference. Either the declaration may be made after loss or it may not. If it is not a good declaration because the subject-matter of the declaration is no longer in existence, that is a matter which is independent of the knowledge of the parties at all and the only relevance that the knowledge might have would be, as I say, as indicating *mala fides*, which is not there alleged. On that point, with respect, I do not agree with the opinions expressed by the learned judges in that case. And I have some confidence in saying so because I think in what I am saying on that point I am agreeing with what was thrown out by the Court of Appeal in the case to which I have referred, in which the decision of the Divisional Court was commented upon.

The argument for the appellant in the present case was in the main this: First, that this was not a vessel which may apply to this contract. It did not satisfy those words, it was contended, because no vessel can apply to the contract until the declaration has been made, and, therefore, the vessel when she was lost was not a vessel which applied to the contract.

The second and, I think, the main argument was this: The clause which I have read, which deals with the vessel being lost before declaration, is only a clause which means that, when the declaration is made, it is a contract to deliver by a named ship, and it imposes two obligations upon the sellers, namely, to deliver the goods and to deliver them by that ship. All that was intended by this clause, it was said, was to exonerate the sellers from the obligation to deliver by that particular ship and that, therefore, although they were exonerated from that obligation, there still remained the obligation to deliver in some other way. They could substitute a ship which otherwise they could not have done. And considerable stress was laid in support of that argument upon the words "the contract to be cancelled so far as regards such lost vessel or vessels."

It was said that that means not so far as regards the goods on the vessel, and that portion of the goods, but as regards the vessels and the vessels alone. In support of that argument it was pointed out that in the subsequent clause "Should the vessel or vessels and the goods or any portion thereof be lost," it was provided "this contract to be cancelled for the whole or such portion," dealing with the goods and not with the vessel.

There is considerable force in that argument and it certainly shows that this contract is not made with the clearness which might be desired.

Another matter was also pointed out. I think both parties agree that the second clause with the marginal note "loss or transhipment" must be confined to loss of the vessel or goods after declaration, and, although it does not say so, I think that is the reasonable construction of the matter. If another view were taken and this second clause were held according to the strict letter to apply to losses before declaration, then undoubtedly it would be in conflict with the previous clause. But as applied to losses after declaration it does not conflict in the same way with the previous clause.

There does remain, however, this difficulty: that, construing these clauses as the respondents invite us to do, and as Bailhache, J. has done, losses before declaration and losses after declaration are treated in a different way. Before declaration if the vessel is lost and part of the cargo comes forward, the contract is still cancelled and the buyer is not obliged to accept that transhipped portion. In the case of the loss after declaration, he has to accept any transhipped portion which comes forward, and no particular reason was pointed out why the loss before declaration was to be treated in a different way from loss after declaration.

I pointed out these difficulties because I confess that they caused a good deal of doubt in my mind, but considering all those difficulties, and giving due weight to all those difficulties, I think that the construction which Bailhache, J. put upon this contract is the right one, and I think that the intention was

this, to safeguard the sellers against difficulties that he might get into if he had made a late shipment and the vessel was lost before they had time to make the declaration.

The declaration was to be made "with due dispatch" and it might very well be, especially in war time, that "due dispatch" would be at a time when the contract period had expired and that the sellers might find themselves in a difficulty of having made a late shipment and not being able to make their declaration until it was too late for them to substitute a shipment even if they could do it.

I think their intention was, amongst other things, to safeguard themselves against a position of that sort, and when they say "This contract is to be cancelled so far as regards such lost vessel or vessels," I think the words were used which convey a great deal more than simply "This declaration shall be set aside" or "This declaration shall not be considered as binding."

It is true that the contract says "as regards such lost vessel or vessels." But I think that that must mean as regards the parcel which is carried upon such lost vessel or vessels. In the present case the parcel carried was the whole parcel—the whole subject of the contract—and therefore the contract would be cancelled as regards the whole of it.

I think that the vessel which may apply to this contract is not ascertained in future declarations made, but this contemplates such a declaration may be made after the loss, and that this vessel was a vessel which applied to the contract; she was lost before the declaration, and, putting the proper construction as I think it ought to be upon the words, the contract was cancelled with regard to that vessel and what she was carrying.

I think, therefore, that the learned judge's decision was right and that this appeal should be dismissed with costs.

Atkin, L.J.—I agree.

I have felt the same doubts as the Master of the Rolls has expressed in his judgment. But upon a survey of the whole of this contract I have come to the conclusion that the decision of the learned judge in the court below was right.

It was contended that this clause could not apply to the case where the vessel was lost at the time the declaration was made before it was said you could only make a declaration of an existing vessel and therefore there would be no vessel or vessels which may apply to this contract, if, as a matter of fact the vessel had been lost before the declaration was sought to be made.

As authority for that proposition the case of *Olympia Oil and Cake Company Limited* v. *Produce Brokers Company Limited* (*ubi sup.*) was cited. I think that that proposition is too wide because eventually it had to be conceded that if the facts were these, that a shipment was made and a declaration was then made in ignorance of the loss of the ship, and it was then ascertained after the declaration that the ship had been lost before the declaration, that was the state of facts to which this clause was intended to apply. That is common ground. At any rate, that is conceded on behalf of the appellants.

If that is so, then there is a vessel or vessels which in the terms of the clause applies to the contract. It is the vessel or vessels which had been applied to the contract by the declaration, and it seems to me, therefore, to be unnecessary to consider the larger proposition, which is too wide for the purposes of the appellant's case, that in dealing with this clause you may not make a declaration and cannot make a valid declaration where the ship has been lost. That case was decided by the divisional court upon a different contract, not containing these clauses. Whether it is now a binding authority or not is a matter which will have to be decided when the actual proposition of law for which it is an authority comes into question again. But I do not think it is really helpful in this case, because here you have to construe this special clause.

One starts with the proposition which is admitted by the appellant, and which I think has to be admitted by the appellant that the clause applies in a case where the declaration has been made after loss, but without knowledge of loss. And if it so applies I see no reason at all why it should not apply where a declaration is made after loss, but with knowledge of the loss. There seems to me to be no reason at all in business why there should be any difference between those two questions.

I think the true construction of this clause is that if a declaration is made, then the ship which is named in the declaration is the vessel which applies to the contract, and I think that the declaration may be made either with or without knowledge of the loss.

Under those circumstances, if the vessel was lost before the date of the declaration, then the clause proceeds to say: "This contract to be cancelled so far as regards such lost vessel or vessels." The contention on the part of the appellant was that that ought to be read that such declaration is to be treated as inoperative. If it really meant that, it was a very easy thing to say and instead of saying that the declaration was inoperative the words go not to the declaration, but they go to the cancellation of the contract; "This contract to be cancelled so far as regards such lost vessel or vessels on production of proof of shipment." I think that must mean proof of shipment in pursuance of the contract.

Under those circumstances it appears to me that the true view is what the clause says, namely, that the contract is cancelled so far as the goods which are coming forward in that vessel are concerned, and so far as the obligation to deliver that quantity of goods under the contract is concerned.

I think that one is helped in that conclusion by reading the provisions which are annexed to the contract at the back of the contract, rule 9 of the General Brokers' Association of London, one clause (*c*) of which states "Each declaration is to be treated as a separate contract." The net effect, I think, is that when a seller has shipped goods in compliance with the contract on board the ship he is then, if the ship is lost, to be entitled to relieve himself of the contract if he is able to appropriate the goods to some contract that he has made, and in respect of which he still has the right of appropriation.

It is plain that the business of the contract and the meaning of the contract is this: While it is a contract for revival, if after a declaration and appropriation the vessel is lost, the obligation to deliver the goods is one from which the sellers are clearly intended to be relieved by the second clause.

Under those circumstances I can see nothing unusual in business for the sellers to bargain that they should be relieved before appropriation, if in fact they have shipped, within the terms of the contract, goods which if the ship had not been lost they would have been able to appropriate to the contract. That to my mind is the proper view of it. I think that the sellers did not mean to leave themselves with the burden, after they had shipped, perhaps on the last day of shipment, goods corresponding to the contract, of finding the ship lost and finding themselves under an obligation for breach of contract.

For these reasons I think that the view taken by the learned judge in the court below was right. I agree that questions may arise as to the construction of the second clause. If it is quite plain that those words only apply in the second clause to a loss after declaration, the difficulty is probably removed, But I do not desire to express any opinion upon that because those points may arise to be determined hereafter.

To my mind, on the facts of this particular case, the sellers were relieved from liability, and the decision of the learned judge in the court below was right.

YOUNGER, L.J.—I am entirely of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Rawle, Johnstone,* and *Co.*, agents for *Laces* and *Co.*, Liverpool.

Solicitors for the respondents, *Waltons* and *Co.*

Judicial Committee of the Privy Council.

March 16, 17, *and* 18, 1920.

(Present: The Right Hons. Lord SUMNER and PARMOOR, the LORD JUSTICE-CLERK, and Sir ARTHUR CHANNELL.)

THE SVITHIOD. (*a*)

ON APPEAL FROM THE PRIZE COURT, NOVA SCOTIA.

Prize Court — Neutral ship — Enemy stowaway— Unneutral service — Absence of facts justifying condemnation.

A German, who was a qualified third officer in the German mercantile marine, was taken on board a Swedish ship at Pernambuco bound for a Danish port with the connivance of the captain. The stowaway was discovered at Halifax (Nova Scotia), after the captain made some attempt to conceal his presence on board. There was no evidence that the stowaway was carried at the expense of the German Government or that he intended to go to Germany. The captain had on board two bags of rubber which was contraband and was carried as a venture of his own. The Prize Court at Halifax condemned the vessel.

Held, that on the facts of the case as proved there was no evidence of an unneutral service to support the decree of condemnation of the ship.

Judgment of the Prize Court reversed.

APPEAL from so much of the judgment of the Exchequer Court of Canada, Nova Scotia Admiralty District (in Prize) dated the 11th Dec. 1918 as decreed the confiscation of the Swedish steamship *Svithiod*.

Sir *Erle Richards*, K.C. and *Pilcher* for the appellants.

Sir *Hugh Fraser* (with him Sir *Gordon Hewart*, A.-G.) for the respondent, the proper officer of the Crown.

The following cases were cited.

The Friendship, 1807, 6 C. Rob. 420;
The Orozembo, 1807, 6 C. Rob. 430;
The Nigretia, 1905, 2 Russ.-Jap. P. C. 201;
The Hakan, 13 Asp. Mar. Law Cas. 479; 117 L. T. Rep. 619; (1918) A. C. 148;
The Kim, 13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215;
The Caroline, 1808, 6 C. Rob. 461;
Carrington v. *Merchants' Insurance Company*, 1834, 8 Peters, 495;
The Mercurius, 1798, 1 C. Rob. 80, 84;
The Vrouw Judith, 1799, 1 C. Rob 150;
The Mars, 1805, 6 C. Rob. 79, 81;
The Rosalie and Betty, 1800, 2 C. Rob. 343, 359;
Hobbs v. *Hemming*, 12 L. T. Rep. 205; 17 C. B. N. S. 791;
The Pizarro, 1817, 2 Wheat. 277.

Reference was also made to

Wheaton (Dana's edit. 1866), par. 502, and note 228, pp. 639 to 642, 643;
Bernard's Neutrality of Great Britain during the American Civil War (1870), pp. 223, 225;
Admiralty Manual (1888 edit., Holland), p. 18;
Westlake, 2nd edit., part 2, p. 302;
Hall, 7th edit., pp. 739, 740n, 741n, 750n;
Proceedings of International Naval Congress (Miscellaneous Papers, No. 5 of 1909, col. 4555), p. 103;
Declaration of London, 1909, arts. 45, 46;
German Prize Code (Huberich and King, 1915), art. 45;
American Journal of International Law, sup. vol. 10, p. 427;
Westlake's Introduction to Takahashi's International Law in Chino-Japanese War, pp. 22, *et seq.*;
Lord Russell's Dispatch, Jan. 10, 1862 (see Bernard, p. 213);
Oppenheim's International Law, vol. 2, pp. 517, 522.
Order in Council, 7th July 1916, withdrawing partial adoption of Declaration of London.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—Their Lordships are much indebted to counsel on both sides for the unusually complete and exhaustive survey of all possible authorities bearing on a most important question, but, for reasons which their Lordships will briefly state, they do not think it necessary to deal with this case in such a manner as would require that time should be taken for its further consideration.

The case is one in which there is no appeal by the captain against the confiscation of the rubber which was his property. The learned local judge in Admiralty, Drysdale, J. has expressly said that for carrying the contraband rubber alone he would not have confiscated the ship, and that, although the captain of the *Svithiod* lied in certain particulars, that alone would not cost his owners their ship;

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

and accordingly the case, although it has involved some discussion as to both the prevarication and falsehood of the captain, and his conduct, in having on board some contraband, really resolves itself, and always has resolved itself, into the question whether the captors made out, or laid foundation for making out, a case of unneutral service.

Upon that the evidence briefly stands as follows. There was a German stowaway on board the vessel found at Halifax. Their Lordships will assume that, as the learned trial judge found, this stowaway was taken on board in collusion with the captain of the vessel, although it may be pointed out that this is rather a matter of indirect inference from the probabilities of the case than dependent upon any fact positively deposed to. This person was the third mate of the *Blucher*, which had taken refuge in Pernambuco at the beginning of the war to avoid the risks of capture at sea, and had remained there for the best part of three years. Hellman came on board and purported to be a stowaway, and purported to discover himself when the ship was a sufficient length of time out of Pernambuco, and was then treated by the captain of the *Svithiod* with some consideration, and so the vessel reached Halifax. The vessel was a Swedish vessel, bound with a full cargo of maize from Buenos Ayres to a port of discharge in Denmark. The learned trial judge found that he was satisfied that the captain took the third officer intending to smuggle him to Germany. In their Lordships' opinion, that, however plausible as a matter of speculation, on this evidence is a matter of speculation only; because all that can be said is, on the one hand, that he was a German, and apparently that his relations were still alive in Germany, while, on the other hand, there is no evidence of any express intention on his part, or of anything done by him to throw any light on his further proceedings after arriving in Denmark; and for what it may be worth there is the fact that he had left Pernambuco under such circumstances of dispute with the other officers on board his ship, the *Blucher*, that the immediate cause of his discovery was in fact the sending of a letter by the first mate, which he must have known would fall into the hands of the British officials, betraying Hellman's presence on board, because he had gone away in debt to him and others. Therefore, it would be quite impossible, in their Lordships' opinion, to say that it has been proved that he was even going to Germany. What this man was, except that he was a mariner and a qualified third officer, the evidence does not show; and even assuming, as probably one may assume, because our eyes cannot be closed to circumstances of public notoriety connected with the war, that, if he reached Germany, some service in connection with the war would promptly have been found for him, the fact remains that he was at the time a seaman in an entirely private capacity seeking the opportunity of a voyage, by which he would at least escape from a further stay at Pernambuco, and proceeding at his own expense, or at the expense of the owners of this Swedish barque, it does not appear which, but without their cognisance at any rate. His case, therefore cannot be placed in the same category at all as the cases where the officers of a belligerent State have engaged a vessel to perform a particular service, or have paid for the carriage of particular passengers, or where persons, already embodied in the service of the belligerent country, are being transported upon some purpose of State.

Their Lordships are impressed with the fact that the circumstances of this case appear to lie outside the scope of any authority to which their attention has been drawn. It is true that when he reached Halifax the captain of the *Svithiod* endeavoured to conceal the presence of the man on board by means of very transparent devices, because, as he knew almost as soon as he was interrogated, the officials were already aware of the man's presence, and anything he might say or do could hardly do more than save appearances for himself, and enable him to say that he had not given the man up. The conduct of the captain of the *Svithiod* does not appear to their Lordships particularly aggravated. At any rate, if there is no sufficient evidence of an act which would constitute an unneutral service or a cause of condemnation under that or any analogous title, the mere deceptions of the captain of the *Svithiod* in themselves would not, either in justice or according to authority, be a ground for confiscating the vessel.

Their Lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions; but it is precisely because their Lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty, if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable, to endeavour to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject.

Their Lordships will, therefore, humbly advise His Majesty that the appeal succeeds; that the decree of confiscation ought to be set aside, and that the confiscated vessel ought to be restored to her owners. The respondent will pay the costs of the appeal.

Solicitors for the appellants, *Botterell* and *Roche*.
Solicitors for the respondent, *Treasury Solicitor*.

March 12, 15, *and April* 30, 1920.

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

THE ORTERIC. (*a*)

ON APPEAL FROM THE PRIZE COURT IN ENGLAND.

Prize Court—Enemy goods—Cargo—Passing of property after seizure—"Sale" of draft to bankers.

On the 22nd July 1914 the appellant, a British subject carrying on business in Sweden, sold 32,000 bushels of wheat to a German firm at Hamburg, payment to be made at Hamburg against shipping documents. The wheat was shipped on the 24th July in a British steamship, delivery to the order of the appellant, who indorsed the bills of lading in blank. The appellant drew on the buyers for the price in reichsmarks and sold the draft, with the bill

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

of lading and policy attached, through brokers to a bank in New York for dollars, with a special indorsement to that bank. The vessel sailed for Hamburg before the outbreak of the war, but was diverted to Liverpool, where the wheat was seized on the 22nd Aug. 1914. *The New York bank indorsed the draft to bankers in Hamburg and forwarded it, with the documents, to them to collect, the documents being received in Hamburg about the 25th Aug.* 1914. *The draft, unpaid and unaccepted, was eventually returned to the bank. A writ claiming condemnation was issued on the 18th Sept.* 1914, *and the bank, and afterwards the present appellant, claimed the goods.*

Held, that the wheat could not be condemned as enemy goods since at the date of its seizure in prize it was not enemy property, and this general rule applied, although the property in the wheat had passed to an enemy before the issue of the writ claiming condemnation.

Judgment of the Prize Court reversed.

The Schlesien (13 *Asp. Mar. Law Cas.* 510; 115 *L. T. Rep.* 555; (1916) *P.* 225) *distinguished.*

APPEAL from a decree of Sir Samuel Evans, P. (in Prize), dated the 11th Feb. 1918, condemning as enemy goods 32,000 bushels of wheat, part of the cargo of the British steamship *Orteric*.

Sir *Erle Richards*, K.C., *Dunlop*, K.C., and *Dumas* for the appellant.

J. G. Pease (with him Sir *Gordon Hewart*, A.-G.) for the respondent, the Procurator-General.

The facts and cases cited appear from the considered opinion of their Lordships, which was delivered by

LORD SUMNER.—The claimant is a British subject, carrying on business at Galveston, Texas, U.S.A. On the 22nd July 1914 he sold to Eicholz and Loeser, of Hamburg, 32,000 bushels of wheat at a price reckoned in gold reichsmarks, "payment in Hamburg by net cash in exchange for shipping documents." By the terms of the contract it was "deemed to have been made in England, and to have been performed there." The seller had no anticipation of war at the time.

The wheat was shipped on board the British steamship *Orteric*, under bills of lading dated the 24th July 1914, making the wheat deliverable to shipper's order. The claimant duly indorsed them in blank. Insurance was effected with the Union Marine Insurance Company of Liverpool, through their New York branch. The claimant drew at eight days' sight on Eicholz and Loeser for the contract price in reichsmarks, attaching the certificate of insurance and the bills of lading, and, wishing not merely to collect money forthwith but to collect it in dollars, he "sold" the draft with documents attached through a firm of brokers to the National City Bank of New York, indorsing it specially to that bank. The brokers' "contract of exchange" describes this transaction as a "sale." The claimant rendered an invoice to the National City Bank for the amount of the draft less one-thirty-second, in dollars at a rate of exchange of 95, and drew a sight draft on them for that amount, which was duly paid. The first question in the case is whether this transaction was a sale in any sense.

The *Orteric* sailed for Hamburg before the outbreak of war, and on passage was diverted to Liverpool, where the wheat was seized. The Crown ought to have proved the date of this seizure, for it was very material, but did not do so. It was, however, stated at the trial that the seizure took place on the 22nd Aug. 1914, and this date the claimant accepted. The wheat was afterwards condemned by Sir Samuel Evans as enemy property.

The National City Bank of New York indorsed the draft to the Norddeutsche Bank in Hamburg on the 28th July 1914, and forwarded it, per the steamship *Savoie*, to that bank with the documents for collection for account of the Direction der Disconto-Gesellschaft of Berlin, the documents to be delivered to the drawees against payment. A special authority was added in the following terms: "You are hereby authorised, if requested to do so, to give a guarantee on our behalf to deliver to interested parties, if entitled thereto, by reason of acceptance or payment, the remaining bills of lading when received." These duplicate bills of lading went forward by the *Carmania*. The Disconto-Gesellschaft of Berlin was advised of this remittance of the documents to Hamburg "for the favour of collection and credit of our account with your good selves." In due course the *Savoie* reached Havre on the 5th Aug., and the *Carmania* reached Liverpool on the 7th Aug. 1914.

What happened in Hamburg is the second question in the case, and there is a good deal of dispute as to the facts and more particularly as to the date when those facts occurred. Eventually the draft and bills of lading came back to the National City Bank of New York. The draft was unpaid and unaccepted; the bills of lading had on the back of them something elaborately obliterated with black pigment. Beyond any real doubt that something was the indorsement of Eicholz and Loeser. After an interval, the bank sent these documents to the present claimant, and called on him to pay the draft, but never pressed their demand. He has neither paid nor been sued.

Certain letters are forthcoming from Eicholz and Loeser to the claimant and from the Disconto-Gesellschaft of Berlin to the National City Bank of New York. If the story they tell is true, the effect of it is this. Eicholz and Loeser had resold the wheat in four parcels, three to sub-purchasers in Hamburg and the fourth to a sub-purchaser in the interior of Germany. When they applied to them to know whether they would take up the documents, these persons in Hamburg, who probably had a very shrewd idea that they would never see the wheat, prudently replied that they would take them up when the wheat arrived. The fourth was telegraphed to but did not answer. It is consistent with these letters that Eicholz and Loeser were asked by the Norddeutsche Bank to accept the draft and made the above inquiries on one and the same day, namely, the 25th Aug. It is improbable that three days had elapsed between the presentation of the draft for acceptance and that date. Eicholz and Loeser say that the documents only arrived in Hamburg on the 25th Aug., and then were handed to them by the Norddeutsche Bank but were not taken up by them, and that they were then presented to the sub-purchasers. To make this presentation regular Eicholz and Loeser, as they say, indorsed the bills of lading. Whether this was done by arrangement with the Norddeutsche Bank does not appear. In any case, it was superfluous, for the bills of lading were already indorsed in blank. When the sub-purchasers refused or failed to take up the documents,

the indorsement of Eicholz and Loeser was obliterated, and the bills of lading were returned to the bank.

The proceedings before the Prize Court, commenced by a writ dated the 18th Sept. 1914, form the conclusion of these transactions. The first to claim in prize were the National City Bank of New York, alleging that they owned the wheat. They supported their claim by inconsistent and contradictory affidavits. Their claim failed, and they do not now appeal. The appellant did not appear until nearly two years after the issue of the writ, and about seven months later he delivered his claim, alleging that the wheat was his. A passage from his evidence was much relied on for the Crown. It is as follows: "Q. You considered, did you not, the documents belonged to the National City Bank of New York?—A. Yes, only as a rule, when you sell documents and indorse them, you are supposed to be back of them. Q. Certainly. In other words, you were subject to your liability as indorser in case the drafts were dishonoured and not paid?—A. Yes, sir. Q. But your transaction with the National City Bank was intended to be an absolute sale of the documents?—A. Certainly. . . . Q. You don't know what authority . . . may have been given by the National City Bank of New York to its correspondent in Germany?—A. No. In the usual course of events, when you part with those documents, you have said 'good-bye' to the transaction."

The learned President, the late Sir Samuel Evans, relying on this passage among other circumstances, held that the appellant "never had any intention to reserve any property or interest in the wheat after he parted with the documents to the National City Bank of New York"; that the Bank were pledgees only, and that "the property had before the seizure passed to the German buyers." Plainly, therefore, not only the passing of the property, but the date on which the property passed were considerations germane to his conclusion that the wheat should be condemned.

Where, as in the present case, cargo is seized and a decree is asked that such "cargo" belonged at the time of capture and seizure thereof to enemies of the Crown, and as such is subject and liable to confiscation as good and lawful prize," the question before the Court is whether what was seized in prize was good prize—that is, whether the goods did or did not then belong to the King's enemies. This is the crucial date for the case of the captors. On the other hand, the position of things at subsequent dates may affect the claimant's rights, independently of any mere traverse of the captor's claim. Thus a claimant, having succeeded in his contention that what the captors seized was then his property, may fail nevertheless to establish a right to have it released to him if, before he comes before the court to claim as owner, it has become enemy property. He cannot then truly claim the goods as his. In order to obtain the release of the goods to himself, he has to prove that the goods were his when seized and that he is still the person who, so to speak, can give a good discharge for them if the Court decrees their release to him. In this attempt he has failed, apart from condemnation, if, in fact, they belong to an enemy: (*The Prinz Adalbert*, 13 Asp. Mar. Law Cas. 307; 116 L. T. Rep. 802; (1917) A. C. 586). It is in accordance with this principle that before releasing goods to a claimant the court satisfies itself that no enemy has any title to or interest in them. Many other considerations may affect the question of seizure. The time and circumstances of the alleged seizure may be inquired into in order to decide whether the seizure was valid (*The Roumanian*, 13 Asp. Mar. Law Cas. 8; 114 L. T. Rep. 3; (1916) 1 A. C. 124), or to decide whether what passed amounted to a seizure at all (*Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft*, 120 L. T. Rep. 102; (1919) A. C. 291). Belligerent rights are not exhausted by a single seizure; if a first seizure should be deemed bad, or its invalidity be apprehended, a second seizure under proper conditions may be made and relied upon. These are the questions which usually make the precise date of a seizure material, but none of these questions arose in the present case. If, as appears to be the fact, the goods did not become enemy goods, if at all, till after the 22nd Aug., the respondent was driven to contend that, for the purpose of deciding the issue of enemy goods or not enemy goods, the date of the writ will suffice as the material date. For this no authority was produced. Reliance was indeed placed on *The Schlesien* (13 Asp. Mar. Law Cas. 510; 115 L. T. Rep. 555; (1916) P. 225), where the goods seized, having been neutral-owned at the date when they were first seized and at the date when a writ in prize was first issued, Sir Samuel Evans held that retention of possession by the Crown might be regarded as a continuous seizure, so that, when the goods had become enemy goods by the outbreak of war with Austria and a second writ had been thereafter issued, the requisites for their condemnation as enemy property were satisfied. If the first seizure was invalid and there was nothing to justify possession except such seizure, a second might be made, when the outbreak of war with Austria made seizure legitimate. The intention of the Crown after the original seizure to hold in the exercise of billigerent rights was found as a fact. The mode in which the cargo had been dealt with was not such as to exempt the goods from further seizure. The issue of the writ itself was not merely the expression of the purpose with which the Crown had continued in possession, though there had been no intermediate release, but it was in itself an overt and notorious act which, coupled with due service, might amount to a second and a valid seizure. It is not quite clear that this was Sir Samuel Evans' finding, but, whatever may be thought of this decision if it proceeded on other grounds, it is inapplicable to the present case. Here there is no second writ and no extraneous event at all to affect the status of the goods after the first seizure. The goods were seized once only and were seized as being then good prize, and this they were not if they were still British-owned. If the seizure was wrongful then, it does not become rightful by continuing the wrong. The captor cannot be allowed to benefit by the chance of what may happen while he delays to issue a writ, so that the chapter of events in the meantime may repair what was imperfect in his own proceedings. If the goods had been enemy goods when seized the captors would not have been defeated by a transfer of the property to a neutral before the writ could issue. If the captors take the goods of a neutral or a British subject by a bad seizure, they must, in order to avail themselves of a subsequent passing of the property to an enemy,

make a fresh and valid seizure. Of this there was no vestige here.

In the present case the respondent proves nothing adverse to the claimant's title without either showing that the title to the wheat had been divested in favour of the National City Bank of New York before the decree, or had passed from the claimant and had become vested in Eicholz and Loeser before the seizure. As to the latter he proves nothing unless he relies on the statements made by Eicholz and Loeser in the letters which were put in. These letters say that the documents only arrived in Hamburg on the 25th Aug., and on this point at least the letters are self-consistent. The respondent produced nothing to the contrary except that the *Savoie* reached Havre on the 5th Aug. and the *Carmania* reached Liverpool two days later. In the circumstances then existing no inference can be drawn as to the date at which letters for Hamburg brought by these vessels would reach their destination. Substantial delay is certain. If the letters arrived on the 25th Aug. it may well be that they arrived earlier than might have been expected. Their Lordships are unable to conclude that the documents were in Hamburg by or before the date of the seizure of the wheat. namely, the 22nd Aug.

Further, in their Lordships' view, it is very improbable that the wheat ever vested generally in the National City Bank of New York, apart from a mercantile pledge, or ever vested in any German owner at all, and they conclude that neither vesting happened. There is no evidence whatever that Eicholz and Loeser or their sub-purchasers ever paid anything. Such evidence as there is goes entirely to the contrary. It was most strongly against the interest of both purchasers and sub-purchasers to part with any money under the circumstances against wheat that had not arrived and might well never arrive. It was contrary to the interests of the Norddeutsche Bank, who were in any case only agents and were acting on the instructions of an important bank in the principal neutral country, to allow the wheat to vest in others if no money was forthcoming. It is true that the bills of lading were indorsed by Eicholz and Loeser, but the Norddeutsche Bank, which allowed this to be done, also allowed the endorsement to be obliterated—a stupid thing in itself and provocative of objection by third parties—and returned them to America. The statement of Eicholz and Loeser is that most consistent with the probabilities of the case, namely, that for the purpose of getting money from the sub-purchasers, in case they could be prevailed upon to pay, they indorsed and presented the bills of lading without either taking them up or getting possession. In all probability a clerk from the bank kept them all the time, but attended when Eicholz and Loeser went to the sub-purchasers in order to exhibit the bills, ready to be delivered. They were never delivered. He took them back to the bank, and so, with the indorsement obliterated, they were sent back by the bank to New York. The whole tenor of the letters is quite consistent with the bills of lading never having been delivered to Eicholz and Loeser, in spite of the indorsement, and such is their Lordships' view.

Again it is wholly improbable that the documents were ever taken by the National City Bank of New York except by way of discount and security. Such would be the natural course of business, and as the transaction, by which the documents were transferred to them, was completed not only before the outbreak of war but even before its imminence became obvious, there was no reason for departing from the natural course. It is plain that when the claimant handed over the documents to the bank, he meant his contract of sale to Eicholz and Loeser to be completed by delivery to them of the bills of lading for the wheat. It is plain that all that the bank would get out of the transaction would be eight or nine dollars for discount. They cannot have meant to buy the wheat out and out, and, whether their statement that the wheat was their property was really believed by them or not, it is no doubt due to the uncertainty, which may well have existed before the decisions in *The Miramichi* (13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71) and *The Odessa* (13 Asp. Mar. Law Cas. 27; 114 L. T. Rep. 10; (1916) 1 A. C. 145), as to the kind of ownership which is required to support a claim as owner in prize. As to the expression in the brokers' contract that the draft (not the wheat) was "sold," that is an intelligible, if inaccurate, expression for an exchange transaction, which would commonly be referred to as a sale of reichsmarks and a purchase of dollars.

There remains the above-quoted evidence of the claimant, as to which the respondent's argument was that he could not go back from his own evidence, but must be taken at his word. Their Lordships will say nothing to encourage the idea that claimants in prize can be allowed to deal uncandidly with the court or to modify in their own favour inconvenient admissions made by or binding upon themselves. It is, however, in fairness always necessary to ascertain what the evidence really means, and in this case the strongest light is thrown on the meaning by the familiar character of this type of transaction. In the vast majority of such cases the shipper does "say good-bye" to the transaction when he parts with the documents and receives the proceeds of the discount of the draft. In substance the documents are absolutely parted with, if not truly sold, for they are never likely to come back. Yet all the time the drawer remains "back of" the documents even when he has "sold" and indorsed them. Their Lordships think that the claimant, with some transatlantic locutions, was intending to describe the usual transaction, in which he would retain the general property and transfer to the bank only a special property by way of security, and that his language should not be further pressed against him. Nor can his case be prejudiced by the ambiguous conduct of the bank in the proceedings, or by their vacillation in asserting against him their claim to recourse on the draft. What rights and remedies may still be outstanding between the claimant and the bank their Lordships do not know and need not inquire. They are of opinion that the wheat never ceased to be the claimant's wheat till it was sold in the course of the proceedings in prize; that he is the owner of the proceeds which represent the wheat, free from any enemy interest; that he is entitled to have the decree of condemnation set aside and the proceeds of the wheat released to him; to have his appeal allowed with costs here and below, and to have returned to him in full his security lodged in the Prize Court. They will humbly advise His Majesty accordingly.

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

Solicitor for the respondent, *Treasury Solicitor.*

March 18 *and May* 4, 1920.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, the LORD JUSTICE-CLERK, and Sir ARTHUR CHANNELL.)

THE OSCAR II. (*a*)

ON APPEAL FROM THE PRIZE COURT IN ENGLAND.

Prize Court—Negligence in effecting capture—Ship sunk after collision—Loss of goods—Action against Procurator-General—Responsibility—Prize Court Rules 1914, *Order II., r.* 3.

A neutral vessel, upon which the goods of the respondent, who was also a neutral, were laden, was lost owing to a collision with an English warship whilst the latter was effecting her capture. The Procurator-General subsequently instituted proceedings in prize against part of the cargo laden on the neutral, but it was admitted that the respondent's goods, and the vessel herself, were not liable to be condemned. The respondent sued the Crown and the Procurator-General, and obtained an order for the restoration of the value of his lost goods.

Held, that under the Prize Court Rules 1914, *whereby the Procurator-General was substituted for the actual captors, he was liable in such damages and costs as under the old procedure the actual captors were subject, and that the rules were not* ultra vires *so far as they imposed that liability.*

Observations in The Zamora (13 *Asp. Mar. Law Cas.* 144, 330; 114 *L. T. Rep.* 626; (1916) 2 *A. C.* 77) *followed.*

Judgment of Prize Court affirmed.

APPEAL by the Crown from a judgment of Lord Sterndale, sitting as President of the Prize Court, dated the 3rd April 1919 (reported 14 Asp. Mar. Law Cas. 447; 121 L. T. Rep. 285; (1919) P. 171), ordering the restoration of the value of 250 bags of coffee laden on board the neutral ship *Oscar II.* to the respondents, and that their value should be ascertained by the registrar and merchants.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), and *Stuart Bevan*, K.C. for the Crown.

Sir *Erle Richards*, K.C. and *Balloch* for the respondent.

The following cases were referred to:

The Zamora, 13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;
The Mentor, 1799, 1 C. Rob. 179;
The Sudmark, 118 L. T. Rep. 383; (1918) A. C. 475;
The Der Mohr, 1800, 3 C. Rob. 129;
The Corsican Prince, 13 Asp. Mar. Law Cas. 29; 112 L. T. Rep. 475; (1916) P. 195.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—In this case the Procurator-General appeals from a decree of Lord Sterndale, sitting in Prize, by which he ordered the restoration to the claimants, as owners, of 250 bags of coffee, part of the cargo of the *Oscar II.*, their value to be ascertained hereafter by the registrar and merchants. It was admitted that the ship with her cargo was sunk on the 1st July 1915 by reason of a collision with H.M.S. *Patuca*, in which the latter was alone to blame; that the *Patuca* was engaged at the time in capturing the *Oscar II.* in order to bring her and her cargo into port as prize of war for the Crown; and that in fact the coffee was not liable to condemnation on any ground. No evidence was given nor were the precise circumstances explained under which the collision occurred. It is, however, clear that the captors' obligation to be answerable for due care in the custody and treatment of the property seized had already attached, and their Lordships were informed that the *Oscar II.* had reached port before she actually foundered in consequence of the collision. There seems to have been no salvage.

The owners of this coffee had a good claim against somebody. So much was not in dispute. The question was whether the Procurator-General could be made liable. Shortly after the *Oscar II.* sank, the Lords Commissioners of the Admiralty accepted liability both for ship and cargo, but as they claimed to limit the amount of the liability, no action was taken against the navigating officer. Matters then remained in abeyance until the following year. In March 1916, for reasons which must be surmised, the Procurator-General issued a writ praying condemnation as prize of part of the lost cargo of the *Oscar II.*, the 250 bags in question not being included in the claim. In July 1918 the present claimants issued a writ to recover from the Crown and the Procurator-General damages for the loss of their cargo by reason of the collision, and the Procurator-General having entered an appearance and alleged that their action was misconceived, the question went to trial without further formal proceeding than an admission of facts. The learned President expressed a doubt whether the course taken by the claimants was correct in form but, as the question was merely one of procedure and could only affect costs, he treated the point as immaterial, and it has not been pressed on their Lordships as a ground for allowing the appeal. The true issue is the liability of the Procurator-General.

Captures at sea in time of war are made under the authority of the Crown in the exercise of its belligerent rights. In the regular course those who effect the capture must hold the Sovereign's commission, though a capture made without it may be afterwards ratified and adopted by the Crown. Subject to condemnation in Prize, the capture is for the Crown's benefit, and it is by the Crown's bounty that the actual captors participate in the fruits of the prize. On the other hand, the obligation is unquestioned to bring the prize in for condemnation and, pending its delivery into the custody of a Court of Prize, to safeguard it from avoidable injury or loss. This obligation is for the benefit of the parties interested, to whom the property may be released by the court if grounds of condemnation fail. These belligerent rights and these obligations towards neutrals are correlative and ought to correspond. They are rights and obligations of the Crown, though exercised and discharged by the proper executive officers.

The Prize Court Rules now make provision for the commencement of the proceedings for condemnation, to which, according to old practice, the actual captors were parties, by the issue of a writ in the name of the Crown only, by its proper officer who is the Procurator-General. As a result of this change the position of neutrals in a Court of Prize must be greatly prejudiced, unless, in assuming the position of captor in the Prize Court proceedings, the Crown also assumes responsibility towards neutral claimants. This matter came

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

before their Lordships' Board in *The Zamora* (*sup.*), and, at least as regards liability for dealings with the *res* during the proceedings to the prejudice of the parties ultimately successful, the question was decided. What now remains open is responsibility for damage arising from failure to take care of the *res* prior to the commencement of proceedings in the Prize Court. Is there any reason why a similar conclusion should not be deduced from the orders and rules in the present case? If not, can it be said that to such extent the orders and rules are *ultra vires?*

The general effect of that judgment, so far as relates to the present question, is summed up in a passage on p. 111 (13 Asp. Mar. Law Cas., at p. 339): "In their Lordships' opinion these rules are framed on the footing that, where the Crown by its proper officer is a party to the proceedings, it takes upon itself the liability as to damages and costs, to which under the old procedure the actual captors were subject."

This passage does not limit the liability spoken of to the consequences of dealings which take place after the issue of the writ, and it sums up the whole argument upon the construction of the orders and rules, which forms the foundation of the judgment, in a manner which does not lend itself to a restricted application.

It was contended before their Lordships that the Procurator-General takes the place of captor only for the purpose of the proceedings in the Prize Court. Hence, it was said, he cannot as captor for that purpose have any responsibility for the derelictions of duty of persons, strangers to himself and his office, which took place before the proceedings began. It was said further, that the present proceedings, for the purpose of which alone he assumed the position of captor, are taken against other cargo and do not relate to the parcel of coffee in question, and that a claim cannot now be enforced against him at the instance of persons whose cargo he does not seek to have condemned.

In their Lordships' opinion, the effect of the Prize Court Rules is that, after the proceedings are instituted, the Procurator-General is the captor not for particular and specified purposes, but generally, though it is true that the actual captors are referred to in some rules for specific purposes, such as joint capture and prize bounty. It is not necessary for their Lordships to decide on the present occasion whether damages could have been claimed against him if he had commenced no proceedings in Prize, though they are not to be understood as negativing his liability even in such a case. They are, however, unable to find anything in the rules to limit his liability, since he has elected to begin proceedings, to such dealings with the subject-matter of the suit as took place in the course of it, and they think that, as a matter of construction, his position and liabilities cannot be so restricted.

Equally little are they able to accept the argument that his liability is only to such persons as may be interested in the actual goods whose condemnation he may have chosen to seek in such proceedings as he thinks fit to institute. The actual captors seized the whole ship and all her cargo. To bring any of it into port they had to bring in all, and they exposed all in common to the risk of such dereliction of duty as they were guilty of and were bound to deliver to the custody of the court all that they might ultimately bring in. Upon this argument, if there had been partial damage to part of the cargo instead of total loss of all, the Procurator-General might have chosen the undamaged cargo as the subject of his proceedings for condemnation and, by forbearing to ask for the condemnation of such cargo as suffered injury, might have escaped all liability in respect of it. Such a contention only needs to be stated to be dismissed. A Court of Prize, unless constrained by the authority of the most explicit and binding regulations, could not expose to so gross an unfairness those neutrals whose interests are committed to its protection.

It was then argued, that, if the rules impose on the Procurator-General so wide a liability they go beyond the function of rules of practice and procedure, transcend the statutory power given by the Act of 1894, which is a rule-making power, and trench upon the Royal Prerogative, which the Naval Prize Act of 1864 expressly saves. Their Lordships think that these points are scarcely debatable, since the decision in *The Zamora* (*sup.*), even though they may not have been expressly dealt with in the terms of that judgment. The argument involves no little injustice. Had the Crown been pleased to issue the proclamation, usual in former wars, granting prize to the actual captors, and had the traditional practice remained unaltered, they would have been liable in the Prize Court proceedings for neglect of due care. On the present view, by forbearing to issue such a proclamation, the Crown takes to itself the fruits of the capture, when harvested in the Prize Court, but leaves to the neutral only the satisfaction, often a barren one, of looking to the actual captors in other proceedings for payment of compensation, if his property is damaged by neglect of the captors' duty. The argument further involves some confusion. The prerogative of the Crown is strictly not involved either in the capture or in its incidents. No question then arises between the Crown and its subjects. The belligerent right of the Crown is to seize the property of neutrals at sea in time of war under certain circumstances and on certain conditions. One such condition is that the property be brought before a Court of Prize for adjudication; another is that in the meantime a certain established measure of care be used in dealing with the property. It is not one of the belligerent rights of the Crown to damage neutral property after seizure, either by omission or commission. The obligation to bring the property before the court for condemnation is one which may be discharged by the actual captors; or, if the Crown is minded to discharge that obligation and to institute the necessary proceedings by its proper officer, such a course may be taken either at pleasure or under a permanent regulation. If the Crown is pleased to take this course, it waives the right to leave the actual captors to be the parties to act. Again to seek the exercise of one part of the jurisdiction of the court is in itself a submission to the exercise, when justice requires it, of the correlative jurisdiction of the court, if the claim for a decree of condemnation fails. The enforcement against the party, who alone is before it as captor, of the liability for neglect of a captor's duty may indeed be regarded as being in itself a matter of practice and procedure, for it is part of the *cursus curiæ*, rules or no rules. The matter may, however, be put somewhat higher. If the Crown is pleased to assume a position which involves the abandonment of its right not to be made

liable in damages, but to leave the enforcement of such liability to be made against the parties actually in fault, such a diminution or waiver of its position is valid. Now the rules are made under the authority of an Order in Council and, as this board pointed out in *The Zamora* (*sup.*), if by Order in Council the Crown intimates consent to being placed in a position more limited than might have been claimed for it, had its full rights been insisted on, a Court of Prize is bound to give effect to such a waiver in favour of the neutral. Were it otherwise, the Crown would be placed in the position of seeming to approbate the part of the rules by which it obtains as captor the advantage of a condemnation, and to reprobate that part by which it bears the captor's responsibility; such a waiver is the effect of what is done under the Prize Court Rules and this is why the construction of those rules was accepted in *The Zamora* (*sup.*) as being the only real question. Their Lordships think that the construction, which in that case made the Procurator-General liable in damages and costs under the rules, is equally applicable in the present case. There is no ground for holding the rules to be *ultra vires*. The decision of Lord Sterndale was, therefore, right and ought to be affirmed. Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitor for the appellant, *Treasury Solicitor.*
Solicitors for the respondent, *Waltons* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Jan. 13, 1920.

(Before ROCHE, J.)

KOTZIAS *v.* TYSER. (*a*)

Marine insurance — Lloyd's policy — Total loss — Treaty of Peace—Ratification—Termination of the Present War (Definition) Act 1918 (8 *&* 9 *Geo.* 5, *c.* 59), *s.* 1.

On the 2nd Nov. 1918 *the defendant agreed by a policy of insurance to make a payment to the plaintiff "in the event of peace between Great Britain and Germany not being concluded on or before the 30th June* 1919."

By the Termination of the Present War (Definition) Act 1918 (8 *&* 9 *Geo.* 5, *c.* 59), *passed before the end of hostilities, it was provided that, for the purpose of construing written instruments, except where the context of the instrument which the Act is invoked to construe "otherwise requires," the date of the termination of the war should be fixed by an Order in Council, and should be as nearly as may be the date on which ratifications of the treaty should be exchanged or deposited by the belligerents. A treaty of peace was signed on the 28th June* 1919. *On the 1st July* 1919 *a Royal Proclamation was issued proclaiming that a definitive treaty of peace had been concluded. Ratifications were deposited by the 10th Jan.* 1920, *but no Order in Council had been made at the time of the trial.*

Held, that the expressions "conclusion of peace" and "termination of the war" refer to the same date, and that, in the absence of any special provisions in the instrument itself, the conclusion of peace contemplated by the parties must mean the exchange or deposit of ratifications, which took place on the 10th Jan. 1920.

Held, also, that the plaintiff did not act prematurely in commencing his action on the 21st Aug. 1919, *since the Order in Council, when it is issued under* 8 *&* 9 *Geo.* 5, *s.* 1, *sub-s.* 1, *must fix approximately the date on which the ratifications were exchanged.*

ACTION in the Commercial List, tried by Roche, J.

The plaintiff claimed for a total loss under a policy of insurance dated the 2nd Nov. 1918, subscribed by the defendant and other underwriters, whereby, for the total sum of 3400*l.*, of which the defendant's proportion was 45*l.* 9*s.* 1*d.*, the defendant and the other underwriters, each for himself and not one for another, agreed to pay to the plaintiff's brokers, on behalf of the plaintiff, the amount of their separate subscriptions "in the event of peace between Great Britain and Germany not being concluded on or before the thirtieth day of June one thousand nine hundred and nineteen."

The action was begun on the 21st Aug. 1919, and the writ claimed to recover from the defendant 45*l.* 9*s.* 1*d.*, being the amount of his subscription under the policy.

In his points of claim, the plaintiff said that he was fully interested in a policy of insurance subscribed by the defendant, whereby the defendant undertook to pay to the plaintiff the sum of 45*l.* 9*s.* 1*d.* in the event of peace between Great Britain and Germany (who were then at war with one another) not being concluded on or before the 30th June 1919. Peace between Great Britain and Germany was not and had not been concluded on or before the 30th June 1919.

By his points of defence, the defendant admitted the policy but did not admit that the plaintiff was interested therein. He denied that peace between Great Britain and Germany was not and had not been concluded before the 30th June 1919. Alternatively, and without prejudice to the foregoing, the defendant said that he would contend that having regard to the Termination of the Present War (Definition) Act 1918, and in the absence of a declaration thereunder by His Majesty in Council at the date of the issue of the writ the action was prematurely commenced and would not lie.

The plaintiff, at the outbreak of the war in 1914, was a Greek merchant, but by reason of the war was unable to continue his business. He was, however, desirous of being able to resume it when the war should come to an end. In the meantime, he took steps to protect himself against the risk of the continuance of the war, and he took out the policy already mentioned under which this action was brought.

An armistice was arranged between the belligerents on the 11th Nov. 1918, and on the 28th June 1919 the treaty of peace between the Allied and Associated Powers, including Great Britain, on the one hand, and Germany on the other hand, was signed at Versailles. The preamble to the treaty contained the following clause: "From the coming into force of the present treaty the state of war will terminate. From that moment and subject to the provisions of this treaty, official relations with Germany, and with any of

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

the German States, will be resumed by the Allied and Associated Powers."

By art. 440 of the treaty it was provided, *inter alia*, as follows:

The present Treaty, of which the French and English texts are both authentic, shall be ratified. The deposit of ratifications shall be made at Paris as soon as possible. Powers of which the seat of Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible. A first *procès-verbal* of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand and by three of the Principal Allied and Associated Powers on the other hand. From the date of this first *procès-verbal* the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty. In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification. The French Government will transmit to all the signatory Powers a certified copy of the *procès-verbaux* of the deposit of ratifications.

On the 1st July 1919, His Majesty the King issued a proclamation which, after reciting that the treaty had been concluded, provided as follows: "In conformity thereunto We have thought fit hereby to command that the same be published in due course throughout all Our Dominions, and We do declare to all Our loving subjects Our Will and Pleasure that upon the exchange of the Ratifications thereof the said Treaty of Peace be observed inviolably as well by sea as by land and in all places whatsoever; strictly charging and commanding all Our loving subjects to take notice hereof and to conform themselves thereunto accordingly."

Ratifications of the above treaty of peace were exchanged by the signatory powers on the 10th Jan. 1920.

The Termination of the Present War (Definition) Act 1918 (8 & 9 Geo. 5, c. 59) was entitled "An Act to make provision for determining the date of the termination of the present war, and for purposes connected therewith."

Sect. 1 provides that:

(1) His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and the present war shall be treated as having continued to, and as having ended on that date for the purposes of any provision in any Act of Parliament, Order in Council, or Proclamation, and, except where the context otherwise requires, of any provision in any contract deed or other instrument referring expressly or impliedly, and in whatever form of words, to the present war or the present hostilities. . . .

(2) The date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the treaty or treaties of peace: Provided that, notwithstanding anything in this provision, the date declared as aforesaid shall be conclusive for all purposes of this Act.

(3) His Majesty in Council may also similarly declare what date is to be treated as the date of the termination of war between His Majesty and any particular State.

Foote, K.C. and *S. P. J. Merlin* for the plaintiff.—On the true construction of the policy, the war did not terminate on or before the date specified in the policy. Therefore, the event on the happening of which the money was to become payable under the policy did in fact happen, and the plaintiff is entitled to recover under the policy. According to international law, in the absence of any statutory or contractual provision to the contrary, a treaty of peace, except when personally concluded by the Sovereign, or some person occupying a station equivalent to that of a Sovereign does not become definitely binding on a signatory state until there has been ratification of it by that State:

Hall's International Law, 6th edit., pp. 322, 554;

Wheaton's International Law, 5th edit., Eng. 1916, pp. 358-360.

In this case the Treaty of Peace which was signed on the 28th June 1919, was not ratified until the 10th Jan. 1920. Therefore, peace, in the sense in which the expression is ordinarily used in international law, was not concluded by the date specified within the meaning of the policy. The termination of the present war (Definition) Act 1918 provides that the date of the termination of the war for the purposes of any contract, deed, or other instrument, (and those expressions include this policy) except where the context otherwise requires—and here the context does not otherwise require—shall be the date to be declared by an Order in Council made under the Act; and that the date so declared shall be as nearly as may be the date of the exchange or deposit of the ratifications of the Treaty of Peace. There was no exchange or deposit of ratifications of this treaty until the 10th Jan. 1920. Art. 440 of the Treaty of Peace, dated the 28th June 1919, after specifying the date of the coming into force of the treaty for certain purposes, provides that in all other respects the treaty will enter into force for each power at the date of the deposit of its ratification. That is the date specified in the treaty as the date of the termination of the state of war. Moreover, the Proclamation of the 1st July 1919, after reciting that a definitive Treaty of Peace was concluded on the 28th June 1919, declared that upon the exchange of ratifications thereof, the said treaty shall be observed inviolably. Thus on any view of the policy, whether under international law, or the Treaty of Peace itself, or the Termination of the Present War (Definition) Act 1918, or the Proclamation of the 1st July 1919, peace with Germany was not concluded by the date specified in the policy; therefore the plaintiff is entitled to recover.

R. A. Wright, K.C. and *Simey* for the defendant.—The event of peace not being concluded on or before the date specified did not happen within the meaning of the policy. In the sense contemplated by the parties to the policy, peace was in fact concluded, or the war terminated, on or before the date specified in the policy,—namely, the 30th June 1919. The policy must be construed with due regard to its object, context and circumstances. By reason of the war the plaintiff had been forced to suspend his business and he desired to resume it as soon as it become possible for him to do so, and he, as a man of business took out this policy to safeguard himself in the meantime against the risk of not being able to resume business by the specified date. The words of the policy must be read as meaning in the event of there not being such a conclusion of peace by the 30th June 1919 as would

allow of a resumption of oversea trade. The mere signing of the treaty of peace which took place on the 28th June, two days before the date specified in the policy, involved a conclusion of peace such as was contemplated by the policy. Therefore, the event on which the policy money was to become payable, did not in fact happen within the meaning of the policy. It is immaterial that the treaty of peace was not ratified before the date specified in the policy, because, by international law, a treaty of peace, as from the date of signature, and before ratification, is so far binding that hostilities must immediately cease:

Hall's International Law, 6th edit., p. 554.

The Treaty of Peace Act 1919 (9 & 10 Geo. 5, c. 33), which was passed on the 31st July 1919 after the signature, but before the ratification of the treaty of peace regards the treaty as concluded and binding. The Act is entitled an Act for carrying into effect the treaty and it provides for giving effect to the treaty by Orders in Council and otherwise. The expression "definitive" in the Proclamation of the 1st July 1919 used in reference to the treaty of peace of the 28th June 1919, means final and conclusive. Moreover, peace has been regarded as concluded by many other Acts and Government notices. Reference was made to the following Acts of Parliament:

Restoration of Pre-War Practices Act 1919 (9 & 10 Geo. 5, c. 42), passed on the 15th Aug. 1919, s. 1, sub-s. 1;
Munitions of War Act 1915 (5 & 6 Geo. 5, c. 54), sched. 2.
Anglo-French Treaty (Defence of France) Act 1919 (9 & 10 Geo. 5, c. 34), passed on the 31st July 1919.

The Anglo-French Treaty of the 28th June 1919 which is set out in a schedule of the last-mentioned Act refers to the treaty of peace as "concluded," although it had not then been ratified. Several notices issued by the Board of Trade after the signature, but before the ratification of the treaty of peace as having been concluded: (see, for example, "Board of Trade Journal," vol. 103, p. 433). No Order in Council has yet been made under the Termination of the Present War (Definition) Act 1918, declaring what date is to be treated as the date of the termination of the war. Moreover, whatever date may be subsequently fixed, it will have no reference to this policy, for the policy must be interpreted as a whole, having regard to sect. 1, sub-sect. 1, of the Act, when it will be found that the policy "otherwise requires." The plaintiff is not entitled to recover.

ROCHE, J.—This is an action brought on a policy of insurance dated the 2nd Nov. 1918, whereby, in consideration of a premium paid by the plaintiff as the assured, the underwriters, of whom the defendant is one, agree to pay to the brokers of the plaintiff on behalf of the plaintiff as principal the amount of their separate subscriptions "in the event of peace between Great Britain and Germany not being concluded on or before the 30th June 1919." The plaintiff claims payment from the defendant of the sum underwritten by him as for a loss under the policy on the ground that peace between Great Britain and Germany was not concluded on or before the 30th June 1919.

The only question to be decided is whether or not peace had been concluded between these countries on or before the date specified.

I am told that a number of other policies have been effected, some of them between the same parties, in terms the same as or similar to those of this policy, and that it will be of advantage to the parties to these other policies to know what interpretation the court puts upon this policy. I desire, however, to say that in the present case I am only interpreting the words of the policy before me and not those of any other document.

This policy was effected on the 2nd Nov. 1918, before hostilities between this country and Germany had ceased, but when the parties contemplated that they might soon cease. It is not contended on behalf of the defendant that the parties, in effecting the policy, meant by the conclusion of peace on or before the 30th June 1919 a mere cessation of hostilities on or before that date: it is admitted that they meant a cessation of hostilities followed at the least by the making of a treaty of peace before that date.

It is said, however, on behalf of the defendant that that is what the parties meant, and that peace was concluded on or before that date for the purposes of the policy, because a treaty of peace between these countries was signed before that date. It is said on behalf of the plaintiff, on the other hand, that peace was not concluded on or before that date within the meaning of the policy because, although the treaty of peace was signed before that date, ratifications of the treaty by the high contracting parties thereto were not exchanged on or before that date, or indeed until the 10th Jan. 1920.

I accept the view contended for on behalf of the plaintiff, and I do so for several reasons. In the first place, the authorities show that, in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that as between civilised Powers who have been at war, peace is not concluded until a treaty of peace is finally binding on the belligerents, and that that stage is not reached until ratifications of the treaty of peace have been exchanged between them.

In the present instance, however, the matter does not rest there. The Termination of the Present War (Definition) Act 1918, which was passed during the war, and is entitled an Act to make provision for determining the date of its termination, provided by sect. 1, sub-sect. 1, that His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and that the war shall be treated as having ended on that date for the purposes, except where the context otherwise requires, of any provision in any contract, deed or other instrument, referring to the war; and by sect. 1, sub-sect. 2, that the date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the treaty of peace.

It is to be observed that the Act speaks of the date of the termination of the war, and that the policy of insurance deals with the date of the conclusion of peace, but both must be treated as referring to the same event, and therefore to the same date. The Act contemplates that an Order in Council or Proclamation may be issued declaring what date is to be treated as the date on which hostilities terminated and peace was concluded.

It is not disputed that no Order in Council or Proclamation in pursuance of the Act has yet been issued. That fact tends to confirm me in the opinion that peace had not been concluded on or before the 30th June 1919.

It is also, I think, material in this connection to consider the provisions of the treaty of peace itself. In the recital or preliminary part of the treaty it is stated that the Powers have agreed that from the coming into force of the treaty the state of war will terminate. Art. 440 of the treaty provides that a first *procès-verbal* of the deposit of ratifications will be drawn up as soon as the treaty has been ratified by the Powers, that from the date of that first *procès-verbal* the treaty will come into force between the Powers who have ratified it, and that in all other respects it will enter into force for each Power at the date of the deposit of its ratification.

The treaty of peace thus provides that it is to come into force, or, in other words, that peace is to be concluded, by a deposit of ratifications of the treaty, and a *procès-verbal* thereof. That was not accomplished until the present month of Jan. 1920, and consequently it had not been accomplished on or before the 30th June 1919, the date mentioned in the policy. In view of these considerations, I am of opinion that peace can only be said to have been concluded at a date considerably later than June 1919.

With regard to the contention that because the plaintiff is a man of business and was insuring himself against a business risk, a special meaning must be given in this policy to the words "in the event of peace not being concluded," I am not satisfied that that contention is well founded. Certain Board of Trade notices which were referred to, no doubt treat peace as having been concluded for purposes of trade before the 30th June 1919, or at least before the treaty of peace was ratified, but these documents must be read in relation to their own special purport, and they do not show that peace was concluded at so early a stage for any other purpose. I am not entirely uninfluenced by the fact that this policy was effected by a man of business, for I recognise that apart from a general licence to do so, trade with Germany could not have been renewed by men of business until after the 30th June 1919.

It is argued that this action has been prematurely brought, inasmuch as no Order in Council or Proclamation in pursuance of the Act of 1918 has yet been made declaring what date is to be treated as the date of the termination of the war, and until an Order or Proclamation is made it cannot be known when the war terminated and peace concluded. In my view, that argument is not well founded. The Act provides by sect. 1, sub-sect. 2, that the date declared by the Order in Council when made shall be as nearly as may be the date of the exchange or deposit of ratifications of the treaty of peace.

On the 21st Aug. 1919, the date on which the action was brought, there had as yet been no exchange or deposit of ratifications of the treaty of peace, and that being so, the date to be declared by the Order in Council as that of the termination of the war could not well be an earlier date than that on which the action was brought. It was, therefore, open to the plaintiff to say when he brought the action that peace had not even then been concluded, and therefore that it had not been concluded on the 30th June 1919, the earlier date mentioned in the policy.

Judgment for the plaintiff.

Solicitors for the plaintiff, *W. W. Young, Son, and Ward.*

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

Monday, Feb. 16, 1920.

(Before BAILHACHE, J.)

OWNERS OF STEAMSHIP LORD *v.* NEWSUM. (*a*)

Charter-party—Prescribed route—Refusal of master to follow—Error of judgment—Breach of charter-party.

By a charter-party dated the 8th April 1916, *for a voyage from Liverpool to Archangel, it was provided by clause* 9 *that the master was to prosecute his voyage with the utmost despatch, and by clause* 14, *that all losses and damages occasioned by "negligence, default or error of judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer" were to be absolutely excepted. The vessel sailed from Liverpool on the 26th Sept.* 1916 *and arrived at Honningsvaag, in the north of Norway. From there owing to the danger of German submarines, a special route to Archangel was prescribed by the British Admiralty and the Norwegian War Insurance Association; the master, however, after waiting some days, decided to proceed by another route and reached Vardoe on the 11th Oct.* 1916. *Subsequently the crew refused to continue the voyage to Archangel owing to reports as to the presence of a hostile submarine, and, in spite of the charterers' protests, the voyage was abandoned and the cargo discharged. The claim of the owners for the hire and of the charterers for damages for breach of the charter-party were referred to arbitration. The umpire found that the master in refusing to follow the prescribed route was guilty of a grave error of judgment, and that in failing to sail he had committed a breach of clause* 9 *of the charter-party, and he awarded the charterers damages for this breach.*

Held, that the decision of the master not to follow the prescribed route was an error of judgment as to route, and not an error of judgment "in the management or navigation" of the steamer, and that consequently the owners were not protected by the exceptions in clause 14 *of the charter-party. Award upheld.*

AWARD stated in the form of a special case.

By a charter-party dated the 8th April 1916, and made between the owners of the steamship *Lord* and Messrs. Newsum, Sons and Co., the charterers, the steamship *Lord*, a Norwegian vessel, was chartered to Messrs. Newsum, Sons and Co., for six months. The charterers sublet the vessel to another firm for a voyage from Liverpool to Archangel. This voyage, as was required by the charter-party, was approved by the Norwegian War Insurance Association. The *Lord* sailed from Liverpool on the 26th Sept. 1916 and arrived at Honningsvaag, in the north of Norway. The route from there to Archangel prescribed by the British Admiralty and the Norwegian Insurance Association, in consequence of the danger from German submarines, was for vessels to proceed at a

(*a*) Reported by L. H. BARNES, Esq., Barrister-at-Law

distance of some 150 to 200 miles from the Norwegian coast. The master, however, after waiting some time at Honningsvaag, decided in consequence of warnings as to the presence of German submarines, instead of following this prescribed route to proceed by the coast route to Vardoe, where the steamer arrived on the 11th Oct. 1916. After waiting at that port until the 23rd Oct. the crew, in consequence of reports as to the danger from hostile submarines, refused to continue the voyage to Archangel, and on the 31st Oct., in spite of the protests of the charterers, the voyage to Archangel was abandoned and the cargo discharged. The claim of the owners for the hire and the counterclaim of the charterers for damages for breach of the charter-party were referred to arbitration. The umpire found that if the master had followed the prescribed route the steamer in all probability would have reached Archangel safely; that, in refusing to follow the prescribed route he was guilty of a grave error of judgment, and that in failing to sail he had committed a breach of clause 9 of the charter-party, which provided that he was "to prosecute his voyages with the utmost despatch." The umpire, therefore, awarded the charterers damages for this breach of the charter-party, but found that on balance a sum was due to the owners for hire.

Clause 14 of the charter-party provided that "throughout this charter losses or damages, whether in respect of goods carried or to be carried, or in other respects arising or occasioned by the following causes shall be absolutely excepted, viz., . . . negligence, default, or error of judgment of the pilot, master or crew or other servants of the owners in the management or navigation of the steamer."

It was contended for the owners that even if the umpire was right and there had been an error of judgment on the master's part which had caused the voyage to be abandoned, it was an error of judgment as to the navigation of the vessel, and that they were protected by clause 14.

For the charterers it was contended that the master's decision to follow the coast route was not an error of judgment with regard to the management or navigation of the steamer, but merely an error as to the choice of route, and that clause 14 did not apply.

Neilson, K.C. and *Jowitt* for the owners.

MacKinnon, K.C. and *Le Quesne* for the charterers.

BAILHACHE, J. (after stating the facts).—It has been contended on behalf of the owners that the decision of the master to proceed from Honningsvaag to Archangel by the coastal route by way of Vardoe, and his refusal to follow the prescribed route and make a wide detour, was "negligence, default, or error of judgment" on his part "in the management or navigation of the steamer" within the meaning of clause 14 of the charter-party. Now it cannot be said that what the master did was done by him in the "management" of the steamer; the question, therefore, remains, was it something done in the "navigation" of the steamer? In my opinion the word "navigation" in clause 14 is used with reference to a vessel in motion, that is to say a vessel that is being navigated, and a reference to the other persons mentioned in the clause in addition to the master—namely, the pilot, crew, or other servants of the owners—seems to point clearly to that being the correct meaning of the term "navigation" as used therein. A pilot could hardly commit an error in navigation except when a ship was in motion, and indeed would not be employed until the vessel was being cast off. The term "management," may be applied equally to a vessel while she is in harbour as well as while she is in motion, and the two words in conjunction signify something done with regard to the user or control of the vessel while she is in harbour or proceeding on her voyage. Anything done of that nature comes within the meaning of the terms "management or navigation," but the decision of the master as to which of two routes he will pursue, a deliberate choice made while in harbour, cannot, in my opinion, be said to be an error "in the management or navigation of the steamer." It is, no doubt, very difficult sometimes to draw a clear line of demarcation between what can and what cannot be included in the term navigation, but, in my view, the line ought to be drawn to exclude the deliberate consideration by the master in harbour as to which of two routes he will pursue to reach his destination. In my opinion, therefore, the umpire was right in holding that there had been a breach of the charter-party, and that the error of judgment of the master did not come within the exceptions contained in clause 14.

Award upheld.

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

Solicitors for the charterers, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

March 16 *and* 22, 1920.

(Before GREER, J.)

AKTIESELSKABET FRANK *v.* NAMAQUA COPPER COMPANY LIMITED. (*a*)

Charter-party—Demurrage—Exception in cases of "accidents or other hindrances beyond charterers' control"—Martial law—Ejusdem generis *rule.*

In Sept. 1914 *the defendants chartered the plaintiffs' vessel for a voyage to Port Nolloth, in Cape Colony. The vessel duly arrived at Port Nolloth and made ready to discharge. Owing, however, to the fact that, on her arrival, the port was under Government control and was being used for disembarking troops and war material for an expeditionary force which was being sent to German South-West Africa, the charterers were unable to discharge her until eighty-six days demurrage had expired.*

The charter-party contained three "exception" clauses. The first dealt with the charterers' obligation to load; the second was the usual exception clause containing, inter alia, *"the King's enemies" and "restraint of princes and rulers"; the third, which was directed to the unloading of the cargo, excepted the charterer from his liability to pay demurrage "in cases of strikes, riots, lock-outs, labour disturbances, trade disputes, accidents, and other hindrances beyond the charterer's control." The defendants relied upon the exceptions contained in the second and third clauses.*

Held, that the second clause, from its position in the charter-party, from its express words, and from the fact that the obligations on the charterers were specifically limited by the other two, did not apply to the charterers' obligation to unload the

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

vessel; as to the third clause, the Government control could not be said to be an accident, and the "other hindrances beyond the charterers' control" must be construed ejusdem generis *with the named "exceptions." The defendants therefore failed.*

Action in the Commercial List, tried by Greer, J.

The plaintiffs claimed from the defendants 1440*l.* for demurrage. The plaintiffs were the owners of a Norwegian sailing ship, the *Frank*, and the defendants were the charterers of the vessel by a charter-party made in Sept. 1914. The plaintiffs alleged that the sum claimed was due to them from the defendants under the charter-party.

By the charter-party in question the defendants chartered the plaintiffs' vessel, the *Frank*, to carry a cargo, mainly of coke, from the port of Swansea to Port Nolloth in South Africa. The charter-party provided that the vessel should load a cargo at Swansea, and that on arrival at the port of discharge the cargo was to be unloaded at a specified rate per working day, and that in case of failure by the defendants to complete the unloading of the cargo at the specified rate per day, the defendants were to pay demurrage at the rate of 3*d.* per net registered ton per day.

The vessel duly loaded the cargo at Swansea, and arrived at the port of discharge in South Africa on the 6th Jan. 1915. The vessel was ready for discharge on the 12th Jan., but the discharge was not completed until the 15th May 1915. The plaintiffs claimed demurrage in respect of eighty-six days.

The defendants denied liability and claimed to be protected by a clause in the charter-party which provided that the cargo was to be unloaded at an "average rate of not less than . . . or charterers to pay demurrage," except in cases of "strikes, riots, lock-outs, labour disturbances, trades disputes, accidents, or other hindrances beyond charterers' control."

The port of discharge in this case was situated on the north-west coast of Cape Colony, and was the nearest port in that colony to German South-West Africa. The port consisted of a jetty and there were the necessary appliances for loading and discharging lighters and small craft that could get over the bar. Large vessels lay outside about a mile or more beyond the bar and were discharged into lighters. But for the abnormal conditions at the port owing to the war, the cargo of the *Frank* could and would have been discharged within the time fixed by the charter-party.

In Aug. 1914, by order of the department of the Union of South Africa, which had charge of railways and harbours, and under the provisions of the South African Defence Act, an officer, described as a provost-marshal and as transport officer, took possession of the railways of the port, the port itself with its jetty, lighters, plant and appliances, and assumed complete control, for purposes connected with the war, of the business of the port, including the business of discharging vessels, the supply and control of all labour, and the determination of all questions of priority of discharge. This was done for military reasons, to facilitate the disembarkation of troops which were sent to carry the war into German South-West Africa, to enable supplies to be landed and the communications to be kept open.

Some time before the arrival of the *Frank* at Port Nolloth a rebellion had broken out in South Africa which lasted until the beginning of 1915. Germans had invaded the colony near Port Nolloth. On the 13th Jan. 1915, the day when in the ordinary course the lay days would begin to run, the *Frank* being then ready to discharge, a martial law order was posted on the jetty, which had the effect of intensifying the control of the port by the Government official. All appliances for unloading, including lighters, tugs, cranes and trucks, were under military control, and were being used for discharging troops and war material and were not available for commercial purposes. The lay days expired on the 18th Feb. 1915, but the discharge was not completed until the 15th May 1915. The defendants contended that they were excused for the delay by the terms of the charter-party, because the state of affairs then existing at the port constituted "accident or other hindrance beyond charterers' control."

The delay in the discharge of the cargo of the *Frank* was due to the congestion of the port caused by the arrival of transports and vessels carrying warlike stores required for the Expeditionary Force and to the priority given by the officials in charge of the port to such transports and vessels carrying military stores, to vessels carrying coal required for the railways and to steamers and other vessels carrying general goods which were required in the country owing to the increase of population by the presence of the Expeditionary Force.

A. Neilson, K.C. and *L. C. Thomas* for the plaintiffs.

R. A. Wright, K.C. and *C. T. Le Quesne* for the defendants.—The following authorities were referred to:

Larsen v. *Sylvester*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295;
Knutsford v. *Tillmans*, 99 L. T. Rep. 399; (1908) A. C. 406;
Thorman v. *Dowgate Shipping Company*, 11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410;
Fenwick v. *Schmatz*, 18 L. T. Rep. N. S. 27; L. Rep. 3 C. P. 313.

Cur. adv. vult.

March 22.—Greer, J.—The plaintiffs, who are the owners of the sailing vessel the *Frank*, claim against the defendants, who are the charterers of the vessel by a charter-party dated the 28th Sept. 1914, 1440*l.* 10*s.* for demurrage which they allege to be due under the charter-party. The vessel was chartered to carry a cargo, consisting mainly of coke, but with liberty to carry fifty tons of liquid fuel and fifty tons of general cargo from Swansea to Port Nolloth, South Africa. Her capacity was 1340 tons, and she in fact loaded only 100 tons of coal, the great bulk of her cargo, as loaded, being coke.

At the date of the charter-party the war with Germany had been in progress for about eight weeks. The port of discharge is situate on the north-west coast of Cape Colony, and is the nearest port in that colony to German South-West Africa. The port consists of a jetty at which are the necessary appliances for loading and discharging lighters and small craft that can get over the bar. Large vessels like the *Frank* lie out a mile or more beyond the bar, and are discharged into lighters. The port, the lighters used for the discharge and loading of vessels, and all the appliances necessary for receiving the cargo from the ships and delivering at the jetty, are the property of the Cape Copper Company, who, in normal times, do all the work of discharge

required to be done by the receiver of cargo. But for the abnormal conditions due to the war, which will be mentioned later, the cargo of the *Frank* could and would have been discharged within the time fixed by the charter party.

At the end of Aug. 1914, by order of the Department of the Union of South Africa, that has charge of railways and harbours. and under the provisions of the South African Defence Act, a local statute, an officer, described in the evidence as a provost-marshal and as a transport officer, took possession of the railways of the port, the port itself with its jetty, lighters, plant and appliances, and assumed complete control, for purposes connected with the war, of the business of the port, including, of course, the business of discharging vessels, the supply and control of all labour, and the determination of all questions as to priority of discharge. The reasons for this step were entirely military, to facilitate the disembarkation of an expeditionary force which was being sent to carry the war into German South-West Africa, to enable supplies to be landed, and communications to be kept open.

A rebellion broke out in the colony and lasted until the beginning of 1915, but the control of the port began before the rebellion, and continued long after the rebellion had ceased, and the delay in discharging the *Frank* was not in any way caused by the rebellion.

On the 13th Jan. 1915, the day when, in the ordinary course, the lay days would begin to run, the *Frank* being then ready to discharge, a martial law order was posted on the jetty. This order was not produced, but it probably had the effect of intensifying the control of the port by the Government official, who was a military officer. It was agreed at the trial that the lay days provided for by the charter-party, by calculation from an agreed rate of discharge, expired on the 18th Feb. 1915, but the discharge was not completed until the 15th May 1915, and unless the charterers were excused by the terms of the charter-party they were liable for the amount claimed..

It was proved to my satisfaction that the delay in the discharge of the *Frank* was due to the congestion of the port by the arrival of transports and vessels carrying warlike stores required for the expeditionary force and to the priority given by the officials in charge of the port to such transports and vessels carrying military stores, to vessels carrying coal required for the railways, and to steamers and other vessels carrying general goods which were required in the country owing to the increase of population by the presence of the expeditionary force. In my judgment, but for the control exercised by the officer in charge of the port for the efficient carrying on of the war, the vessel would have been discharged within her lay days.

It was contended for the defendants that even on those facts the defendants were protected by the terms of the charter-party. The charter-party provides that the good ship *Frank* shall with all possible dispatch proceed to Swansea and there load a cargo of the description in the margin, that is, coke with a small quantity of coal and liquid fuel and general cargo, which the charterers bind themselves to ship. Then follows an exception which I shall call the first exception: "Except in case of riot, commotion by keelmen, strike, lock-out, or stoppage of shippers' pitmen, or any hands striking work, frosts or floods, or any other accidents or causes beyond the control of the charterers which may delay her loading." And then it says that she is to proceed to Port Nolloth in South Africa, "or so near thereunto as she may safely get, and deliver the same in the customary manner alongside any craft, steamer, floating depot, wharf, or jetty, where she can lie always afloat as may be directed by the consignees to whom written notice is to be given of the vessel being ready to discharge." And then follows the exception, which I will call the exception clause No. 2: "The act of God, the King's enemies, restraint of princes and rulers, perils of the sea, fire, barratry of the master and crew, pirates, collisions, stranding and other accidents of navigation, boilers and machinery always excepted, even when occasioned by the negligence, default, or error in judgment of the pilots, master, mariners, or other servants of the shipowner, in the navigation of the ship, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager."

Then the only other part of the charter-party that is material is the third exception clause, which relates to the discharge of the vessel: "The cargo is to be unloaded at the average rate of not less than 40 tons for coke, liquid fuel, and general cargo, and 70 tons for coal, per working day, weather permitting, but when required by the consignees such extra quantity is to be unloaded as may be practicable (the master lending all possible assistance with the ship's boat and crew) or charterers to pay demurrage at the rate of 3*d.* per net registered ton per diem or *pro rata* for part thereof, except"—and this is the clause that I have to construe—"in case of strikes, riots, lock-outs, labour disturbances, trade disputes, accidents, or other hindrances beyond charterers' control." It will be seen that there are three exception clauses, the first relating to the charterers' obligation to load the cargo in fifteen colliery working days. The second, the usual exception clause, which appears in contracts of carriage by sea, contains, *inter alia*, "the King's enemies," and "restraint of princes and rulers," and the third is specifically directed to the unloading of the cargo.

It was contended for the defendants that the second exception clause applied to the charterers' obligation to unload the cargo in the lay days. I am clearly of opinion that it does not so apply. The parties to the contract contained in the charter-party directed their specific attention separately to the causes that were to excuse the charterers from their obligation to unload the ship within the lay days. The position of the second exception clause and also its express words show that the exceptions are intended to apply only to the obligations of the shipowner, and the fact that there is a specific exception clause applying to the charterers' obligation to unload the ship prevents any implication that the other exceptions in the charter-party are intended to apply to the discharging obligation of the charterers.

It was also contended on behalf of the defendants that they were relieved from liability by the third exception clause on the ground that the demurrage was caused by an accident or hindrance beyond the control of the charterers within the meaning of that clause. As the demurrage was due to the conscious and intentional acts of the lawfully authorised Government official for the better conduct of the war, it would be, in my opinion, an abuse of words to say that it was due to accident. Whatever may be

the extent of that word as used in the contract between the parties, it is not, in my view, wide enough to cover the results of the conscious and purposeful control of the port by the duly appointed officer of the Colonial Government and the lawful representative of the Crown.

The argument that the causes of the demurrage as above stated are within the general words "other hindrance beyond charterers' control" raises a more difficult question. The answer to the question depends on the right understanding and application of the rule of construction compendiously referred to as the *ejusdem generis* rule. Where there is a list of persons, things, causes, or events, followed by general words, and the question arises for decision whether any given person, thing, cause, or event (not included in the specific list) is within the general words, the rule furnishes the test to be applied so as to arrive at a correct answer.

According to Lord Ellenborough in *Cullen* v. *Butler* (1816, 5 M. & S. 461), the question to be answered is, "Is the alleged exception of the like kind with those specially enumerated and occasioned by similar causes?" As I read the judgments of Lord Halsbury, Lord Herschell, and Lord Macnaghten in *Thames and Mersey Marine Insurance Company* v. *Hamilton* (6 Asp. Mar. Law Cas. 200; 1887, 57 L. T. Rep. 695; L. Rep. 12 App. Cas. 484), the test to apply is to ask whether the alleged exception is like any of these specially enumerated.

The judgments in that case do not seem to me to contemplate that the judge should go through the somewhat difficult process of defining a genus or category which will comprehend all the exceptions, and should then decide the case according to whether the alleged exception is covered by the definition. However this may be, in *Tillmanns* v. *Knutsford* (99 L. T. Rep. 399; (1908) 2 K. B. 385; (1908) A. C. 406) the Court of Appeal, consisting of Vaughan Williams, Farwell, and Kennedy, L.JJ., expressed the view that the right test to apply is that you must find a genus or category which describes all the specifically excepted causes, and, if you cannot do so, the general words must be literally interpreted. I do not think, however, that the Court of Appeal intended to lay it down that the *ejusdem generis* rule is to be rejected if you cannot define the genus or category with scientific precision. It is extremely difficult to define with precision the general character of the list of persons, things, or causes that is put together for practical and not for scientific purposes. I cannot help thinking that the broader statements of the question, as put in the earlier cases to which I have referred, is to be preferred to that laid down by the Court of Appeal in *Tillmanns'* case (*sup.*). If I find it difficult to define accurately the genus in the present case, I am consoled by the knowledge that Lord Bramwell unsuccessfully struggled with a similar difficulty in the case of *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (*sup.*). I am also consoled by the knowledge that there is high authority for the view that the *ejusdem generis* rule may apply even when the enumerated exceptions suggest not one but several genera or categories of goods, and for the view that scientific precision is not required: (see per Lord Sumner (then Hamilton, J.) in *Thorman* v. *Dowgate Steamship Company Limited* (11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410).

A genus or category may be roughly defined either by its positive or by its negative qualities, and, if it is necessary for me to define the genus or category to which all the specific exceptions in the clause under consideration belong, I think that I can adequately do so for the present purpose by saying that there are causes of delay that are accidental in the sense that they are nor consciously directed to the purposeful management of the business of the port in the public interest.

If the right question be that which I have referred to in the judgments in the House of Lords in *Thames and Mersey Insurance Company* v. *Hamilton, Fraser, and Co.* (*sup.*), my answer would be easier to frame and would have the same result in the decision of this case. The cause of the demurrage is not like or akin to any of the enumerated exceptions. Accordingly, I think that the *ejusdem generis* rule applies to the clause of the charter-party dealing with the exceptions from liability for demurrage; that the demurrage was not caused by any of the specific exceptions or by any cause coming within the general words so interpreted.

There are other considerations that lead me to the same conclusion. The war with Germany had been in operation for about eight weeks when the charter-party was signed. The port of discharge was so situated that it was not improbable that the Imperial or Colonial Government might require to exercise, for military ends, the control which they in fact did exercise over the port, and which they had begun to exercise before the date of the charter-party.

If it had been intended that the risk of delay arising from such control should be put on the shipowners, and that the cargo owners should be relieved from demurrage so caused, it is not unreasonable to suppose that specific words would have been used that could leave no doubt as to the intention of the parties. The charter-party contains express words relieving the shipowners from their obligation to carry and deliver the goods to the charterers in the event of their being prevented from performing, or delayed in the performance of, their obligations by the acts of the King's enemies or by restraint of princes. These exceptions, which are expressly stated in the second exception clause, may not unfairly be said to be expressly omitted in the third exception clause. It appears to me that there are strong reasons to be found in the contract itself and the circumstances in which it was made to reinforce the argument based on the *ejusdem generis* rule.

In the result there will be judgment for the plaintiffs for the amount claimed and costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Parker, Garrett, and Co.*

Friday, April 23, 1920.

(Before Lord READING, C.J., AVORY and ROCHE, JJ.)

MERSEY DOCKS AND HARBOUR BOARD *v.* LORDS COMMISSIONERS OF THE ADMIRALTY. (*a*)

Requisition—Barge under construction—Increase in cost of materials and labour—Inevitable delay in constructing duplicate—Loss of services—Measure of compensation—Remoteness.

The claimants in 1914 *made a contract with builders, at an agreed price, for the construction of a hopper barge, which was to be the property of the claimants at all stages of its construction. In Feb.* 1917 *the Admiralty requisitioned the barge, which was then still unfinished. But for the requisition it would have been finished in April* 1917. *The Admiralty also instructed the builders to make alterations, which deprived the barge of the essential character of a hopper barge, and these alterations were carried out. Owing to the war it was impossible for the claimants to replace the barge within less than three years from the date of the requisition, and between that date and the earliest date at which a contract for a similar barge could have been placed prices of materials and labour rose enormously. In these circumstances the claimants claimed from the Admiralty:* (1) *The difference between the contract price for the construction of the barge and the price which would have to be paid for a duplicate; and* (2) *compensation for the loss of the use of the barge during the three years from April* 1917 *to the date of completion of the duplicate.*

Held, that the claimants were entitled to recover the difference between the contract price and the cost of replacing the barge, regard being had to the fact that replacement was impossible at the date of the requisition and continued to be impossible for several years, but that they were not entitled to compensation for the loss of the use of the barge during the three years above mentioned.

CASE stated by an arbitrator under sect. 19 of the Arbitration Act 1889.

By an agreement made between the parties it was referred to the arbitrator to determine the amount of compensation to be paid to the Mersey Docks and Harbour Board in respect of the Admiralty's acquisition of the hopper barge No. 798 which Messrs. Lobnitz were building for the board at the time of such acquisition. The case was stated for the opinion of the court under sect. 19 of the Arbitration Act 1889, and not by way of final award.

1. The Mersey Docks and Harbour Board was a public body incorporated by Act of Parliament for the purpose (*inter alia*) of maintaining and improving the channels, dock entrances, docks, and other similar utilities and conveniences of the port of Liverpool. The board had power to levy rates and duties and to borrow money for such purposes, and (as the arbitrator held) the corresponding obligation to take all steps reasonably necessary to keep such channels, dock entrances, docks, and appliances in a proper state and condition. For the due performance of such duty it was necessary for the board to have a fleet of dredgers and hopper barges.

2. In the latter part of the year 1914 the board was in urgent need of additional self-propelling hopper barges to work with their dredgers in keeping open the channels, dock entrances, docks, and other appliances of the port within their jurisdiction, and in December of that year they entered into contracts with builders for three such barges. *Inter alia* they contracted with Messrs. Lobnitz for two such barges, one of which, known as No. 798, was the barge in question in this case. This barge was to be built according to certain plans and a specification, and was to be delivered on or before the 1st Oct. 1915, the builders agreeing to pay as liquidated damages the sum of 100*l.* per week for such time as the barge should remain undelivered after the said date. The price of the completed barge was to be 22,750*l.* There was no provision for increase or decrease of price in the case of any alteration in the cost of material or wages.

3. The said barge was to be of unusual design and construction, being planned with special reference to the port and to the delivery gear of the dredgers with which she was intended to work. By the terms of the contract she was to be the property of the board at all stages of her construction, whether instalments on account of the price had been paid or not.

4. In consequence of war work for the Admiralty, which took precedence of all ordinary work, the builders were unable to complete the vessel by the stipulated date, but the board agreed to an undefined extension of the time on condition that every effort was made to complete the barge as soon as possible. In Aug. 1915, with a view to advance the work, they had obtained from the Government a certificate that the construction of the barge was work of national importance, and with the same object, in Feb. 1916, they obtained from the Director of the Priority Section of the Admiralty a declaration that their contract with Messrs. Lobnitz was to be considered as munitions work.

5. In Feb. 1917 the barge was approaching completion, and the arbitrator found that, if it had not been for the occurrence mentioned in the next paragraph, it would have been completed in the course of April 1917. The board remained entitled under their contract to delivery of the completed vessel for the total sum of 22,750*l.*, and on her completion they would have at once taken delivery and have set the barge to work in the port.

6. On the 8th Feb. 1917 the Admiralty purported to requisition the unfinished barge for Admiralty service. They instructed the builders to stop work on the hopper doors and to plate over the bottom of the barge and otherwise to alter the barge. The alterations ordered were such as to deprive the barge of the essential character of a hopper barge. The Admiralty sent officers to the builders' yard to see that these orders were carried out.

7. The unfinished barge was not a "British ship or vessel as defined in the Merchant Shipping Act 1894," and, subject to the opinion of the court, the arbitrator held that the requisition and alteration of the barge was not authorised by His Majesty's Proclamation of the 3rd Aug. 1914, or by any Order in Council made under the authority of the Defence of the Realm Act 1914, or of any other Act. The contention of the Admiralty before the arbitrator was that the barge was lawfully requisitioned and altered by virtue of the

(*a*) Reported by J. F. WALKER, Esq., Barrister-at-Law.

general prerogative of the Crown, acting for the preservation and defence of national interests.

8. Shortly after the requisition and after the commencement of the alterations the Admiralty informed the board they did not intend to acquire the property in the large, but proposed to hire her for an uncertain time. The board objected to the requisition, and also claimed that if it was to stand the vessel must be considered as entirely appropriated by the Admiralty, having regard to the nature of the alterations which had been made, or were in course of being made, and they objected to the proposal to hire the vessel. The Admiralty insisted upon their requisition, and completed the adaptation of the barge to their requirements, converting her into a vessel to carry and work hydroplanes or to serve some similar purpose. On the 9th May 1917 the vessel was sent on her trials by the Admiralty.

9. On the 7th Aug. 1917 the Admiralty, by letter of that date, for the first time informed the board that they proposed to purchase the barge from the builders. Up to this date the Admiralty had persisted in their claim to take the barge on hire, and the board had persisted in their objection and in their contention that the Admiralty had possessed themselves of the barge and that the board no longer had any interest in her, save a claim for compensation.

10. The arbitrator found the following facts:

(1) When the alterations ordered by the Admiralty were completed the barge was no longer a hopper barge, and in her converted state would have been useless to the board. It could not have been reconverted into a hopper barge without a large expenditure of time and money or without some risk that it would prove inefficient as a hopper from the effect of the Admiralty's work upon it.

(2) The barge had remained in the possession of the Admiralty up to the date of the statement of the case. There was no evidence as to the arrangement, if any, made by the Admiralty with the builders, but the agreement of reference of the 1st March 1919 contained the following clause: "The Admiralty to settle direct with Messrs. Lobnitz for the hopper which they have had completed to their special requirements."

(3) The Admiralty, when they made their requisition, and also in Aug. 1917, knew that for a long period it would be impossible for the board to replace the barge by building another.

(4) Owing to the war it was in fact impossible for the board to replace the barge, either by purchase or by building, within a less period than three years from the date of the requisition. No suitable vessel could have been purchased at any time. It was admitted that no priority order could have been obtained before the early part of 1919, and therefore no contract for construction could have been placed before that time, and a similar barge could not have been constructed in less than twelve months from the date of the contract.

(5) Between the date of the requisition and the earliest date at which a contract for a similar barge could have been placed the prices of materials and labour rose enormously, and for that reason the barge could not be replaced at less cost than about 70,000*l*. If a priority order could have been obtained, and a contract placed at or shortly after the date of the requisition the cost would have been less.

(6) The condition of the port of Liverpool at the date of the requisition, and at all material times afterwards, was such that it was the duty of the board to replace the barge as soon as possible, and accordingly at the earliest possible date—viz., in Feb. 1919—the board obtained estimates for that purpose. The lowest estimate was that of the original builders, who offered to duplicate No. 798 for 63,000*l*., with a provision for increase or decrease in the event of the increase or decrease of the cost of materials or labour during the construction. The board reasonably and properly accepted the builders' offer, and on the 7th May 1919 a formal contract to replace the barge, as per the original specification and plans, upon the terms of the said offer was entered into. Wages rose during the construction of a barge under this contract, and for the purposes of this case it was to be taken that the amount which the board would have to pay to the builders would not be less than 70,000*l*. The arbitrator further found that the barge could not be completed before the spring of 1920.

11. In these circumstances the board claimed from the Admiralty the difference between 22,750*l*., the contract price of No. 798, and the price that they would have to pay for the barge being built to replace it, and they further claimed a sum of 28,770*l*. for the loss of the services of the barge for the three years which would have elapsed between the date when No. 798 would have been completed and available if she had not been taken by the Admiralty and the date when she would be replaced by the barge being built.

12. The Admiralty did not dispute that the board was entitled to compensation for the loss, by the action of the Admiralty, of the benefit of the contract of the 4th Dec. 1914 for building No. 798, but they contended before the arbitrator that the principles on which damages were assessed for tortious acts or breach of contract had no application to the acts of the Crown in the exercise of its duty to provide for the national defence, and that neither the cost of replacement nor the delay involved therein should be taken into account in the circumstances of the case. Counsel submitted that the measure of compensation should be the difference between the contract price and the value of the vessel when taken.

As regards this contention the arbitrator found the following facts:

13. Owing to the special design of No. 798 there was no market for it or for similar vessels. No instance was produced of the same or similar design and character having been bought or sold in the market. Its value to the board consisted of the services which it was capable of rendering in the port of Liverpool, and except for the purpose of such services it would not have been worth while to build the vessel or for anyone to buy it or to take over the contract for it with a view to continue its character. It had an emergency value to the Admiralty for the purpose of conversion into war plant, but the Admiralty did not furnish the arbitrator with any evidence or estimate of the value to them. They furnished an estimate of her value, based on the value of a cargo steamer of the same tonnage, and this estimate appeared to the arbitrator to be fallacious as the hopper was not a cargo steamer and was not fitted to carry cargo, and was not a vessel of the same cost to build.

14. Inasmuch as the board was bound to replace this vessel on losing possession of it, the arbitrator

thought that it was worth to the board whatever it would cost the board to replace it, limited possibly to the value to the port of the work which it would be capable of doing during its life, and he found that the board would not willingly have parted with their contract for a less sum than that for which it could have procured the building of a similar vessel. The arbitrator was unable to find any other reasonable criteria of value for such a vessel. The cost, to the builders, of the material and labour which they had put into the vessel did not appear to the arbitrator to be such a criterion, in view of the rise in prices since the vessel was laid down, but, if this figure was in any way important, the arbitrator estimated it at 26,000*l.*, or thereabouts, on the 8th Feb. 1917.

15. The increase in cost involved in the replacement was due to the general rise in wages and cost of material, which occurred between the early part of 1917 and 1919, and so far, if at all, as such rise was occasioned by the war it was only indirectly so occasioned; but the war was the direct cause of the work of replacement being delayed until such rise had occurred.

16. As regards the claim for the loss of the services of the barge for the three years preceding her replacement, the delay in replacement was a consequence of the war and was of the nature of the loss and inconvenience caused to the whole community by the war, but the board would not have suffered this loss and inconvenience from the war if the Admiralty had not taken possession of the barge. No suitable hopper could have been bought or hired by the board during that period. There was accumulation and consolidation of silt caused by the board's being short of a hopper for three years, which will be difficult and costly to deal with, and the work will have to be done at a time when wages and expenses had risen much beyond the rates of 1917. It appeared, however, in evidence that the board's claim of 28,770*l.* was arrived at by treating the expenses, such as wages, coal, and similar outgoings, in working a hopper barge for three years as an approximate measure of the value of the work which the barge would have done in that time, as suggested in the case of *The Marpessa* (10 Asp. Mar. Law Cas. 197, 232, 464; 94 L. T. Rep. 168, 428; 97 L. T. Rep. 1; (1906) P. 14, 95; (1907) A. C. 241), upon which counsel for the board relied. In that case the board had the capital value which was invested in the injured dredger and producing no return while it was under repair. In the present the board had not paid for and did not possess the hopper in respect of which they claimed for the loss of services although they would have possessed and have paid for it if the Admiralty had not taken it.

17. The questions for the opinion of the court were:

(1) Whether the board was entitled to recover the difference between the contract price of No. 798 and the cost of replacing her, regard being had to the fact that replacement was impossible at the date of the act complained of and continued impossible for several years?

(2) If the board was not so entitled, how should the compensation be assessed?

(3) Whether the board was further entitled to compensation for the loss of the services of the hopper during the three years mentioned, and upon what principle the compensation, if any, should be assessed?

Greaves Lord, K.C. for the Mersey Docks and Harbour Board.

Sir *Gordon Hewart* (A.-G.) and *G. W. Ricketts* for the Admiralty Commissioners.

Lord READING, C.J.—The questions that arise for the opinion of the court on the case stated by the arbitrator are concerned with the method of ascertaining the compensation to be paid to the Mersey Docks and Harbour Board, which had a contract for the delivery of a special kind of hopper barge, No. 798, which the Government requisitioned. The Government had given notice on the 8th Feb. 1917 that they required the use of the hopper barge and, some question having arisen as to what that meant and whether they were not bound to take over the barge, the matter was settled in Aug. 1917 by the Government's definitely taking the vessel and becoming the owners of it. The Government have settled with Messrs. Lobnitz and Co., who had contracted with the Mersey Docks and Harbour Board for the construction and delivery of the barge, and therefore no question arises as to that. But the difficulty that has given rise to the question submitted to arbitration is (*inter alia*) that the cost of wages and materials has risen so enormously from the year 1917 until the present year, that it would now cost approximately three times the amount to construct this hopper barge as compared with the price fixed by the contract in Dec. 1914, and, to put it shortly, what the Mersey Docks and Harbour Board seek to obtain is compensation for the loss of their hopper barge, and they contend that that compensation should be measured by the amount of the difference in price that they would now have to pay in order to replace the barge of which the Government took possession in Aug. 1917. If the vessel had not been requisitioned, then in the ordinary course, after making allowance for the delay caused by the war and taking into account the fact that the contractors had obtained a priority certificate for the continued construction of the barge, it would have been delivered complete to the Mersey Docks and Harbour Board in April 1917. I assume on the facts that in no circumstances could the board by the exercise of reasonable diligence have obtained before April 1920 delivery of a barge designed and constructed like barge No. 798 as per the contract of Dec. 1914, *i.e.*, that from the year 1917, when the Government requisitioned the barge, the board could not, if they had set to work to replace the barge by a new contract, have got delivery before April 1920, when one bears in mind all the difficulties that there were during the war and the Government control of the materials required and the necessity of a certificate, and so on, before the building of the barge could be completed. Now that substantially means that three years would have elapsed by the time when the vessel would have been completed. When one looks at the facts broadly, for it is certainly not for us here to enter into minute detail, what is the principle on which the compensation is to be measured? In my opinion it is sufficient for the purpose of this case to say that the board is entitled to have their property (which, I assume, would have been in their possession in April 1917) replaced by the Government, and, as it cannot be replaced except by the expenditure of money, the board is entitled to the amount of money which will represent the cost of the replacement to them, and that must be measured in view of the circumstances of the war and the

increase in the cost of wages and materials up to the present time. I think that the true answer to the question put by the arbitrator, whether the board is entitled to recover the difference between the contract price of No. 798 and the cost of replacing her, regard being had to the fact that replacement was impossible at the date of the act complained of and continued impossible for several years, is yes. I do not myself see that there is a very material difference between the principles contended for on behalf of the board and on behalf of the Admiralty. In truth I think that they would lead to the same conclusion. One is assisted very much to that by the finding of fact that the board would not willingly have parted with this contract for a less sum than that for which they could have procured the building of a similar vessel. Therefore, if we adopt the contractual test put forward on behalf of the Admiralty, one gets back to the same conclusion, and from any point of view it seems to me that one must arrive at the same result. I have stated what I think is the answer to the first question Of course all detail is for the arbitrator.

The second question does not arise, in view of our answer to the first.

The answer to the third question, whether the board is further entitled to compensation for the loss of the services of the barge during the three years, and upon what principle the compensation, if any, should be assessed, is, in my opinion, that the board is not further entitled to compensation for the loss of the services of the barge during the three years. I cannot think that the board is in any better position as against the Admiralty than against a wrongdoer, and as to the latter there is the high authority of Gorell Barnes, J. in *The Harmonides* (9 Asp. Mar. Law Cas. 354, at p. 355; 87 L. T. Rep. 448; (1903) P. 1, at p. 6). That was a case of collision, and therefore the value had to be estimated against the wrongdoer and estimated as at the time of the collision. Gorell Barnes, J. there said: "If one goes to the root of the matter, it is obvious that what the shipowners lose, if a vessel like this is run into and sunk, is what it would cost to replace them in the position they were in before the accident." Then he says: "So that the real test, where there is no market, is, as counsel on both sides agree, what is the value to the owners, as a going concern, at the time the vessel was sunk?" That is an authority that the test is the true value to the owners as a going concern, and therefore the Admiralty is not liable to make a further payment in respect of the loss of the services of the barge during the three years.

Further, I think it may also be said that in truth the loss of the services of the barge during the three years is not the direct consequence of the Admiralty having taken the barge; in other words, these damages are too remote for the court to take them into account. Of course one always gets into a difficulty in considering the question of the remoteness of damage, and it is not very easy to reconcile all the authorities. But in none of the numerous cases in which the court has had to fix the compensation to be paid to persons who have been deprived of their property by requisition by the Government has it ever been held that they could recover the damages referred to in the third question which has been put to us.

For these reasons therefore I am of opinion that the questions must be answered in the way that I have indicated.

Avory, J.—I agree, and I will only add a quotation from the case of *The Marpessa* (10 Asp. Mar. Law Cas., at p. 202; 94 L. T. Rep. 168; (1906) P., at p. 33), a quotation which appears to me to apply both to the first and to the third question: "This tribunal, in assessing their damages, may say, as a jury would do, 'We must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation.'"

Roche, J.—I agree.

Solicitors for the Mersey Docks and Harbour Board, *Rawle, Johnstone*, and *Co.*, for *W. C. Thorne*, Liverpool.

Solicitor for the Admiralty Commissioners, *Solicitor to the Treasury.*

Judicial Committee of the Privy Council.

March 23, 25, *and May* 4, 1920.

(Present: The Right Hons. Lords Sumner, Parmoor, Wrenbury, the Lord Justice-Clerk, and Sir Arthur Channell.)

The Noordam (No. 2) and other Ships. (*a*)

ON APPEAL FROM THE PRIZE COURT IN ENGLAND.

Prize Court—Securities—Seizure from letter mail—"Goods"—"Postal correspondence"—"Enemy property"—"Enemy origin"—Reprisals Order in Council of the 11th March 1915—Hague Convention, No. 11, art. 1.

The detention, under the Reprisals Order in Council of the 11th March 1915, was claimed of certain bearer bonds and coupons which had been seized from Dutch vessels in which they had been shipped by letter mail from Holland to ports in the United States. All the securities had been recently purchased in Germany. Some were being forwarded to American buyers by Dutch agents; others had been bought by Dutch dealers for prompt resale in America, or for delivery in respect of sales already made there.

Held, that the securities were not exempted from seizure as "postal correspondence" under Hague Convention No. 11, but, as documents of title, were "goods" within the intention of the Reprisals Order. Further, that, although they were not "enemy property," they must nevertheless be regarded as of "enemy origin" within the meaning of the Order, since they had recently formed part "of the common financial stock of Germany's holding in foreign securities." They were therefore liable to detention under the Order, but there was nothing to prevent a proper application being made for their release to the respondents.

Judgment of the Prize Court varied.

Consolidated appeals from judgment and decrees of the President (Lord Sterndale) of the Admiralty Division in Prize dated the 30th May and the 25th June 1919, and reported 14 Asp. Mar. Law Cas. 406; 122 L. T. Rep. 239; (1919) P. 255.

The appeals were by the Procurator-General from decrees ordering the release to the respondents

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

of certain bearer bonds and securities seized in Dutch mail steamships, the *Noordam*, *Rotterdam*, *Zaandijk*, and *Gelria*, while in course of transit from Dutch ports to New York, and rejecting a claim for their detention under the Reprisals Order in Council of the 11th March 1915.

C. Lawrence (with him Sir *Gordon Hewart*, A.-G., and Sir *Ernest Pollock*, S.-G.) for the appellant, the Procurator-General.

Sir *Erle Richards*, K.C., *Inskip*, K.C., *Dunlop*, K.C., *Theobald Mathew*, *Darby*, and Sir *Robert Aske* for the various respondents.

The following cases were referred to:

Re Cleland, 16 L. T. Rep. 403; L. Rep. 2 Ch. 466, 477;
The Frederik VIII., 13 Asp. Mar. Law Cas. 570; 116 L. T. Rep. 21; (1917) P. 43;
The Baltica, 11 Moo. P. C. 141;
The Dirigo, 14 Asp. Mar. Law Cas. 457; 121 L. T. Rep. 477; (1919) P. 204;
The United States, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 193; (1917) P. 30;
The Kim, 13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215;
The Kronprinzessin Victoria, 14 Asp. Mar. Law Cas. 391; 120 L. T. Rep. 75; (1919) A. C. 261;
Lindo v. *Rodney*, 1782, 2 Doug. 612 n.;
Bullock v. *Dodds*, 1819, 2 B. & Al. 258;
The Leonora, 14 Asp. Mar. Law Cas. 500; (1919) A. C. 974.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—This appeal relates to various bearer securities found in the mails carried on voyages from Holland to the United States by several neutral mail steamers which were stopped and diverted under the Reprisals Order in Council of the 11th March 1915. They were all issued by extra-European Governments or companies, though in some cases they were parts of the issues appropriated to Germany. The respondents are neutral claimants, to whom Lord Sterndale, P., sitting in Prize, released these securities. The Procurator-General appeals. He contends that within the meaning of the Order they all were "goods" and were either enemy property or of enemy origin, and as such should be either condemned or detained. The respondents accept the Order in Council as valid, but contest its application and construction. In addition to traversing each contention of the Crown, they further allege that in any case the securities are exempt from either capture or detention as being "postal correspondence" within the meaning of the Eleventh Hague Convention, art. 1. There are some minor matters in respect of which an appeal is also brought, but as to these their Lordships, having examined the facts, think it sufficient to say that they see no reason to differ from the conclusion of the learned President. The questions above mentioned are those which alone require detailed consideration.

No doubt these securities were documents found in the mail bags of the mail steamers in question, but it cannot be contended that everything found in a mail bag at sea and carried at postal rates or franked by postage stamps, is *ipso facto* "postal correspondence" for the purpose of the Convention. These documents, though printed and engraved matter, are not vehicles of information, and the value of their contents does not lie in what they tell the reader. On the contrary, expressed in common form and earmarked by serial letters and numbers or otherwise, they are identical records of proprietary rights in certain loans and shares or in the interest payable thereon, and, by their terms or by mercantile usage applicable to them, are transferable by delivery. To a *bonâ fide* buyer the document represents the holder's right to a portion of the loan or the share capital as the case may be. They are commonly dealt in; they are a convenient form in which to transfer wealth from one country to another, and they require no separate assignment nor the execution of any instrument of transfer. If, therefore, any incorporeal rights can be assimilated to goods and merchandise, they must be such rights as these documents represent. If any document can stand outside the description "postal correspondence," it must be such a document as these. The occasion is not opportune for an attempt to define the word "correspondence" as used in the Convention, but their Lordships are satisfied that none of these securities come within it. Whether in the circumstances of this case the Eleventh Hague Convention has any application at all is a question which accordingly need not be pursued.

At first sight the word "goods" might seem to be an equally inappropriate description. It must, however, be observed that the word is of very general and quite indefinite import, and primarily derives its meaning from the context in which it is used. Their Lordships were referred to sundry statutes, in which the word is either defined or stated to include specified things. Of the latter kind the Naval Prize Act 1864 was particularly relied on, for it brings within the term "goods" "all things subject to adjudication as prize." This does not advance matters. When, as in that Act, a word is extended by statute to include a named thing, the conclusion naturally is that in its ordinary sense the bare word would have been insufficient to include it. There is further no reason why the definition clause of the Naval Prize Act 1864 should be treated as explanatory of the language of an Order in Council which makes no reference to it.

Their Lordships are of opinion that the cardinal consideration in interpreting the Order in Council is the character and scope of the order itself. The content of the word "goods" differs greatly according to the context in which it is found and the instrument in which it occurs. In a will or in a policy of marine insurance, in the marriage service or in a schedule of railway rates, in the title of a probate action or in an enactment relating to the rights of an execution creditor, the word may sometimes be of the narrowest and sometimes of the widest scope. The question is what is its content here.

This Order was made for the purpose of further restricting the commerce of Germany, and the retaliation, which this Order gives effect to, finds its unquestionable justification in the avowed policy of Germany to prevent crews, passengers, or goods being intrusted to British or Allied ships. That policy was intended to be, and was in fact, carried into effect by sinking ships with all that they contained. The "goods," upon which the Order operates by way of retaliation for such outrages, are things which instead of being destroyed

are to be adjudicated upon, and condemned or detained as the case may be. They are things such as can be loaded on board a ship and discharged from it, placed in the custody of the Marshal of the Prize Court, requisitioned or detained, sold or released. They are such as, having been enemy property, may become neutral property at a definable date. The Order contains no definition of the word. Its general object is recited as being "to prevent commodities of any kind from reaching or leaving Germany." How should the word "goods" be construed in such a context?

If securities such as these are not covered by the word "goods," it is plain that the order as a means of carrying out its declared policy contains a large and lamentable lacuna; not that this is a reason for supplying its defects by doing violence to its language, but that the language may be legitimately interpreted with reference to the general scope of the Order. Of the several things which under the terms of the Order can be predicated of the "goods" to which it refers, no one can be said to be inapplicable to these securities. Their Lordships are of opinion that the scope of this Order is correlative to the enemy policy, which it was intended to defeat. In a British ship these securities were liable to be sunk by enemy action in the name of legitimate warfare; nothing but the clearest defect in the wording of the Order should compel the conclusion that they were not also liable, when carried on neutral ships, to be brought before a Court of Prize to be dealt with after trial in accordance with the terms of the order. "Goods" are not limited to things which are of considerable bulk or weight, though indeed these securities were anything but imponderable. The documents were not mere symbols of a right or title to be transferred by the operation of other instruments. If lost, they could not be proved and given effect to by secondary evidence. They themselves were things of price, the subjects of sale and delivery, irreplaceable and unalterable. No doubt can be entertained that they are within the descriptive word "goods" as used in the order.

Next, when these securities were seized it is plain that in fact they all belonged to neutrals. The appellant contends that they ought to be deemed to be enemy property because by the law of nations belligerent rights are not to be defeated by changes of ownership, while goods are in transit. If the securities have been in Germany since the date of the order, it is said that enemy ownership ought to be presumed, and that no transfer can be effective from the moment of their despatch from somewhere in Germany until their arrival at an ultimate destination in the United States. In order to apply the old rule of prize law to the present circumstances the argument must assume that transit is not confined to sea transit or to transit in the vessel actually seized, but extends to anterior land transit, even through Germany into Holland or through Holland to the Dutch port of departure, before the securities reach the mail steamer. It assumes the inversion of the doctrine of continuous voyage by applying this doctrine to transit away from Germany; it assumes its application to a transit in separate and discontinuous stages, and to articles which are not contraband at all; it assumes that the valid and complete transfer of property by delivery of the documents at the intermediate stages may be disregarded for the present purposes. Their Lordships are not to be understood to accept these assumptions as legitimate, or to express any opinion upon them; nor do they hold that the facts in the present case establish a "continuous transit" from Germany to America, in progress at the time of the seizure, in the sense in which that expression is used by the appellant in this part of the argument. They think that it is not necessary to investigate these assumptions on the present occasion. There is, in any case, a broad ground on which the whole of the appellant's argument on this point fails.

The Order in Council is a reprisals Order—that is to say His Majesty, in the exercise of his belligerent right, has been pleased upon just and adequate provocation to resort to measures not prescribed by the general existing rules of the law of nations. These measures are of his own selection and are defined in such manner as he thought fit to adopt in the terms of the Order. It is just because neutrals are required to submit to an Order, validly and justly made by way of reprisal, that they must also be held entitled to know from the terms of the Order itself what is the extent and limit of their liability under it. If clear terms are used, their clear meaning must be enforced; if ambiguous terms are used, the belligerent cannot ask to have them extended by construction in his own favour. It rested with those who framed the order, within the limits of the Crown's right of reprisal, to select and to state the extent of its exercise. It is the duty of a Court of Prize, administering the law of nations, to protect the rights of neutrals in this matter by limiting their obligation to that which the order itself states, no less than to enforce the obligations which the order duly creates and clearly declares. In the present case, in order to deter neutrals from assisting the enemy by engaging in his commerce, the Order tells them that their goods, if of German origin, are exposed to detention; and by declaring that condemnation applies to enemy property it tells them also that, so far as the order is concerned, what belongs to them will not be condemned, though it may be detained. The words are precise. There is nothing said of "enemy character," nothing added to the words "enemy property" to make them applicable to a date antecedent to that of the diversion, nothing to show that the words are to be deemed to include something to which otherwise they would not extend. How can their Lordships be asked, under the name of construing the plain and simple language of the Order, to declare that it condemns neutral property which has been validly acquired from Germans within a certain time and under certain circumstances, and this not by force of the Order itself, but by an appeal to general rules whose inadequacy made it necessary to bring the special provisions of the Order into existence to meet the enemy's provocation? It is not enough that the second proviso to art. 4 contemplates the release of neutral property. This is to be done only on the application of the proper officer of the Crown, and is discretionary; nor, in any case, is the argument valid that, if a misconstruction of the language leads to hardship, the hardship can be redressed by the action of the executive. Their Lordships are unable to accept the argument of the Procurator-General on this point.

There remains the question of enemy origin. Origin is a quality of the goods, not of the owners or of their intentions or dealings. To decide where a chattel originates may often be difficult; in the

case of things of great durability, often impossible. Origin sometimes refers to the place where raw material was produced, but *ex hypothesi* the Reprisals Order goes beyond the general rules applicable to the produce of enemy soil, since existing rules were found inadequate. Origin means sometimes the place of manufacture of an artificial commodity, and sometimes it is a thing undiscoverable. It is not inconsistent with the enemy origin of goods, which come from Germany, that they have previously come into being elsewhere than in Germany. After a certain lapse of time, or certain changes of circumstances, origin may be of little more than curious or antiquarian interest. This order could not be concerned, for example, with old German machinery or old German books or old German wine imported into Holland many years ago. For present purposes there is no utility in applying to "goods" ideas appropriate only to human beings, such as the effect of an individual's place of birth or race or nationality upon his subsequent rights or obligations.

The best guide is the language and context of the order itself, and the purpose which it was intended to serve. In substance art. 3 and art. 4 of the Order are to the same effect, an inwards movement being dealt with in the one, and an outwards movement in the other. The words "of enemy origin" in the latter must correspond to "with an enemy destination" in the former; certainly no other words do. Neither expression makes any reference to the completion of some one mercantile or financial adventure or transaction; neither is limited in any way to goods which start from, or are bound to, an enemy port. One of the purposes of the order is to prevent commodities of any kind from leaving Germany; as regards certain commodities, namely, such as are of enemy origin but are not enemy property, the means of prevention is diversion, discharge and detention till the conclusion of peace. To origin in such a connection neither the place where the securities were printed or signed or sealed is really material, nor the country in which the undertakings or the debtors, from whom the securities emanate, chance to carry on their affairs.

As to the securities with which this appeal is concerned, in some cases they were bought in Germany for American buyers and received and forwarded to them by their Dutch agents; in some they were bought in Germany by Dutch dealers for the purpose of prompt resale or of delivery under sales already made in the United States. It is clear as a common characteristic that no long time before they were diverted all had formed part of the common financial stock of Germany's holding in foreign securities. What happened was that as part of the liquidation of this stock, either to support foreign exchange or to establish foreign credits or otherwise, these securities, no doubt along with many others, were separated from that common stock and dispatched from a terminus *a quo* in Germany to a terminus *ad quem* overseas. Only in two cases, and those cases of collection of interest coupons, is that terminus elsewhere than in the United States, where doubtless a free market was to be found. There they became merged in the general mass of American-owned securities. In a word, these securities were part of Germany's resources, and the subject-matter of these dispatches had its source in Germany. Their origin does not depend on subsequent and intermediate dealings. That the transfer from the place of their origin to their new resting-place was effected by *bonâ fide* transfers in the ordinary course of financial business and physically by a series of transportations in various vehicles, not necessarily predetermined from the outset, is material to the question of enemy property, but not to that of enemy origin. If it were otherwise the whole order could be made nugatory as to all classes of goods if care were taken in each case to sell to a neutral buyer and to deliver in Germany and to leave the buyer to do the rest. Their Lordships are of opinion that the meaning of "enemy origin" in the order is abundantly clear and satisfies all that a neutral is entitled to require of the language of a Reprisals Order.

Under the terms of art. 4 the following parcels were of enemy origin, and as such were liable to detention:

[The judgment set out the eleven parcels of bonds and coupons which had been purchased in Germany.]

In No. 190 the claimants' affidavit admits the purchase of the coupons in Germany and gives no explanation of the accompanying bond, which therefore their Lordships do not propose to separate from the coupons. The mere fact that bonds bear a German revenue stamp, apparently because they were at some time issued in Germany, does not seem to them sufficient to prove origin, where there is no evidence as to the character of the sellers.

There are other cases as to which the facts are insufficient, either by way of proof or of presumption, to establish such a connection with Germany as would bring them within the term "enemy origin," but it is not necessary to discuss these cases in detail.

Their Lordships, therefore, think that the judgment of Lord Sterndale, which was otherwise correct, should be varied by setting aside the decrees for the release of the securities, numbered and described as above, and by substituting the order for their detention, till it be otherwise ordered, which he should have made. It is not necessary to decide what constitutes "the conclusion of peace," mentioned in the first proviso to art. 4, for the objects of the Order in Council have now been satisfied and there is no further reason why the proper officer of the Crown should not forthwith apply to the Prize Court for the release of the securities to the respondents. The very limited success of his appeal does not entitle the appellant to any order as to costs, which will therefore be borne by the respective parties.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondents *Travers-Smith, Braithwaite,* and *Co.; Parker, Garrett,* and *Co.; Waltons* and *Co.*

April 20 *and May* 4, 1920.

(Present: The Right Hons. Lords HALDANE, MOULTON, and PARMOOR.)

TRINIDAD SHIPPING AND TRADING COMPANY LIMITED *v.* G. R. ALSTON AND CO. (*a*)

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad—Contract—Freight—Agreement to pay rebates on freight—Illegality by foreign law—Performance of contract of carriage—Liability to pay rebates.

Till 1917 *the appellants, with other companies trading between Trinidad and the United States, allowed rebates on freights to traders exclusively shipping by their steamers. The appellants' chief office was in London, and they had branch offices in Trinidad and New York. After* 1917 *they discontinued the rebates, alleging that rebates had been declared illegal by an Act of Congress of the United States.*

Held, that the agreement to allow rebates could not be repudiated after the goods had been carried and the freight paid, since the lex loci contractus *was British, and by British law there was no illegality in the rebate agreement, and the refusal to grant the rebate could not be supported even if the rebate had been made illegal by Act of Congress.*

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of Trinidad and Tobago, dated the 13th Jan. 1919, reversing a judgment of Russell, J. in an action claiming rebate on freight.

The respondents sued the appellants to recover 159*l.* 0*s.* 6*d.*, the amount of agreed rebates upon freights paid by the respondents for the carriage of goods from Trinidad to New York by the appellants' steamships between the 7th Sept. 1916 and the 30th Oct. 1917.

The trial judge dismissed the action, but his judgment was reversed on appeal and judgment entered for the respondents.

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

Foote, K.C. and *Moritz* for the respondents.

The following cases were referred to:

Re Missouri Steamship Company, 6 Asp. Mar. Law Cas. 264, 423; 61 L. T. Rep. 316; 42 Ch. Div. 321;

Ralli Brothers v. *Compania Naviera Sota y Aznar*, *post* p. 33; 123 L. T. Rep. 375; (1920) 2 K. B. 287.

The considered opinion of their Lordships was delivered by

Lord PARMOOR.—This is an appeal against an order of the Supreme Court of Trinidad and Tobago setting aside the judgment delivered by the trial judge, Russell, J. The action was brought to recover the sum of 159*l.* 0*s.* 6*d.*, claimed to be due as a rebate on freights paid for the carriage of cocoa and cocoanuts from Trinidad to New York. The facts are not in dispute, and may be shortly stated.

The respondents are general merchants, carrying on business at the Port of Spain, Trinidad. The appellants are shipowners incorporated in the United Kingdom, with their head office in London, and with branch offices at Port of Spain, Trinidad, and New York, U.S.A. They are members of a shipping conference, in which certain ship-owning companies have mutual arrangements for fixing uniform freight tariffs. These companies, prior to the 30th Oct. 1917, allowed rebates on freight to traders, conditional on their shipping exclusively by steamers belonging to members of the conference. The tariff in force at all material dates was headed: "Freight Tariff Trinidad to New York. Effective 26th Feb. 1916," and after a number of rates for various merchandise it continues: "The rate on cocoa is subject to deferred rebates to conference shippers of 10 per cent. and 5 per cent. on the net freight paid. The rate on cocoanuts is subject to a deferred rebate of 25 per cent. to conference shippers payable on the 30th June and the 31st Dec. in each year on the net freight paid on shipments made during the previous periods of six months ending the 31st Dec. and the 30th June respectively."

In the present instance the rebates claimed come within the terms stated in the general notice. The respondents have complied with the condition of exclusive shipment in steamers belonging to members of the conference; their goods were shipped in a steamer of the appellants and duly carried to New York; and they have paid freight thereon due under the terms of the bill of lading, thus fulfilling all the conditions which, under British law, would entitle them to claim the sum of 159*l.* 0*s.* 6*d.* It was argued on behalf of the appellants that the rebates formed part of a continuing contract between the parties, but in the opinion of their Lordships there is no ground for this contention. Each consignment was carried on a separate contract, and it is a matter of business convenience that the amount due as rebate was paid half-yearly on shipments made during the previous period of six months. The said tariff remained in force without any alteration until the 30th Oct. 1917, when the appellants gave notice to discontinue the payment of rebates on the ground that they had been rendered illegal, as regards shipments to New York, ,under the provisions of an Act of Congress of the U.S.A., which was approved, and had come into operation more than a year previously, on the 7th Sept. 1916.

The contracts under which the rebates are claimed are contracts between British subjects, made in British territory, and therefore to be governed by British law. It is clear that the *lex loci contractus* was British, and that no such question arises as in the case of *Re Missouri Steamship Company* (61 L. T. Rep. 316; 42 Ch. Div. 321). By British law there is no illegality in a rebate agreement such as was made between the appellants and respondents. The contracts have not been frustrated or rendered impossible of performance; on the contrary, the goods have been landed at New York, the freights in respect thereof have been paid, and all conditions have been fulfilled which, apart from any special defence founded on the Act of Congress, would entitle the respondents to claim payment.

The case of the appellants is based on the allegation that the payment of the rebates would render them liable to heavy penalties, under the Act of Congress, approved and brought into operation on the 7th Sept. 1916. It was argued on behalf of the respondents that this Act had no application to the contracts in question, but in the opinion of their Lordships it is not necessary to give any opinion on the construction of the Act of Congress,

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

or to decide whether or not the appellants have rendered themselves liable to penalties. If the respondents are right in this contention, it is clear that the appellants would be liable, but the same result would follow, though the appellants had rendered themselves liable to a penalty, uncertain in amount, but of which the maximum is 25,000 dollars. It may be that the appellants might have declined to ship the goods on the ground that the allowance of a rebate might render them liable to penalties under the laws of the U.S.A. It is not necessary to express any opinion on this point. The appellants did not decline to ship the goods. It is said that when the liability for rebate was incurred, neither party was aware of the change in the law of the U.S.A. The truth is that the appellants have had the advantage of the contracts of carriage; have been paid freights due in respect thereof under the various bills of lading, and are now refusing to fulfil the collateral contract for a rebate allowance on the faith of which the respondents consigned their goods by the appellants for carriage to New York. In the opinion of their Lordships, whatever may be the true construction of the Act of Congress, such refusal cannot be supported. Their Lordships concur in the judgment of the Supreme Court of Trinidad and Tobago, and will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: for the appellants, *Parker, Garrett,* and *Co.*; for the respondents, *J. N. Mason* and *Co.*

March 19, 20, *and May* 14, 1920.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, the LORD JUSTICE-CLERK, and Sir ARTHUR CHANNELL.)

THE URNA. (*a*)

ON APPEAL FROM THE PRIZE COURT IN ENGLAND.

Prize Court—Conditional contraband—Consignment to selling agent—Advances by agent—"Consignee of the goods"—Order in Council of the 29th Oct. 1914, *cl.* 1 (*iii.*).

By the Declaration of London Order, No. 2, *of the* 29*th Oct.* 1914 *conditional contraband is liable to capture on board a vessel bound for a neutral port "if the ship's papers do not show who is the consignee of the goods."*

Held, that an ordinary agent for sale who had not the real control of the destination of the goods was not a consignee of the goods within the meaning of the above order, even if he had advanced a large percentage of the value of the goods, and therefore goods so consigned could properly be condemned.

The Louisiana (118 *L. T. Rep.* 274; (1918) *A. C.* 461, 471) *applied.*

Judgment of the Prize Court affirmed.

APPEAL from a judgment of Lord Sterndale, P., dated the 14th April 1919, condemning 9077 boxes of Californian prunes as contraband of war.

Inskip, K.C. and *Balloch* for the appellants.

Gavin Simmonds (with him Sir *Gordon Hewart,* A.-G.) for the respondent, the Procurator-General.

The following cases were referred to:

The Odessa, 13 Asp. Mar. Law Cas. 27; 114 L. T. Rep. 10; (1916) A. C. 145, 154;

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 Hellig Olav, 14 Asp. Mar. Law Cas. 380; 120 L. T. Rep. 98; (1919) A. C. 526;

The Kronprins Gustaf, 14 Asp. Mar. Law Cas. 464; 121 L. T. Rep. 474; (1919) P. 182.

The considered opinion of the board was delivered by

Lord PARMOOR.—The appellants are a corporation of the State of Illinois, doing business in the States of California, Illinois, New York, and in other places in the United States, as packers, shippers, and dealers in dried fruits and other food stuffs. Alf Hansen is a Danish subject carrying on business as a merchant at Copenhagen, who has acted as selling agent for the claimants at Copenhagen for some years. On the 14th April 1919 the President of the Prize Court made an order condemning 9077 boxes of California prunes as good and lawful prize as contraband of war. These boxes were shipped by the appellants on board the *Urna* on the 26th Nov. 1915 for carriage to Copenhagen, and were consigned for sale to Alf Hansen. On the 24th Dec. 1915 the boxes were seized as prize, and required to be discharged at the port of Bristol. At the hearing before their Lordships two questions were raised: (1) Whether the goods, which were conditional contraband, were destined for Germany? (2) Whether they were protected by the Order in Council of the 29th Oct. 1914?

A statistical table was put in evidence, which proved that in 1915 the imports into Denmark of dried fruits were 18,651 tons, whereas the annual average of imports before the war (1911-1913) were 6300 tons. The President has found that the statistical evidence establishes a case which throws upon the appellants the onus of showing that the goods were not going to Germany. Their Lordships concur in this opinion. There is ample statistical evidence to place an obligation on the appellants to show that the destination of the goods is innocent. The President further finds that it is impossible for him to say that the appellants have discharged the onus thrown upon them, and their Lordships concur in this finding.

The goods are said to have been consigned in pursuance of a verbal agreement made between Alf Hansen, the agent of the appellants in Copenhagen, and A. W. Porter, a vice-president of the appellants, at that time in Copenhagen. Under this Alf Hansen undertakes to sell goods for the Armsby Company, advancing 70 per cent. of the value. There is no evidence that any consignment other than the boxes of California prunes was sold on these terms, and Hansen received notice of shipment for the first time on the 29th Nov. 1915. So far as has been ascertained, no goods belonging to the claimants have been previously condemned except in the case of what is called the "Hammerstrom Group." In this case it is said that the appellants did not put in an affidavit through inadvertance, but it is not denied that the appellants were from time to time in fact sending goods to Germany. The President in his judgment deals at length with a letter written in July 1915 from the firm of J. and T. Lauezzari, and with the explanation made in the affidavit of Mr. Lester on behalf of the appellants. In this it is stated that

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

J. and T. Lauezzari were simply a centre from which a quotation from the appellants was radiated through Continental Europe. J. and T. Lauezzari, however, carried on business at the same address as Jantzen and Deeke, who carried through a transaction with Broderna Hammerstrom for the appellants, with the intention of sending on contraband goods to an enemy destination. The explanation given by Mr. Lester is set out in the judgment of the President. Their Lordships concur with the conclusion of the President that the explanation put forward by the appellants is not satisfactory, and it is not necessary to restate all the facts in detail.

In addition to this instance there are a series of intercepted messages and letters from the appellants of a character not free from suspicion. On the 23rd Nov. 1914 a wireless message was sent to Christian Eckardt, of Hamburg, indicating that the appellants were dealing or prepared to deal with him. Of this intercepted message no explanation is given. A more important message of the 17th March 1915 was sent to the Bulsing Company of Rotterdam, asking them to notify Behn and Son, of Hamburg, that the appellants had consigned apricots to them at Rotterdam. Again no explanation is forthcoming. On the 4th Nov. 1915 a wireless message was sent to ship peaches to Rabe Neuschafer, of Hamburg, under cover of the name of Rudolf Kolmodin, of Stockholm. In addition to direct dealings with Germany, there were consignments from the appellants to Nils Soeron, of Gothenburg, and Ekstrom and Leffler of the same city, both of whom had been engaged in assisting German trade during the war, as stated in the affidavit of Mr. Greenwood. There were also consignments to Clarholm and Bergman, of Gothenburg, who are merchants dealing in dried fruits and other colonial products. There is, however, no evidence that Clarholm and Bergman have been engaged in forwarding goods to Germany. All these transactions tend to confirm the judgment of the learned President that the goods in question were conditional contraband destined for Germany, and that they are subject to condemnation unless it can be established that they are protected by Order in Council of the 29th Oct. 1914.

In the opinion of their Lordships it would be impossible to say that an ordinary agent for sale is a "consignee of the goods" within the Order in Council of the 29th Oct. 1914. Such an agent would not have the real control of the destination of the goods. It would be within the power of his principal to give instructions from time to time. The meaning of the words in the Order was decided in *The Louisiana* (*sup.*): "The consignee of the goods in the Order in Council of the 29th Oct. 1914 means some person other than the consignor to whom the consignor parts with the real control of the goods."

In the present instance Alf Hansen was in the position of an agent for sale who had advanced 70 per cent. of the value of the goods consigned to him. Whatever rights of lien or otherwise Alf Hansen might have, so long as the advance made by him in respect of the goods was outpaid and outstanding, there is no evidence that there was any special arrangement that he would not be subject to the direction of the appellants in making sales, or that the appellants might not from time to time determine their ultimate destination. In respect of his advance, and apart from special conditions, the agent would not be in a better position to control the destination of goods, owing to his advance of 70 per cent. of their value, than the pledgee of the whole cargo of a ship seized as prize; and their Lordships have determined in *The Odessa* (*sup.*) that legal ownership is the sole criterion. In this case admittedly the legal ownership remains in the appellants. It is only as such owners that they are entitled to make their claim. The following passage occurs in the judgment of Lord Mersey: "If special rights of property created by the enemy owner were recognised in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might for example in every case borrow on the security of the goods an amount approximating to their value from a neutral lender, and create in favour of such lender a charge or lien or mortgage on the goods in question."

In the opinion of their Lordships the advance of 70 per cent. by Alf Hansen does not, in the absence of any other special conditions, alter the character of the ownership of the goods in question, or constitute the agent for sale a consignee within the meaning of the Order in Council of the 29th Oct. 1914. At the same time their Lordships desire to say that they find no evidence to suggest that Alf Hansen did not act throughout in an honourable and straightforward manner.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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

Solicitor for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 26, 27, *March* 2, 3, *and* 26, 1920.

(Before Lord STERNDALE, M.R. and WARRINGTON and SCRUTTON, L.JJ.)

RALLI BROTHERS *v.* COMPANIA NAVIERA SOTA Y AZNAR. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — English contract—Freight payable in Spain—Payment of part of freight illegal by Spanish law — Implied condition — Mutual inability to perform—Conflict of laws—Restraint of princes—Mutual exception.

An English firm chartered a Spanish vessel from Spanish owners to carry a cargo of jute to Spain. The charter-party, which was in English, made in London in charterer's usual form, provided that part of the freight should be paid by the charterers in London when the vessel sailed, and the balance at the port of discharge in Spain, by the receivers of the cargo, who were Spaniards. It contained clauses terminating the liability of the charterer on shipment of cargo, except for the payment of

(*a*) Reported by L. H. BARNES and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

freight, and excepting (inter alia) "*restraints of princes.*" *There was also a clause submitting disputes to arbitration in London.*

When the vessel arrived at the port of discharge the balance of freight payable was, owing to fluctuations in the rates of exchange, in excess of the amount fixed by a decree of the Spanish Commission of Supplies. The decree was issued on the day previous to that on which the charter-party was dated. The decree, which was shortly afterwards confirmed by Royal Proclamation, subjected to penalties persons paying or receiving freight for jute in excess of the specified rate. The receivers refused payment in excess of the rate fixed by the decree.

The shipowners sued the charterers for the balance.

Held, that the charter-party was an English contract and that the charterers were liable for the balance of the freight; but that there was an implied condition excusing the parties from obligations which neither was able legally to fulfil. The Spanish decree made illegal the payment or receipt of freight in excess of a certain figure at the place where the material part of the contract was to be performed, and the charterers were therefore excused from paying any higher rate.

The mutual application of the exception "restraint of princes," upon which Bailhache, J. had in part based his decision, not considered by the Court of Appeal.

Appeal dismissed.

Ford *v.* Cotesworth (23 *L. T. Rep.* 165; *L. Rep.* 5 *Q. B.* 544) *and* Cunningham *v.* Dunn (3 *Asp. Mar. Law Cas.* 595; 38 *L. T. Rep.* 631; 3 *C. P. Div.* 443) *approved and followed.*

Jacobs, Marcus, and Co. *v.* Crédit Lyonnais London Agency (50 *L. T. Rep.* 194; 12 *Q. B. Div.* 589) *referred to.*

Decision of Bailhache, J. affirmed.

AWARD of umpire stated in the form of a special case. Differences having arisen between the owners and the charterers of the steamship *Eretza Mendi* (1) as to the liability of the latter for payment of freight, and (2) as to the amount of freight payable by the charterers if liable, the matter was referred to arbitration. The facts as found by the umpire were as follows:

Ralli Brothers (hereinafter called the charterers) were a firm of merchants having their head office in London, England.

Compania Naviera Sota y Aznar (hereinafter called the owners) were a Spanish company having its head office at Bilbao, Spain. The latter were the owners of the steamship *Eretza Mendi*, which sailed under the Spanish flag. The owners acted in the charter-party, under which the arbitration arose, by their agents Sota and Aznar, a firm of shipbrokers in London.

Godo and Co. (hereinafter called "the receivers") were a Spanish company having their place of business in Barcelona.

On the 2nd July 1918 Ralli Brothers sold to Godo and Co., Barcelona, a cargo of jute for shipment per *Eretza Mendi*, Calcutta to Barcelona, half freight payable by Ralli Brothers on steamer sailing from Calcutta and the other half payable by Godo and Co. at Barcelona. The price agreed for the cargo included the freight thereon.

On the 3rd Dec. 1918, Ralli Brothers invoiced to Godo and Co., Barcelona, 29,338 bales of jute at sundry prices per ton—contract dated the 2nd July 1918—steamship *Eretza Mendi* for Barcelona.

	£	s.	d.
The amount of the said invoice was	576,969	2	2
Freight at £50 per 5 bales £293,380			
Less advance 146,690	£146,690	0	0
	430,279	2	2
Less port dues on £293,380 at 6 per cent.	17,602	16	0
Payment net cash	£412,676	6	2

The umpire found that the receivers thereby were given credit for part of the freight and the amount thereof they were to pay to the owners was part of the purchase price of the goods sold, and they were to make the payment as agents for the charterers.

On the 3rd July 1918, Ralli Brothers, London, chartered, on their own form of charter, the steamship *Eretza Mendi*, owned by the Compania Naviera Sota y Aznar, of Bilbao, for a full cargo of jute from Calcutta to Barcelona, Valencia, Alicante, Cadiz, Pasages, or Bilbao, as ordered on signing final bills of lading.

The charter-party form used was peculiar to Ralli Brothers, and was printed in London. It was drawn up in London for the voyage to be made by the *Eretza Mendi* and was signed in London by Ralli Brothers as charterers and by Sota and Aznar, of London, under telegraphic authority from and as agents for owners.

By clause 1 of the charter-party the freight was agreed at 50*l.* per ton of five bales.

The clauses of the charter-party provided, *inter alia*:

2. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and robbers, arrests and restraints of princes, rulers, and people, or accidents of navigation excepted. Strandings and collisions and all losses and damages caused thereby are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners, but nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, ports or other openings in the fabric of the ship, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage, but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners, or any of them, or of the ship's husband or manager.

5. Charterers to have the option of underletting the vessel in whole or part, they remaining responsible for due fulfilment of this charter.

22. Charterers' liability to cease on completion of shipment, they remaining responsible for freight, dead freight, and demurrage in loading, if any.

25. The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo, by cash or approved bills (at charterers' option) at the current rate of exchange for bankers' short bills on London.

26. 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.

29. Any dispute that may arise under this charter to be settled by arbitration, each party appointing an arbitrator, and should they be unable to agree, the decision of an umpire selected by them to be final. The arbitrators and umpire are all to be commercial

men and resident in London, and the arbitration to take place there. This submission may be made a rule of the High Court of Justice in England by either party.

30. On receipt of telegraphic advice of steamers sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash, without discount, one half of the total freight earned less any disbursements under clause 18, such payment to be a first charge against the total freight earned, and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due on the vessel's arrival at discharging port. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on arrival of the vessel and the remainder concurrent with discharge.

On the 23rd Sept. 1918 the *Eretza Mendi* arrived at Calcutta to load under the above-mentioned charter.

On or about the 12th Oct. 1918 the *Eretza Mendi*, having completed the loading under the said charter, sailed for Barcelona.

On the 22nd Oct. 1918 the half freight, viz. 146,690*l.*, due on telegraphic advice of steamer sailing from Calcutta, was paid.

On the 28th Dec. 1918 the *Eretza Mendi* arrived at Barcelona to discharge.

On the 2nd Jan. 1919 Godo and Co. notified F. Withy and Co., Barcelona, the steamer's agents, that if the freight as per bills of lading exceeded the official tariff rate they reserved the right to claim the payment of the difference which the final account on the said head might show in their favour.

On the 3rd Jan. 1919, Godo and Co. paid 50,000*l.* on account of freight to F. Withy and Co.

On the 4th Jan., Godo and Co. wrote to F. Withy and Co. that they were convinced by competent persons that freight must be paid at the official rate of pesetas 875, per ton of 1000 kilos, and submitted their statement of the freight due to the *Eretza Mendi* as follows:

	Pesetas.
29,338 bales of 400 English lbs. at 182 kilos per bale, 5,339,516 kilos at 875 pesetas per 1000 kilos	4,672,076.50
Paid on account:	
£146,690 on departure of vessel	
50,000 on arrival	
£196,690 at the exchange of 23.75	4,671,387.50
Remaining to be paid—Pesetas	689.00

The umpire found that the balance so alleged was not the correct one. It was, in fact, 129,375.50 pesetas. The umpire explained in a letter that he arrived at this figure by taking the rates of exchange on the dates when the two sums were paid.

On the 8th Jan. 1919 the captain wrote to Godo and Co. demanding from them the payment of freight at 50*l.* sterling per ton, and, having no reply, he made a demand upon Godo and Co. on the same day through a notary, informing them that he would apply for the deposit of the cargo as security for the freight owing.

On the 10th Jan. 1919 Godo and Co. wrote the captain acknowledging his notarial demand, and continued as follows:

There having been made on the 14th Sept. last a Royal Order of the Ministry of Supplies, by which by virtue of the powers given to the Government in the law called the Ley de Subsistencias of the 11th Nov. 1916 there was fixed as the maximum freight for the transport of jute for India to Spain 875 pesetas per ton, it is evident that all Spanish shipowners must respect and comply with that sovereign provision, which having been inspired by consideration of the general interest and public policy, must prevail over any private agreements or contracts. By virtue thereof, as we stated in our said letter of the 4th inst., the settlement of the freight must take place in the following manner.

Godo and Co. then reproduced in this letter their freight statement of the 4th Jan. 1919, and repeated that there were only 689 pesetas due to complete the freight, which sum they called upon the captain to receive. They refused to pay freight as demanded by the captain, and failing collection by the captain of the 689 pesetas as the balance of freight they notified him of the deposit of the said sum and called upon him to abstain from delaying the delivery of the cargo and from demanding its deposit.

On the 13th Jan. 1919 Godo and Co. wrote the captain that he had unjustifiably detained discharge of *Eretza Mendi* since the 9th Jan., and maintained that freight in full had been paid in accordance with the Royal Order of the Ministry of Supplies of the 14th Sept. 1918, and demanded that the discharge be no longer delayed..

On the 13th Jan. 1919 the captain informed Godo and Co. that, owing to the non-fulfilment by them as holders of the bills of lading of the terms of the charter-party, he was obliged to suspend the discharge of the cargo, and that he held them responsible for any damages and losses caused by the stoppages of the discharge, especially for any demurrage incurred.

The umpire then referred to proceedings that were taken in various Spanish courts. So far as they are material they were as follows:

On the 21st Jan. 1919 the captain applied to the Spanish court to order the deposit of the cargo and that Godo and Co. be required to pay the sum of 96,690*l.*, or its equivalent in pesetas, as the amount of the freight due, failing which that the cargo should be sold. The court granted the order, but on the 27th Jan. 1919, Godo and Co. deposited the sum of 2,286,718.50 pesetas as the equivalent of the sterling sum demanded at the exchange of the day, and petitioned the court to order this sum to be placed in the general deposit fund and to order the cargo to be delivered to them. The court granted the order. The captain, however, refused to continue the delivery of the cargo, and his appeal against the order was still pending on the 15th Feb. 1919.

By a decree dated the 2nd July 1918 of the General Commission of Supplies made under the Spanish "Ley de Subsistencias," and by a royal decree of the 14th Sept. 1918, it was provided: "For goods coming from other countries, the following rates shall rule: Jute 875 pesetas per ton . . . "

The umpire found as a fact that this decree came into force in Sept. 1918 in Spain and had the force of law.

The rates of exchange for bankers short bills on Barcelona, on the material dates were:

July 3, 1918	....	17.25
Oct. 2, „	....	23.15
Oct. 22 „	....	22.90
Dec. 27 „	....	23.72
Jan. 3, 1919	....	23.67

The umpire found as a fact that on the 19th April 1919, 23,064 bales of jute had been discharged from the *Eretza Mendi*, leaving about 6274 bales still to be discharged.

The owners, by their points of claim filed the 17th April 1919, claimed the sum of 96,690*l.* as balance of freight, together with interest at 5 per cent. from the 25th Dec. 1918 to the date of payment. At the hearing, however, they altered their claim to one for damages for breach of the charter-party by non-payment of, or refusal to pay, the balance of the freight. The claim was so treated in the argument.

They contended (*a*) that the contract was an English contract, to be decided by English law; (*b*) that the charterers were liable for the freight under the terms of the charter-party; (*c*) that deposit in court in Spain was not payment of the freight under the charter; (*d*) that while payment under the charter was required in Spain at current rates of exchange on London, they were entitled to an award of damages calculated at the rate of exchange at the date of the breach, such damages to be payable in London in sterling.

At the hearing the charterers contended (1) that the freight was not due, as the cargo was not fully discharged; (2) that the arbitration was premature, as the matter was still pending in the Spanish courts; (3) that they were only in the position of guarantors, the primary liability being on the receivers of the cargo; (4) that any question as to the freight and the payment must be governed by Spanish law; (5) that under the charter-party the balance of the freight had to be paid in Spanish currency at the port of discharge, and that this was prohibited by Spanish law; (6) that payment was prevented by restraint of princes; (7) that payment had been made by the deposit in court in Spain of the amount claimed.

The umpire continued:

The questions for the opinion of the court are as follows on the facts so found:

(*a*) Are the charterers liable for the freight reserved under the charter-party?

(*b*) If they are, was that liability discharged by the payment into court in Spain by the receivers to the cargo?

(*c*) If the charterers are not liable for the freight reserved, are they liable for the amount which, with that part of the freight already paid, would amount to 875 pesetas per ton of 1000 kilogrammes?

(*d*) If they are so liable, was that liability discharged by the said payment into court?

1. Subject to the opinion of the court, I am of opinion that the charterers are liable for the freight reserved and that the payment into court did not discharge them from that liability. That they committed a breach of that obligation in refusing to pay the freight as demanded by the owners, and I assess the damages in respect thereof in the sum of 35,074*l.* 14*s.*, and I direct that the charterers pay that sum in sterling to the owners in London with interest thereon in the meantime at 5 per cent. per annum from the day of the date of this award to the day of payment inclusive, . . . together with the costs of the award and the owner's costs of the reference.

2. If the court is of opinion that the charterers are liable for the freight reserved, but that the liability was discharged by the payment into court in Spain, then I find that the charterers committed a breach of their obligation, and award as damages the sum of 137*l.* 0*s.* 8*d.*, being the sum of 41*l.* 1*s.* 11*d.* interest on 50,000*l.* from the 28th Dec. 1918 to the 3rd Jan. 1919, and 95*l.* 18*s.* 9*d.*, interest on 23,345*l.* from the 28th Dec. 1918 to the 27th Jan. 1919, at 5 per cent. per annum, and I direct that the charterers pay this sum of 137*l.* 0*s.* 8*d.* forthwith in sterling to the owners in London, with interest at 5 per cent. per annum from the date of this award till the day of payment inclusive, and also the costs of the award.

3. If the court is of opinion that the charterers are not liable for the freight reserved, but are liable for freight at the rate of 875 pesetas a ton of 1000 kilos, and that such liability was not discharged by the payment into court in Spain, then I find and award that the charterers committed a breach of their obligation when they (or the receivers on their behalf) alleged that the total remaining liability for freight in respect of 29,338 bales of jute was 689 pesetas, and repudiated their liability to pay more, whereas the total liability for freight on such amount of cargo calculated at the rates of exchange ascertained on the various dates of payment was 129,375.50 pesetas, and I award as damages in respect of such breach the sum of 5*l.*, and I direct that the said sum of 5*l.* be paid forthwith by the charterers to the owners in sterling in London, with interest at 5 per cent. per annum . . . and costs of this award. . . .

4. If the court shall be of opinion as in the last alternative mentioned, but that the charterers' liability was discharged by the payment into court in Spain, then I find and award that the charterers have not committed a breach of their obligation, and I direct the owners to pay the costs of this award, and the costs of the charterers' of this reference to be taxed. . . .

5. If the court is of opinion that the charterers are not liable for the freight reserved under the charter party, nor for freight at 875 pesetas a ton of 1000 kilos., then I find and award that the charterers have not committed a breach of their obligation and I direct that the owners pay the costs of this award and the costs of the charterers to be taxed.

The umpire based these alternative awards on the fact that 23,064 bales had been delivered, and they were not to affect the charterer's liability (if any) to pay freight on the balance of the cargo undischarged on the 19th April 1919.

On the 3rd and 4th Dec. 1919 the case came on to be heard before Bailhache, J.

Neilson, K.C. and *Clement Davies* for the charterers.—The Spanish law relieves the charterers of their liability under the charter. This was a Spanish ship belonging to Spanish owners, and one of the terms of the charter-party was that part of the freight was to be paid in pesetas at Barcelona, where the cargo was to be delivered. The Spanish law was incorporated in the charter-party and the charterers were entitled to refuse to pay more than the 875 pesetas per ton, which was the amount allowed by the Spanish law. Both parties were prevented from performing their contract owing to the Spanish decree; it was illegal for the charterers to pay, and for the receivers to receive, more than the 875 pesetas per ton. Further, the charterers are excused by the clause as to restraint of princes, which is a mutual clause. The umpire was wrong in his method of arriving at the amount due, which should be based on the rate of exchange at the date of the arrival of the ship at Barcelona. The rate fixed by the Spanish decree applies to the total freight. [Bailhache, J.—You must take the current rate of the day in estimating the value in pesetas of the amount of freight paid in Calcutta.] The umpire was also wrong in making his award in sterling, it should be

in pesetas in Spain. The receivers have deposited the amount in court in Spain, that is, a payment of the freight, and the charterers are only liable if the receivers do not pay. They referred to:

Jacobs v. *Crédit Lyonnais*, 50 L. T. Rep. 194; 12 Q. B. Div. 589;
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;
Barrie v. *Peruvian Corporation*, 73 L. T. Rep. 678; (1896) 1 Q. B. 208;
Re Newman and Dale Steamship Company and British South American Steamship Company, 9 Asp. Mar. Law Cas. 351; 87 L. T. Rep. 614; (1903) 1 K. B. 262.

R. A. Wright, K.C. and *Claughton Scott* for the owners.—The charter-party is an English contract and must be interpreted according to the law of England. There is an express agreement by the charterers to pay freight at 50*l.* per ton, and the cesser clause is altered so that even after the ship has been loaded the charterers remain liable. The payment of the freight is on a sterling basis; part of the freight has to be paid in pesetas in Spain, it is true, but that payment must be the equivalent of the balance of the amount in sterling. The receivers have refused to pay the half of the freight at the port of discharge, owing to the Spanish decree but that does not excuse the charterers who are bound by an absolute promise to pay. The position is the same as that in *Jacobs* v. *Crédit Lyonnais* (*sup.*), in which it was held that the defendants were not excused from performing their contract to deliver a cargo by reason of a French law making it illegal. The clause as to restraint of princes is not a mutual clause, but is for the benefit of the owners only. Even if it is mutual the charterers still remain liable, and if the payment in pesetas in Spain is illegal, the contract must be performed in some other way. The payment into court is not a payment to the owners under the contract. They referred to

Blackburn Bobbin Company v. *T. W. Allen and Sons*, 119 L. T. Rep. 215; (1918) 1 K. B. 540;
Bracmount Steamship Company v. *Andrew Weir and Co.*, 11 Asp. Mar. Law Cas. 345; 15 Com. Cas. 101; 102 L. T. Rep. 73.

Neilson in reply.

Cur. adv. vult.

Dec. 17, 1919.—Bailhache, J. read the following judgment: The facts of this case, so far as they are relevant to the point submitted to me for decision, are these. On the 3rd July 1918, Messrs. Ralli Brothers of London made a charter-party through the English agents of the Compania Naviera Sota y Aznar, a company whose head-quarters are in Spain, whereby they chartered a Spanish steamship to carry a cargo of jute from Calcutta to Barcelona at a freight of 50*l.* per ton, which worked out on the cargo loaded to about 293,000*l.* Of this sum one-half was to be paid to the owners in London on receipt of telegraphic advice of the steamers sailing from Calcutta, and the balance was to be paid at Barcelona by the receivers of the cargo as to one-half on arrival and as to the remainder concurrently with the discharge. The freight payable at Barcelona was to be paid in cash or approved bills at charterer's option at the current rate of exchange for banker's short bills on London. There was a cesser clause, but the charterers' liability to pay freight was preserved. There was also an exception clause to which I will revert later. The steamship duly sailed from Calcutta, and the freight payable on that event was paid, amounting to 146,690*l.* The steamship arrived at Barcelona on the 28th Dec. 1918. Meanwhile on the 2nd July 1918, a circular was issued on behalf of the Spanish Commission of Supplies, a commission apparently set up under the Spanish Emergency War Legislation, to the effect that freight on jute to Spain was not to exceed 875 pesetas per ton. This was confirmed by Royal Proclamation on the 14th Sept. 1918. The freight reserved by the charter-party was largely in excess of 875 pesetas per ton, and the situation on the arrival of the steamship at Barcelona was that the charterers had bound themselves to pay a higher freight than they were by Spanish law entitled to pay, or the owners to receive.

On these facts the question arises: Were the owners entitled to demand from the charterers the contractual freight, or were they only entitled to demand the freight as limited by the Spanish law? The umpire has awarded to the shipowners the contractual freight. In order to answer this question the first point to be decided is: What is the proper law of the contract? That again is a question of intention to be gathered from the circumstances and from the form of the contract. The charter-party was made in London. It is in English, is on Messrs. Ralli's own form, and it contains an arbitration clause under which disputes are to be decided by commercial men resident in London, and the submission may be made a rule of the English High Court. The owners' agents carry on business in London, but the owners are Spaniards, the ship is Spanish, the port of discharge was Spanish, and the balance of freight was payable there in Spanish currency. There are three possibilities. It may be the law of the flag, or, as performance was to take place in Spain, the law of Spain, which is in this case the same, or it may be English. The presumption in favour of the proper law of the contract being English is not, I think, nearly so strong as it was in *Jacobs* v. *Crédit Lyonnais* (*sup.*), but I will assume that the parties intended English law to apply to the construction of the contract and to the consequences attaching to non-performance. It seems to be considered that the presence of an English arbitration clause and the provision for making the submission a rule of court are almost conclusive on the point. The charter-party was, however, to be carried out by discharge of cargo and payment of freight in Spain, and there is considerable authority for saying that with reference to these parts of the contract which are to be performed in Spain, the law to be applied is Spanish law, although the proper law of the contract is English, a presumption which is not lessened by the fact that the ship is Spanish, as are her owners, see *Chatenay* v. *Brazilian Submarine Telegraph Company* (63 L. T. Rep. 739; (1891) 1 Q. B. 79). There is, in my opinion, no inconsistency in holding that a contract is an English contract, and to be construed according to English law, but that for some of its incidents the English courts are to have regard to the law of the country in which those incidents are to take place. Probably the true view is that this charter-party incorporates

the law of Spain so far as regards the mode in which any part of it had to be performed in Spain, but that where there has been a failure to perform the contract in Spain, the court, in considering whether there has been a breach of the contract or not, considers the failure and its consequences from the standpoint of English law, and will not admit an excuse which might be valid by Spanish law, unless it was also valid in England. This was the decision in *Jacobs* v. *Crédit Lyonnais* (*sup.*), where an attempt was made to incorporate into an English contract an exception of *vis major* upon the ground that under the circumstances of that case the French courts would have done so.

The next point to be determined is the effect to be given in construing an English contract to a prohibition upon its performance by the municipal law of a foreign country where the prohibited acts were to be performed. If instead of the Spanish proclamation there had been an English proclamation limiting freight, there would have been a supervening illegality, and performance of the contract according to its tenor would have been *pro tanto* excused. The owners say that no such effect is to be given to the Spanish Proclamation, and that it affords no excuse to the charterers for refusing to pay the full freight, although that freight is to be paid in pesetas in Spain. For this they relied on *Jacobs* v. *Crédit Lyonnais* (*sup.*). I have stated what in my opinion that case decided, but the decision was so strongly relied upon by counsel for the owners in this case that I prefer to justify my statement of its effect by a higher authority than I can claim to be. Mr. Dicey in his book on Conflict of Laws (2nd edit.), dealing with that case, says on p. 554: "*Jacobs* v. *Crédit Lyonnais* suggests the conclusion that an English contract to be performed in France, the performance whereof is, at the time when the contract is made, lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the headnote to the report of *Jacobs* v. *Crédit Lyonnais* (*sup.*), and by some expressions in the case, but is (it is submitted) erroneous. *Jacobs* v. *Crédit Lyonnais* (*sup.*) only decides that a person who enters into an English contract, *i.e.*, a contract governed by the law of England, is not excused for its non-performance in France by circumstances which take place after the contract is made and afford a legal excuse for non-performance under French, though not under English, law. It does not appear from the case that it would have been illegal under French law to have shipped the cargo, but only that the shipping was prevented by *force majeure*, namely, by the action of the rebels. This hindrance was a valid excuse according to French law, but not according to English law; hence, in an English court it would not be a valid defence for non-performance of an English contract. If the shipment had been a violation of French law this would apparently have been a valid excuse in an English court for the non-shipment of the cargo, *i.e.*, the non-performance of the contract." In that case the defendant had contracted to ship a cargo of esparto grass from Algeria and had failed to perform his contract because of an insurrection in that country. By French law, such an insurrection amounted to *force majeure*, and by French law *force majeure* would have been a defence. It was there held that the contract was an English contract. It does not appear that the shipment was illegal by French law, and the case does not, I think, decide that an English court will enforce under the provisions of an English contract the doing of something in a foreign country which is illegal by the law of the country in which the act is to be done; see particularly the observations of Lord Bowen on p. 603. What was attempted to be done in that case was to import a *vis major* clause into an English contract which contained no exceptions clause, and would thus be contrary to the canons of construction applicable to an English contract. If Mr. Dicey's statement of the effect of that decision is correct, as I think it is, it obviously does not support the shipowners' contention. The impossibility there was one of actual fact and not of foreign law. There are, however, other authorities in the shipowners' favour. Lord Ellenborough laid it down in *Barker* v. *Hodgson* (1814, 3 M. & S. 267, at p. 270) that if the performance of the contract had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and the defendant would have been excused for the non-performance of it, and not be liable in damages, but if in consequence of what had happened in a foreign country the freighter was prevented from furnishing a loading there which he had contracted to furnish, the contract was neither dissolved nor was he excused from performing it, but must answer in damages. There are other authorities to the same effect, *e.g.*, *Sjoerds* v. *Luscombe* (1812, 16 East 201), and in *Kirk* v. *Gibbs* (1857, 1 H. & N. 810) a plea alleging prevention of loading of cargo by the regulations of a foreign Government was held bad on demurrer. In that case a loading pass was necessary, and the charterers had undertaken to obtain it, and failed to do so. On the other hand there is authority for the proposition that when the municipal law of a foreign State imposes an equal disability on both contracting parties, neither of them can sue the other, although the contract is English: (see *Ford* v. *Cotesworth*, *sup.*, and *Cunningham* v. *Dunn*, *sup.*). Mr. Carver, in his book Carriage by Sea, 6th edit, s. 229, criticises the principle of joint inability as applied to these cases, and points out that it might have been applied with equal force in *Barker* v. *Hodgson* (*sup.*) and *Sjoerds* v. *Luscombe* (*sup.*). In Scrutton, L.J.'s work on Charter-parties, 9th edit., it is suggested on p. 327 that *Ford* v. *Cotesworth* (*sup.*) and *Cunningham* v. *Dunn* (*sup.*) are reconcilable with *Barker* v. *Hodgson* (*sup*) and *Sjoerds* v. *Luscombe* (*sup.*), by the presence in the latter cases of a definite time for loading or unloading, and its absence in the former, citing for this a passage from the judgment of Martin, B. in *Ford* v. *Cotesworth* (*sup.*). This suggestion is not, I think, in accord with the view taken of *Ford* v. *Cotesworth* (*sup.*) in *Cunningham* v. *Dunn* (*sup.*). In that case Brett, L.J., says at p. 449: "*Ford* v. *Cotesworth* is in point and seems to me to decide this case; it establishes that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other." If this is putting the decision in *Ford* v. *Cotesworth* (*sup.*) too high, it was necessary to go that length in *Cunningham* v. *Dunn* (*sup.*). That was an action by charterers against owners for not having the ship *Rainton* ready to load at Valencia. The

reason she was not ready was that she had military stores on board. That fact was not a breach of her charter-party, but it would have prevented her loading, and rendered her liable to confiscation by the Spanish authorities, and she refused to go to Valencia. Had she gone there the charterers would have been prevented from loading by Spanish law, and she would have been prevented from taking her cargo on board by the same law. There was no exception in the charter-party of restraints of princes and the owners' contractual obligation to go to Valencia was absolute. It was held, however, that as the prevention of loading affected both owners and charterers, the owners were excused from going to Valencia. Cotton, L.J. puts the position at p. 449 thus: "The charterers cannot say that the ship has not been loaded through the default of her owners; the act of the Spanish Government has prevented the contract between the parties from being carried out." If that case is in point it is a decision of the Court of Appeal and is binding upon me notwithstanding the criticisms of Mr. Carver, and the suggested explanation of Scrutton, L.J., which does not, I confess, seem to me to fit the case of *Cunningham* v. *Dunn* (*sup.*), however satisfactory it may be when applied to *Ford* v. *Cotesworth* (*sup.*). I think *Cunningham* v *Dunn* is in point and I do not think it necessary to discuss the matter further. Perhaps I may be allowed to summarise my conclusions thus: *Jacobs* v. *Crédit Lyonnais* is a strong authority for holding that the proper law of this contract is English, but no authority for the proposition that the municipal law of Spain is no excuse for non-performance in Spain of such parts of the contract as have to be performed there. There is authority for that proposition in *Barker* v. *Hodgson* (*sup.*) and cases of that class, where the inability to perform the contract owing to foreign law is treated as being that of one of the contracting parties only. There are, on the other hand, the cases of *Ford* v. *Cotesworth* (*sup.*) and *Cunningham v. Dunn.* (*sup.*) which decide that foreign law is an answer if it affects both contracting parties alike, and I may add that, as I read the judgments in *Kirk* v. *Gibbs* (*sup.*), the court there would have been of that opinion if the plea had alleged a joint inability. This case falls, in my opinion, within the *Cunningham* v. *Dunn* (*sup.*) line of decisions. It is not a case in which the balance of freight is to be paid *simpliciter*. Freight is to be paid in pesetas in Spain, and, in my opinion, it would be equally illegal for the owners to demand or receive as for the charterers to pay in Spain a freight in excess of the legal limit. Up to that limit freight must of course be paid.

There is, however, another way of looking at the matter. The charter-party contains an exception clause, the second of some thirty-three clauses. It is in these terms: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and robbers, arrests, and restraints of princes, rulers and people, or accidents of navigation excepted." It then goes on to enumerate other exceptions solely applicable to the shipowner. If so much of the first part of the clause as might be applicable to the performance of the contract by the charterers is mutual, if, for example, the exceptions of the act of God, perils of the sea, and restraints of princes are mutual, the charterers would appear to be protected by their contract whatever be the law applicable to it. The Spanish Proclamation constituted such a restraint. The earlier view was that such exceptions as these only relieved the shipowner and not the charterers. This was Lord Alvanley's opinion in *Touteng* v. *Hubbard* (1802, 3 Bos. & P. 291) and Lord Kenyon's in *Blight* v. *Page* (1801, 3 Bos. & P. 295, n.); *Sjeords* v. *Luscombe* (*sup.*) is to the same effect. In those days, however, the restraints of princes clause usually occurred in that part of the charter-party which defined the shipowner's duties and not as a separate clause. This was so in *Sjoerd* v. *Luscombe* (*sup.*), in *Touteng* v. *Hubbard* (*sup.*), and *Blight* v. *Page* (*sup.*), in both of which last cases the further words were added "during the said voyage." In charter-parties so framed it was inevitable that the exceptions should be construed as enuring for the benefit of the owner only. The form of charter-party has since then changed and the various duties of owner and charterer are set out in separate clauses as are the exceptions. With this change of form there has been a change in the view taken of their scope and operation, and where they are general and may, or some parts of them may, equally refer to either owner or charterer, they are held to do so. Martin, B. was inclined to take this view in *Ford* v. *Cotesworth* (*sup.*), where, although the exception restraints of princes formed part of the clause setting out the Master's duties, it was followed by the words, "throughout this charter-party." The matter was the subject of decision by Mathew, J. in *Barrie* v. *Peruvian Corporation* (*sup.*), a decision which was followed, though with doubt, by Bigham, J. in *Re Newman and Dale Steamship Company and British and South American Steamship Company* (*sup.*). In that case the exception of "fire" was held to protect the charterers. I venture to think that Bigham, J.'s doubts would have disappeared had his attention been called to the difference in form between the older charter-parties and those in use in 1903. I take it that the law now stands that unless a contrary intention is expressed or is to be gathered from the form of the charter-party, exceptions are mutual where they are contained, as is the modern practice, in one of the numerous separate clauses of a charter party, and do not form part of a clause dealing solely with the obligations of the shipowner or charterer as the case may be. Especially is that the case where as here there is only one set of exceptions and not, as in many modern charter-parties two sets, one appropriate to the charterers' and one to the owners' obligations. The clause in this charter-party does not differ in any material sense from the clause before Bigham, J. except it contains the words, "and all the above exceptions are conditional upon the vessel being seaworthy when she sails." It might be argued that those words show an intention that all the exceptions are in favour of the shipowner only. As I read the clause, however, the words, "all the above exceptions" relate to the exceptions which are included in the long sentence of which they form part, and which begins with the words "strandings and collisions.' They do not, I think, relate to the earlier sentence in which the words "restraints of princes" appear and which begins with "act of God" and ends with "accidents of navigation excepted." In any case the words are a truism and are inserted because of the qualification which follows them.

I have come to the conclusion in a case which I confess to have found very difficult that the position is indistinguishable in principle from *Re Newman and Dale Steamship Company, &c.* (*sup.*), that the exception "restraints of princes" is available for the charterers, and that being so I agree with Martin, B.'s opinion in *Ford* v. *Cotesworth* (*sup.*) that the exception is an answer to the shipowners' claim for freight beyond the limit fixed by the Spanish proclamation. The charterers' contention that their liability for freight is limited to the sum allowed by the Spanish proclamation is in my judgment correct both on the doctrine of mutual disability as laid down in *Cunningham* v. *Dunn* (sup.) and because of the contractual exception of restraints of princes.

I decided during the argument that the rate of exchange was to be taken as the rate of exchange on the day of payment, or on the day that it ought to have been paid. It was agreed that no notice was to be taken of the amount that was paid into court in Spain. That will be returned to the person who paid it in.

From that decision the shipowners now appealed.

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

Neilson, K.C. and *Clement Davies* for the respondents.

The arguments adduced in the court below were substantially repeated and the material authorities there cited were again referred to.

Cur. adv. vult.

March 26.—The following written judgments were delivered:—

Lord Sterndale, M.R.—This appeal from a judgment of Balhache, J. on an award stated by a commercial umpire, raises a difficult question as to the rights of the parties to a charter-party when the performance of the charter, or part of it, is prevented by the law of the country in which the performance was to take place.

The particular question in the present case is as to the amount of freight payable by the charterers to the shipowners. The charter was one for the carriage of a cargo of jute from Calcutta to Spain; The clauses as to freight were as follows: "Clause 1. That the steamer shall with all possible speed proceed under steam to Calcutta . . . and shall there load in the customary manner at any safe place, always afloat, as ordered by charterers or their agents a full and complete cargo of jute, which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle," and so on, "and being so loaded shall therewith proceed with all possible speed under steam, *via* the Cape of Good Hope to Barcelona, Valencia, Alicante, Cadiz, Pasajes, or Bilbao as ordered on signing final bills of lading, or so near thereto as she may safely get, and there deliver the same, always afloat, on being paid freight at the rate of 50*l.* per ton of five bales of jute. Clause 18. Cash at the port of loading, for the expenses of which charterers are to be in no way responsible, not exceeding 2500*l.*, to be advanced the master if required by him at the current rate of exchange for three months documentary bills. Said advance to be a first charge against the total freight earned, and the master to so indorse on the bill of lading the amount advanced, which is to be deducted from freight due under clause 30."

Clause 25: "The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo by cash or approved bills (at charterers' option) at the current rate of exchange for bankers' short bills on London."

Clause 30: "On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash, without discount, one half of the total freight earned less any disbursements under clause 18. Such payment to be a first charge against the total freight earned and the master to so indorse on the bill of lading the amount advanced, which is to be deducted from the freight due on the vessel's arrival at discharging port. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on the arrival of the vessel and the remainder concurrent with discharge."

There was also an exception clause, containing, amongst other exceptions, that of restraint of princes. There was no cesser clause; although clause 30 provided that the balance of freight was to be collected from the receivers of the cargo, the charterers still remained liable in case of non-payment by the receivers.

The charter was on the charterers' usual form, and was made in London between the charterers and a firm of Sota and Aznar by telegraphic authority, and as agents for the owners, a Spanish company called the Compania Naviera Sota y Aznar; I have no doubt that it was an English charter and governed by English law.

The umpire has found, as a fact, that in Sept. 1918, there came into force in Spain a decree having the force of law fixing the maximum freights payable on jute imported into Spain at 875 pesetas per ton. It appears from the documents produced to us that persons infringing this decree made themselves liable to penalties, the result being, in my opinion, that it became illegal in Spain to pay or receive a higher freight than the maximum fixed by the decree.

Messrs. Ralli had sold the cargo to a firm of Godo and Co. at a price not stated as "c.i.f.," but the invoice shows that the second half of the freight was to be paid as part of the contract price per ton. We have, however, nothing to do with the rights existing between the charterers and Godo and Co.

When the vessel arrived the receivers tendered freight to the amount which they considered correct, at the rate of 875 pesetas a ton, but the shipowners refused to deliver the cargo except upon payment of the charter rate of 50*l.* per ton. Certain litigation, which it is not necessary to discuss, took place in Spain, and eventually the rights of the shipowners and charterers upon the contract have to be decided upon the case stated by the umpire.

The most important question is as to the obligation imposed upon the charterers in respect of the payment of freight. It is contended by the shipowners that it is an absolute obligation to pay 50*l.* per ton, and that the subsequent clauses as to payment in Spain are only instructions not altering that obligation. They, therefore, contend that that part of the contract may be performed in England, and that the charterers are therefore liable.

I am not sure that if this were the obligation the contention would be right. The shipowners are a Spanish company, and a debtor must seek his creditor and pay him in his own country. Sota and

Aznar, the firm in London, are not the creditors, and have so signed the charter as to prevent their having rights or liabilities under it.

But I do not think that this contention correctly states the charterers' obligation. I think the clauses as to place of payment constitute part of the obligation to pay and are not merely instructions. The contract and obligation, therefore, are to pay on delivery in Spain in cash, that is, Spanish currency, or approved bills at the charterers' option. The simultaneous acts of delivery and payment are both to be performed in Spain, and the shipowners are a Spanish company.

As I have shown, it was illegal in Spain to pay or receive more freight for imported jute than 875 pesetas a ton, therefore the performance of the contract was illegal by the law of the place of its performance.

In my opinion the law is correctly stated by Professor Dicey in his work on the Conflict of Laws (2nd edit., at p. 553), where he says: "A contract . . . is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed."

I think this is in accordance with the cases of *Ford* v. *Cotesworth* (*sup.*) and *Cunningham* v. *Dunn* (*sup.*). Those cases have been criticised, notably in Carver on Carriage by Sea, sect. 129, but they are still authorities, and support the view which I have expressed. It was argued by the appellants that they are inconsistent with the cases of *Barker* v. *Hodgson* (*sup.*) and *Sjoerds* v. *Luscombe* (*sup.*), and that these last cases are the authorities applicable to the present case. When these cases were decided the doctrine that a person who contracted absolutely to perform a contract must do so whatever the difficulties, as laid down in *Paradine* v. *Jane* (Aleyn, 26), had not been qualified as has been the fact by later authorities. They may be reconciled with the later cases I have cited in the manner suggested in Scrutton on Charter-parties (9th edit., at p. 298). But, if there be a difference between them and *Ford* v. *Cotesworth* (*sup.*) and *Cunningham* v. *Dunn* (*sup.*), I prefer to follow the later authorities.

The appellants also relied upon the case of *Jacobs, Marcus, and Co.* v. *Crédit Lyonnais London Agency* (*sup.*), and the headnote at first sight seems to bear out their contention. I do not, however, think the headnote is correct. The procuring or shipment of the cargo of esparto grass was not illegal. But, by reason of insurrection, consequent Government prohibitions had become difficult and perhaps impossible. There was no clause in the contract applicable to such a state of things, but it would have amounted in French law to *force majeure*, and it was attempted to introduce that exception of *force majeure* into the contract because it had to be performed in France. That is not at all the question which is raised here. That case is examined and criticised by Professor Dicey in his Conflict of Laws (2nd edit., p. 554).

I think on principle and on authority that the charterers in the present case are not bound to perform that part of the contract, that is, the payment of freight above the maximum allowed by Spanish law, which has become illegal by the law of the place of its performance. We have not before us, and I do not decide any question as to what the result of this decision may be upon the rights of the parties as to delivery and disposal of the cargo. I do not think it necessary to express any opinion as to whether the exception of restraint of princes applies to the obligations of the charterers as well as to those of the shipowners.

In my opinion the decision of Bailhache, J. was right, and the appeal must be dismissed with costs.

Warrington, L.J.—This is an appeal from an order of Bailhache, J. upon an award stated in the form of a special case by a commercial umpire in an arbitration between shipowners and charterers.

The question in the arbitration was whether the owners could require the charterers to pay the full amount of the unpaid balance of the chartered freight or only such sum, if any, as together with the sums already paid would make up the maximum freight by Spanish law in force at the time the freight was payable allowed to be paid or received in respect of a cargo of jute consigned as the cargo in the present case was to Spanish consignees at a Spanish port. Bailhache, J. has on this question adopted the contention of the charterers that they cannot be called upon to pay any larger amount for freight than that allowed by the Spanish law.

The owners appeal. They contend that the contract is an English contract to be construed and to have effect according to English law; that according to its true construction it contains an absolute obligation on the part of the charterers to pay the freight fixed by the contract; and that although it contemplates the payment by the receivers of the cargo in Spain, and it may be unlawful under Spanish law for them to pay it, this does not affect the obligation of the charterers.

The charterers on the other hand contend that, though the contract as a whole is an English one, the performance of it in the material respect was to take place in Spain, that the only obligation as to the balance of the freight was that it should be paid in Spain by the Spanish receivers of the cargo, that such an obligation ought to be held to be subject to an implied condition that such payment should not be illegal by Spanish law, and that if it is they cannot be required to pay.

The first question I think is what as regards payment of the freight is the true construction of the contract. The contract is one of charter-party dated the 3rd July 1918, and made between a Spanish company, owners of the steamship *Eretza Mendi*, and Messrs. Ralli Brothers, an English firm carrying on business in London. It is partly written and partly printed, the form used being one of Messrs. Ralli's ordinary forms with certain special variations. It contains an arbitration clause providing for an arbitration in London, and for making the submission a rule of the High Court of Justice in England. It is clear, I think, that the parties are right in treating the contract as a whole as an English contract.

The contract provides that the steamer, then at sea, is to proceed to Calcutta, there load a cargo of jute, which the charterers bind themselves to ship, and being so loaded is to proceed to Barcelona or another of certain named ports in Spain and there deliver the same on being paid freight at a specified rate per ton. There is no cesser clause as regards liability for freight. There are two clauses dealing with the payment of freight—clauses 25 and 30. Clause 25 is as follows: "The freight, except as provided for under clause 30, to be paid at the port of discharge on the unloading and right delivery of the cargo by cash or approved bills at charterers' option, at the current rate of

exchange for bankers' short bills on London," and clause 30: "On receipt of telegraphic advice of steamer's sailing from Calcutta, charterers undertake to pay in London to the owners or their agents in cash without discount one-half of the total freight carried, less any disbursements under clause 17. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one-half on the arrival of the vessel and the remainder concurrent with discharge."

The true effect of these provisions as regards payment of freight is, I think this: There is no unqualified obligation on the part of the charterers to pay the freight; the introductory part of the contract contains no express obligation. "On being paid freight" which qualifies the owners obligation to discharge the cargo means, I think, "on being paid in accordance with the provisions hereinafter contained."

The express obligation on the charterers is found in clauses 25 and 30. We are not concerned with the first half. This was duly paid. The second half is to be paid by the receivers at the port of discharge in Spain and in Spanish money. The charterers in effect contract for the payment of the balance of the freight by Spaniards in Spain. I will consider the position of the charterers in the event of a failure on the part of the receivers, justified by Spanish law, to make the payment bargained for, after I have stated the remaining material facts.

The charter was entered into by Ralli Brothers for the purposes of a contract for sale of jute made by them with Godo Brothers, of Barcelona. The ship arrived at Barcelona on the 28th Dec. 1918, and was ready then to discharge her cargo. Questions then arose as to the amount of freight to be paid, Messrs. Godo insisting that they could not be called upon to pay more than the legal rate fixed by the Spanish law. There was then some litigation in the Spanish courts into the particulars of which I do not propose to enter, and this arbitration was commenced in London.

The umpire finds that in Sept. 1918 there came into force in Spain a decree having the force of law fixing the maximum freight on jute at 875 pesetas per ton of 1000 kilogrammes. It appears by the translation of one of the documents annexed to the award that infractions of this decree render the infringer liable to legal penalties.

I think, therefore, that it is sufficiently made out that it would be illegal for a person subject to the law of Spain either to pay or to receive more than the maximum freight, and such payment or receipt would render him liable to penalties. There remains to be considered the legal position arising from the construction which I think ought to be placed on the contract and from the facts.

Professor Dicey (at p. 553 of the 2nd edit. of The Conflict of Laws) makes the following statement accepted by both parties in the present case as an accurate statement of the law: "A contract (whether lawful by its proper law or not) is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed" and at p. 583: "When the contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract especially as to the mode of performance may be presumed to be the law of the country where the performance is to take place." This last statement is in substance identical with a passage in the judgment of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Company* (*sup.*).

In the present case I am of opinion that the contract is one the performance of which so far as the payment of the second half of the freight is concerned is to take place in Spain. It is true that the obligation with which we are dealing is that of the charterers. But what they promise is that payment shall be made by Spaniards in Spain. And it is only in case of default by those who are to make the payment that their own liability arises. On the facts the default of these persons is justified by the law of Spain where the performance of such a contract is unlawful and the contract would be invalid.

Does this position affect the liability of the English charterers? I think it does. It must be remembered that not only is it illegal in Spain for the Spanish receivers to pay more than the legal rate of freight, but it is unlawful for the owners who are also Spaniards to receive it. I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country.

Had the performance of the contract, so far as it was to be performed in England, become illegal by English law, performance would, in my opinion, have been excused, and on the ground that the contract was subject to an implied condition that its performance should not be illegal: (see *Metropolitan Water Board* v. *Dick, Kerr, and Co. Limited* (117 L. T. Rep. 766; (1918) A. C. 119) and many other cases to which it is unnecessary to refer.

That a similar consequence will result from a joint inability of performance arising from illegality by foreign law where that law governs the performance appears, I think, from the decision in *Cunningham* v. *Dunn* (*sup.*).

But it is said that there are authorities which lay down the proposition that if a man contracts absolutely to perform a certain act, he is not excused by the fact that such an act is illegal by the law of the place where it is to be performed. A type of such cases is *Barker* v. *Hodgson* (*sup.*). It was conceded by Lord Ellenborough in that case that had performance been rendered unlawful by the Government of this country, both parties would have been excused. But he held that the same principle did not apply where the illegality arose from the law of a foreign country.

I am not sure that this and similar cases would have been decided in the same way at the present time owing to the recent development of the law in reference to implied conditions. But, however this may be, it does not, in my opinion, govern the present case, in which, according to my view of the construction of the contract, there is no absolute obligation on the part of the charterers that they will themselves pay but only that payment shall be made in a particular way, namely, by foreigners at a foreign port.

It was contended that *Jacobs, Marcus, and Co.* v. *Crédit Lyonnais London Agency* (*sup.*) was an authority contrary to the view that I have expressed. I think the criticism of Professor Dicey on the suggestion contained in the head-note to that case is well founded: (see Conflict of Laws, 2nd edit., p. 554). The performance of

the contract itself was not illegal by the foreign law. It was sought to be excused by saying that the collection of the subject-matter was prohibited, that such prohibition would by French law amount to *force majeure*, and that *force majeure* would by that law be a good defence. It was this contention which was rejected by the court.

On the whole, I come to the conclusion that in the present case the owners could not in this country maintain an action for a larger amount of freight than that allowed by Spanish law, and that the judgment of Bailhache, J. must be affirmed, the point of law raised by the special case being there determined in favour of the charterers.

An argument was founded on the exception of restraint of princes. It is unnecessary to decide whether this exception was intended to be mutual, and I prefer to express no opinion on the point.

I take it that this judgment decides nothing except that the owners cannot recover more than the freight fixed by Spanish law. How this may affect the legal relations of the parties in other respects is not before us, and I express no opinion about it.

I think the appeal fails, and must be dismissed.

SCRUTTON, L.J.—This is an appeal from the judgment of Bailhache, J. on a special case stated by a commercial umpire, and raises a question of general importance as to the effect on a contract to be performed in a foreign country of illegality by the law of the place in which it was to be performed.

The question arises as to the freight payable by English charterers to Spanish shipowners for the transit of jute from Calcutta to Spain on a Spanish ship. The umpire finds that in Sept. 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute (imported into Spain) at 875 pesetas per ton. He adds certain exhibits (Exhibits 14, 15, 19, and 20) from which it appears that this decree was part of a system for keeping down the price of goods essential for national welfare by, amongst other means, fixing the freight on goods coming to Spain. And the exhibits, together with the full text of that of the 11th Nov. 1916, with which we were furnished, appear to show that penal consequences follow infractions of these laws.

It appears from the special case that on the 2nd July 1918, Messrs. Ralli Brothers sold to Messrs. Godo and Co. of Barcelona, 28,000 bales of jute at various prices from 118*l.* 10*s.* to 105*l.* per ton, to be shipped by steamer *Eretza Mendi* from Calcutta to Barcelona. Rallis were to pay half the freight at Calcutta, Godos to pay the other half on arrival at Barcelona. The contract document is obscure, but the invoice shows that the second half-freight was to be paid on account of and as part of the contract price per ton.

The *Eretza Mendi* was a Spanish steamer owned by Compania Naviera Sota y Aznar, a Spanish company with its head office at Bilbao, in Spain. Its owners had on the 3rd July 1918 chartered the ship to Messrs. Ralli Brothers to load at Calcutta a full cargo of jute and proceed to Spanish ports as ordered, and there deliver the same on being paid freight at the rate of 50*l.* per ton.

Half the freight was to be paid by charterers in London on receipt of telegraphic advice of sailing from Calcutta. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on arrival of the vessel and the remainder concurrent with discharge. The half freight payable at port of discharge was to be paid by cash or approved bills at charterers' option. This half, the freight in question, was payable to a Spanish shipowner, resident in Spain, for the carriage to and delivery of goods in Spain by a Spanish ship, in Spanish money, at a Spanish port of discharge.

On arrival the receiver alleged that a maximum rate of freight for such goods was fixed by Spanish law, and that he could not legally pay more. He paid or tendered what he alleged to be the right amount of freight at 875 pesetas per ton, the maximum freight fixed by Spanish law.

The umpire finds that on his own basis, having regard to the rate of exchange, he tendered too little. Complicated proceedings followed in the Spanish courts. In April 1919, 23,084 bales had been delivered by the ship and 6274 bales were still on board. But I understand these proceedings were not brought to ascertain what was the result if freight was to be paid at 875 pesetas per ton, but to test the claim by the Spanish shipowners that they were entitled to be paid by the English charterers freight at the rate of 50*l.* per ton, without any regard to Spanish law.

I accept the contention of the shipowners that the charterers remain liable for the freight, in spite of the provision that half of it is to be paid by the receivers. But I think they remain liable to pay it in Spanish currency at the Spanish port of discharge to a Spanish company resident in Spain; and further to pay freight in Spain to a Spaniard for goods to be discharged in Spain at a rate in excess of the maximum freight fixed by Spanish law for carriage of such goods is illegal by the law of Spain. What then is the effect on the contract of illegality by the law of the place where it is to be performed, such law not being British law?

In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws (2nd edit., at p. 553), where he says "A contract . . . is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed." And I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.

The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties have provided against by their contract, and for which they must be liable, if they had not expressly relieved themselves from liability.

This is the old doctrine of *Paradine* v. *Jane* (Aleyn's English Reports, 1647, p. 26) "When the party by his own contract creates a duty upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

It was emphasised by Lord Ellenborough, C.J. in *Atkinson* v. *Ritchie* (1809, 10 East, 530, at p. 533) when he said: "No exception (of a private nature at least) which is not contained in the contract itself can be engrafted upon it by implication, as an excuse for its non-performance." And Lord Bowen as late as 1884, in the case of *Jacobs, Marcus*

and Co. v. *Crédit Lyonnais London Agency* (*sup.*), cited Lord Ellenborough's approval of *Paradine* v. *Jane* (*sup.*) with approval.

But the numerous cases of which *Metropolitan Water Board* v. *Dick, Kerr, and Co. Limited* (*sup.*) is a recent example, most of which are cited in McCardie, J.'s exhaustive judgment in *Blackburn Bobbin Company Limited* v. *Allen and Sons* (*sup.*, at p. 546) have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions, from liability to be grafted by implication on contracts, if the parties by necessary implication must have treated the continual existence of a specified state of things as essential to liability on the express terms of the contract.

If I am asked whether the true intent of the parties is that one has undertaken to do an act, though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that the doing of that act is subject to the implied condition that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. "I will do it provided I can legally do so" seems to me infinitely preferable to, and more likely than "I will do it, thoughit is illegal."

Great reliance was placed by the appellants on the case of *Jacobs, Marcus, and Co.* v. *Crédit Lyonnais London Agency* (*sup.*). The headnote in that case speaks of "the prohibition by the constituted authorities of the export of esparto from Algeria." I cannot find any authority for this in the case, which only speaks of difficulty from insurrection and Government commands in collecting and transporting cargo to the port of loading. No express exception covered this, and the attempt in the case was to introduce *force majeure*, which would be a defence by the French law into the English contract. If it had been illegal to export esparto from Algeria the question in this case would have arisen.

In *Blight* v. *Page* (*sup.*) a ship was chartered with fixed lay days to proceed to Libau and load barley. On her arrival there the Russian Government had prohibited the export of barley. Lord Kenyon held the charterer liable for freight, the foreign illegality being no defence to an action for damages.

This was followed in *Barker* v. *Hodgson* (*sup.*), where a charterer who had undertaken to load at Gibraltar in fixed days and who was prevented from doing so by prohibition to load, due to plague was held liable on the same principle "if he was unable to do the thing is he not answerable on his covenant?"

In sharp contrast with those fixed days cases is the decision in *Ford* v. *Cotesworth* (*sup.*). That was a charter to discharge at Callao, no fixed time being mentioned, and the law implying a reasonable time. Discharge was prevented for a considerable period by prohibition of landing due to the fear of the arrival of the Spanish Fleet. After a long time discharge was finished. When that case was decided, the interpretation of reasonable time, as a reasonable time under the existing circumstances, and not the normal time of discharge in normal circumstances, had not been explained as it subsequently was by the House of Lords in *Hick* v. *Raymond* (7 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 175; (1893) A. C. 22) and *Hulthen* v. *Steward and Co.* (9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) A. C. 389).

Lord Blackburn in giving the judgment of the Queen's Bench seems to accept the position that "reasonable time" means normal time, and, that the party prevented from performing his contract by an unforeseen circumstance beyond his control would be liable, but distinguishes the case where the act not done is one in which both parties should concur, and which neither can perform, in which case he says that the obligation on each is to use reasonable diligence, and either is excused by events beyond his control.

Ford v. *Cotesworth* (*ubi sup.*) would now, under the House of Lords' decisions, be decided as a matter of course in favour of the party sued, for the foreign prohibition would be an existing circumstance to be taken into account in fixing the reasonable time in which the act omitted was by implication to be done. Such reasonable time would not now be construed as normal time under normal conditions.

In the Exchequer Chamber the case was again put on reasonable time—as distinguished from fixed time, and the ground that a cause of delay affecting both parties must be considered in fixing reasonable time.

In *Cunningham* v. *Dunn* (*sup.*) the ship was to proceed to Malta and load dead weight, which both parties knew would be military stores, and then proceed to a Spanish port to load fruit. On arrival at Valencia it was found that the law of Spain did not allow cargo to be loaded on a ship which had military stores on board, and when it was found that permission could not be obtained the vessel sailed away. The charterer sued her, and the Court of Appeal held that both parties being prevented by superior power neither was liable, citing *Ford* v. *Cotesworth* (*ubi sup.*)

The late Mr. Carver forcibly criticises these two cases on the ground that in neither was there really joint disability, but takes the view, in which I concur, that they are both supportable on other grounds, which I take to be that in *Ford* v. *Cotesworth* (*ubi sup.*), a reasonable time case, the time must be judged by the then existing circumstances, and that in *Cunningham* v. *Dunn* (*ubi sup.*) the parties must be taken to have contracted on the basis that it should be legally possible to load that ship. At the time those two cases were distinguished from *Barker* v. *Hodgson* (*sup.*) and other fixed lay day cases, on the ground partly of no fixed time, partly on joint inability.

It may be possible to put the earlier cases on the ground that a contract to load in fixed days, unless prevented by specified causes, excludes implied causes such as foreign illegality. An instance of this class of case is *Braemount Steamship Company* v. *Weir* (*sup.*), where a clause excusing payment of hire in certain named events was not extended to an unnamed event, strikes, which prevented the vessel being profitably used, though strikes were included in an exception clause. In my opinion, however, at the present day, in the absence of very special circumstances, cases which decide that a contracting party who has undertaken to do something in a foreign country is not relieved from his obligation by the fact that such an act is, or becomes, illegal in that foreign country are wrongly decided; and this is the true view to be taken of early cases like *Barker* v. *Hodgson* (*sup.*, at p. 270), decided

before the courts had developed the doctrine of continued validity of contracts being dependent impliedly on the existence, or continuance, of certain states of fact.

Bailhache, J. treated the present case as one of a joint act to be performed by both parties, paying and receiving a fixed amount of freight, in a country where it is illegal to pay or receive such an amount; and that such a joint act prevented by illegality comes within the principle of *Ford* v. *Cotesworth* (*ubi sup.*) and *Cunningham* v. *Dunn* (*ubi sup.*) which are binding on him. In view of the fact that the recent decisions of the House of Lords would require or enable the results of these decisions to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the reasoning that where a contract requires an act to be done in a foreign country, it is in the absence of very special circumstances an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not, in my opinion, assist or sanction the breach of the laws of other independent states.

Bailhache, J. has arrived at the same result, by holding that if there is a contract, in spite of its illegality in the place of performance, the charterer is protected by the exception of restraint of princes, rejecting the argument that in this charter the exception clause only protects the shipowner. As the view I have already taken results in the dismissal of the appeal, I prefer to express no opinion on this point. But I may say that as in my experience most charters at the present day avoid the difficulty by using the words "mutually excepted," it would be well in future charters to make clear the intention that the exceptions shall protect both parties.

I understand our decision only to settle the point whether the Spanish shipowner can claim freight from the charterer at the rate of 50*l.* per ton in spite of the law of Spain, and to hold that he cannot. What freight he can claim, in view of the actual facts which are not fully before us, we do not decide.

The appeal must be dismissed with costs.

Appeal dismissed.

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

Solicitors for the respondents, *Pritchard* and *Sons*, agents for *Andrew M. Jackson* and *Co.*, Hull.

Jan. 15 *and* 16, 1920.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

MUNRO BRICE AND CO. *v.* MARTEN;

SAME *v.* THE KING. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Perils of the sea—War risks—"Free of capture and seizure" clause—Unascertained cause of loss—Proper inference to be drawn from the facts.

If no news has been received of the fate of a vessel which set out on a voyage, part of which would take her into an area known to be infested with enemy submarines, the Court of Appeal held that it was to be inferred that she was lost by war perils rather than by the perils of the sea, as on the facts there were no circumstances likely to prevent her from reaching the area where the danger lay,

The decision in Munro Brice and Co. *v.* War Risks Association (4 *Asp. Mar. Law Cas.* 312; 118 *L. T. Rep.* 708; (1918) 2 *K. B.* 78) *overruled on the proper inference to be drawn from the facts.*

APPEAL from two judgments of Bailhache, J.

The first judgment was given in an action by the owners of a cargo of timber against the underwriters of a policy of insurance against marine perils. The second judgment was given upon a petition of right by the same owners as suppliants, who founded their petition of right upon a certificate of insurance issued by the War Risks Insurance Office, a sub-department of the Board of Trade, insuring the same cargo against war perils. The action and petition were heard together for the convenience of the parties interested.

The sailing ship *Inverramsey* left Gulf Port for Fleetwood with a cargo of timber on the 21st March, 1917, carrying a deck cargo, but not being overloaded. She had not been heard of since. The normal length of the voyage for a sailing ship was forty days. It was conceded that she had sunk at sea. It was known that submarines were at the time active off the coast of Ireland, and that a number of timber-carrying ships from the same port on a similar voyage had been sunk by submarines. From meteorological charts it appeared that there was no wind above a strong gale over the course at the time, and that only on a few occasions and for a short period. The *Inverramsey* was a well-found ship.

The question whether the ship and cargo were lost by marine risks or war risks had been decided by Bailhache, J. in a former action—*Munro Brice and Co.* v. *War Risks Association* (118 L. T. Rep. 708; (1918) 2 K. B. 78)—where the learned judge held that the shipowners had failed to prove a loss by war risks, and that, as the ship was lost on a voyage, the loss was due to perils of the sea. In the present cases Bailhache, J., after hearing certain further evidence, followed his earlier decision, and gave judgment for the plaintiffs, the owners of the cargo, against the marine risk underwriters, and dismissed the petition of right.

The defendants in the action, and the suppliants in the petition, appealed.

R. A. Wright, K.C. and *Simey* for the defendants in the action.

Greaves Lord, K.C. and *Clement Davies* for the plaintiffs in the action, and the suppliants in the petition.

Branson (Sir *Gordon Hewart*, A.-G., with him) for the Crown.

The Court of Appeal, after considering *Lindsay* v. *Klein*; *The Tatjana* (11 Asp. Mar. Law Cas. 562; 104 L. T. Rep. 261; (1911) A. C. 194), *Swansea Vale* (*Owners*) v. *Rice* (104 L. T Rep. 658; (1912) A. C. 238), *Fleet* v. *Johnson* (1913, 6 B. W. C. C. 60), *Lendrum* v. *Ayr Steam Shipping Company* (111 L. T. Rep. 875; (1915) A. C. 217), and *Bird* v. *Keep* (118 L. T. Rep. 633; (1918) 2 K. B. 692), held that the proper inference to be drawn from the facts was that the ship and cargo were lost through war perils and not through

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

marine perils. They allowed the appeals, and entered judgment for the defendants in the action and for the suppliants in the petition of right.

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

Solicitors for the suppliants, *Pritchard, Englefield,* and *Co.* for *Simpson, North, Harley,* and *Co.,* Liverpool.

Solicitor for the Crown, *Treasury Solicitor.*

Tuesday, May 4, 1920.

(Before Bankes, Scrutton, and Atkin, L.JJ.)

Owners of Steamship Richard de Larrinaga *v.* Admiralty Commissioners. (*a*)

appeal from the king's bench division.

Marine insurance—War risk—Warship on voyage to pick up convoy—Collision with merchant vessel—Absence of navigation lights—"Consequences of hostilities or warlike operations."

A steamship, which was insured by underwriters against war risks, and by other underwriters against marine risks, was proceeding in a convoy at night, on the 23rd July 1917, without lights by orders of the Admiralty, when she came into collision with a warship also proceeding without lights. The warship was on her way to a port to take up duty as an escort to another convoy. The war risks policy covered "all consequences of hostilities or warlike operations by or against the King's enemies." The arbitrator found that neither vessel was guilty of negligence; and he awarded that the war risks underwriters must bear the loss. Bailhache, J. held that the warship was at the time of the collision engaged in a warlike operation, and that the loss was a consequence of the operation.

Held, on appeal, that the case was covered by Ard Coasters *v.* The King (36 *Times L. Rep.* 555) *and* British Steamship Company *v.* The King (14 *Asp. Mar. Law Cas.* 121; 118 *L. T. Rep.* 640; (1918) 2 *K. B.* 879); *and that therefore the war risks underwriters were liable.*

Decision of Bailhache, J. affirmed.

Appeal by the war risks underwriters from the judgment of Bailhache, J. upon an award in the form of a special case.

The claim in the arbitration arose out of a collision between the steamship *Richard de Larrinaga* and H.M.S. *Devonshire* in the Atlantic Ocean on the 23rd July 1917. The *Richard de Larrinaga* was insured under two policies, a marine risks policy containing the usual f.c. and s. clause, and a war risks policy.

At the time in question the *Richard de Larrinaga* was sailing in a convoy at a speed of about six to seven knots an hour. In obedience to Admiralty orders she was exhibiting no lights. The night was very dark. H.M.S. *Devonshire* had been on duty at Halifax and was on a voyage to Hampton Roads to pick up a convoy of merchant vessels. She was making a speed of about twelve knots an hour and was exhibiting no lights. The two ships sighted one another at close quarters and very shortly afterwards the collision occurred. A good look-out was being kept on each.

By a memorandum of agreement made the 2nd Nov. 1918 between the owners of the *Richard de Larrinaga* of the one part, the Liverpool and London War Risks Insurance Association of the second part, certain marine underwriters as set out in the schedule thereto of the third part, and the Treasury Solicitor for and on behalf of the Commissioners for executing the office of Lord High Admiral of the United Kingdom of the fourth part, the questions of liability for the collision and whether the damages sustained by H.M.S. *Devonshire* and the *Richard de Larrinaga* respectively arose from a marine or a war peril were referred to an arbitrator.

On the 18th June 1919 the arbitrator issued an interim award, whereby he determined that it was not established that either of the ships was to blame for the collision. Subsequently the marine underwriters and the War Risks Insurance Association came before him for the determination of the question whether the collision arose from a marine or from a war peril. By clause 2 of the war risks policy upon the *Richard de Larrinaga* it was provided that: "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, but this insurance shall not be subject to a 3 per cent. or other franchise."

Clause 9: "The said ship shall be deemed to be at all times fully insured against all perils covered by an ordinary Lloyd's policy with collision clause attached and containing an f.c. and s. clause in the following terms: 'Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat, barratry, piracy, riots, and civil commotions excepted and also from all consequencies of hostilities or warlike operations, whether before or after declaration of war.' And to be fully entered in the Liverpool and London Steamship Protection Association Limited, and no claim whatever against which a ship is deemed to be otherwise insured or protected as aforesaid or against which she is in fact insured or protected by any other insurance policy or Protection Association shall be recoverable under this policy."

It was contended by counsel on behalf of the marine underwriters that the collision arose from a war peril and was a consequence of hostilities or warlike operations because the collision was caused by the fact that in obedience to Admiralty orders (1) the two ships were navigating on a dark night without lights; (2) that as the *Richard de Larrinaga* was sailing in convoy she was engaged in a "warlike operation" and that fact was the cause of the collision; and (3) that H.M.S. *Devonshire* was a warship engaged in a warlike operation, and that a collision with her was in the circumstances a consequence of "hostilities or warlike operations."

On behalf of the war risks underwriters it was contended that the collision was caused by a marine and not a war peril, and was not a consequence of "hostilities or warlike operations." It was urged that the fact that the cause of the collision was the absence of lights in obedience to Admiralty orders did not make it a consequence of hostilities or warlike operations; that the fact that the *Richard de Larrinaga* was sailing in convoy did not constitute a warlike operation; that H.M.S. *Devonshire,* although a warship, was not performing a warlike operation, but was at the time in question engaged on a peaceful errand—namely, on a voyage for the purpose of picking up and protecting a convoy of merchant ships—and that a collision

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

with her was not a consequence of "hostilities or warlike operations."

The question in dispute was whether the collision arose from a marine or a war peril.

Subject to the opinion of the court the arbitrator determined that the collision was a consequence of hostilities or warlike operations and was caused by a war peril, and he awarded that the war risks underwriters were liable.

The Admiralty Commissioners did not appear on the hearing of the special case, as the dispute was between the marine risks underwriters and the war risks underwriters (the Liverpool and London War Risks Insurance Association).

Bailhache, J. held that, although the warship was not at the material moment actually engaged in convoying vessels, but was going to a point at which she was to take up the duty of escorting a convoy, she was engaged in a warlike operation, and the collision was therefore a consequence of a warlike operation. He accordingly affirmed the award.

The war risks underwriters appealed.

Raeburn, K.C. and *S. L. Porter* for the appellants.—The *Devonshire* was not engaged at the time of the collision in a warlike operation. She was proceeding to pick up a convoy, and was merely contemplating a warlike operation, which had not commenced, and she was in the position of a peaceful merchant ship. A mere operation in war is not a warlike operation. The mere fact that the ships were operating without lights did not make the operation warlike. In any case the alleged warlike operation was not the proximate cause of the loss, which was due to an accident caused by the absence of navigating lights. Further, the *Richard de Larrinaga* at any rate was not engaged in a warlike operation. They referred to

Britain Steamship Company v. *The King* (*The Petersham*), 14 *Asp. Mar. Law Cas.* 507; (1919) 2 K. B. 670; *British India Company* v. *Green* (*The Matiana*), 14 *Asp. Mar. Law Cas.* 503; 121 L. T. Rep. 553, 559; (1919) 2 K. B. 670;

Robinson Gold Mining Company v. *Alliance Company*, 86 L. T. Rep. 861; (1902) 2 K. B. 500;

Ard Coasters v. *The King*, 36 Times L. Rep. 555;

British Steamship Company v. *The King* (*The St. Oswald*), 118 L. T. Rep. 640; (1918) 2 K. B. 879.

R. A. Wright, K.C. and *A. T. Miller*, K.C., for the respondents, were not called upon.

Bankes, L.J.—In this case a collision took place at night between H.M.S. *Devonshire* and the merchant vessel *Richard de Larrinaga*. The night was dark, and, acting under Admiralty orders, neither vessel was exhibiting lights. The *Richard de Larrinaga* formed part of a convoy of considerable size, which was proceeding at a speed of six to seven knots an hour. The *Devonshire* was proceeding at a speed of twelve knots. Both vessels were damaged by the collision, and the arbitrator has found that neither was to blame. The question is whether the marine underwriters or the war risks underwriters are liable for the damage. That depends upon whether the damage can properly be said to have been the consequence of a warlike operation against the King's enemies. In my opinion it is too late to give effect in this court to any part of the argument of the appellants, even if we agreed with it, because both points which have been taken are concluded by previous decisions of this court. I cannot distinguish the facts of this case from those in the case of *Ard Coasters* v. *The King* (36 Times L. Rep. 555), where H.M.S. *Tartar* was engaged in patrolling on the look-out for submarines. In the present case H.M.S. *Devonshire* was on a voyage to take up a convoy of merchant vessels. That is so found by the arbitrator, and I read it as a finding that the warship was proceeding under orders to a rendezvous to pick up, as he expresses it, a convoy which was either waiting for her or about to assemble there. Counsel for the appellants urged that the *Devonshire* was at the material time proceeding on a peaceful voyage with a view later on to engage in a warlike operation. I do not agree with that contention. I think that the *Devonshire* while proceeding to her station in order to pick up a convoy was at that time engaged in a warlike operation.

The second point taken was that, assuming it was a warlike operation, it was not the proximate and direct cause of the damage. In my view this point is covered by the decisions of this court in *British and Foreign Steamship Company v. The King* (*sup.*) and *Ard Coasters* v. *The King* (*sup.*). Counsel for the appellants sought to draw a distinction between the present case and the *St. Oswald* case (*sup.*) by saying that in the latter case both the vessels which came into collision were engaged in a warlike operation, whereas in the present H.M.S. *Devonshire* was so engaged and the *Richard de Larrinaga* was not. Assuming that to be so, then the present case is the same as *Ard Coasters* v. *The King* (*sup.*), because there the *Tartar* was engaged in a warlike operation, but the *Ardgantock* was not.

On these grounds, in my opinion, the case is covered by authority, and the appeal fails.

Scrutton, L.J.—When this group of cases reaches the House of Lords the interesting and ingenious arguments of the appellants will demand careful consideration. In this court I do not see my way to distinguish this case from *Ard Coasters* v. *The King* (*sup.*). Whether the decision in that case is consistent with the decision in *Britain Steamship Company* v. *The King* (*The Petersham*) (*sup.*) is a matter which the House of Lords will have to consider, and if they come to the conclusion that it is not consistent, they will have to say which is right. So far as this court is concerned the question has been determined by the decision in *Ard Coasters* v. *The King* (*sup.*).

Atkin, L.J.—I agree.

Appeal dismissed.

Solicitors for the war risks underwriters, *Parker, Garrett*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the marine risks underwriters, *Charles Lightbound* and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Saturday, Feb. 18, 1919.

(Before HILL, J.)

THE KAFUE. (*a*)

Collision—Damage—Demurrage—Claim for period beyond that needed to effect repairs—Remoteness of damage.

The plaintiffs' vessel put into port to repair damage sustained in collision. Whilst she was there her Government issued an order requiring all vessels to be fitted with a gun platform and other apparatus. In assessing damages against the defendants the registrar allowed a claim for demurrage not only for the period occupied in carrying out the repairs, but also for the additional period occupied in fitting the gun platform. The defendants moved that the report be referred back.

Held, that the claim for demurrage whilst the gun platform was being fitted was bad, because the delay was not a result following naturally from the collision, but arose from circumstances unconnected with it.

The London (12 *Asp. Mar. Law Cas.* 405; (1914) *P.* 72) *distinguished.*

MOTION in objection to an item in the registrar's report assessing damage.

The barque *Dieppedalle*, French owned, suffered damage in collision with and through fault of the steamship *Kafue*. She was taken into the Thames for necessary repairs and while under repair had to be fitted with a gun platform and wireless apparatus by order of the French Government. The repairs were finished before the fitting. The registrar allowed demurrage against defendants for extra days required for this fitting.

HILL, J. in giving judgment said:—The collision was on the 20th Nov. 1916. The collision repairs were completed on the 3rd May 1917. The ship did not sail till the 12th July 1917. Substantially the detention from the 3rd May to the 12th July was due to the fact that by order of the French Government the ship had to be fitted with a gun platform and supplied with a gun and gunners, and a wireless apparatus. The question is whether the loss by delay so caused can be treated as a consequence of the collision.

I have already decided a similar point in the case of *The Charles le Borgne* (1920) P. 15n.). The only difference between the two cases is that in *The Charles le Borgne* the order of the Government was in existence at the date of the collision, and in the present case it came into existence after the date of the collision. For the purposes of the point to be decided, the difference is immaterial.

The learned registrar reports "As regards the loss of time caused by the installation of wireless apparatus, &c., this time is under the decision of *The London* (12 Asp. Mar. Law Cas. 405; (1914) P. 72), time which would not have been lost but for the collision and is therefore under the principle of that decision attributable to it.

I have no doubt at all that *The London* lays down correct law. But it has no application to the facts of this case.

In *The London* the collision necessitated repairs, the repairs took time, the period of repair was the longer because there was a strike of workmen—a not extraordinary incident in repairs—just as the period of repairing might have been longer because of bad weather of an unavoidable delay in procuring material or getting a dry dock. The detention of the ship was in the ordinary and usual and natural course of things, having regard to the contingencies which may operate to delay repairs. And the whole of the detention was, in the circumstances, a consequence of the collision.

In the present case it may be true that if the ship had not been in collision and had continued her voyage, she might never have come to any port in which the French Government would have compelled her to fit a gun or a wireless apparatus. Even that cannot be affirmed with absolute certainty. But, first, it was not in the usual or ordinary or natural course of things that a ship, by reason of being in collision, should be compelled by its Government to fit a gun and a wireless apparatus, and wait for gunners; and secondly, the necessity for fitting a gun and wireless apparatus and waiting for gunners arose not from the fact that the ship had been in collision, but from a quite independent series of facts—the orders of the French Government operating upon the ship, not as a ship which had been in collision, but as a ship of a certain tonnage. There was in my judgment no relation of cause and effect between the collision and the detention necessary to obey those orders. At most the collision created the condition in which these orders operated as an independent cause.

The time occupied by the necessity of obeying the orders of the French Government cannot be treated as part of the damages flowing from the collision and the matter must go back to the registrar to be adjusted on that footing.

Solicitors for the plaintiff, *Stokes* and *Stokes*.

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

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

Feb. 25, 26, *and March* 1, 1920.

(Before HILL, J.)

THE CRETE FOREST. (*a*)

Practice—Lump sum tender to separate salvors in consolidated action — Costs — Separate representation of master and crew.

The owners of two salving vessels issued a writ for salvage whilst the masters and crews of the same vessels issued another against the same defendants. On the actions being consolidated, the conduct was given to the owners and not to the masters and crews. The defendants tendered 400l. to all the plaintiffs. The owners delivered a reply putting the sufficiency of this tender in issue, but no reply was delivered by the masters and crews. The defendants supplied no affidavit of value to the plaintiffs until the day of the trial.

Held, (1) *that the tender in the present case was sufficient'; (2) that in a consolidated salvage action tender of a lump sum to separate salvors is a good tender; (3) that, having regard to the time when the*

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

affidavit of values was handed to the plaintiffs, they acted reasonably in continuing the action after the tender was made and should have the whole of their costs; (4) that the masters and crews, whose interests were in this case identical with those of their owners, were not entitled to the costs of separate representation; (5) that if any conflict should arise in any future case between tug owners and the masters and crews of tugs, it could only be a conflict as to apportionment in which defendants are not interested. The proper course for masters and crews to adopt in such a case was not to ask for an apportionment at the hearing, and then afterwards, failing agreement with their owners as to apportionment, to take proceedings for apportionment.

THIS was a case in which salvage was claimed by the respective owners of two tugs, and by their masters and crews, in respect of services rendered to a concrete dumb barge. Two writs were issued, one by the two tug owners and the other by their masters and crews. The actions were consolidated according to the usual practice of the court, and the conduct was given to the owners of the tugs. Separate statements of claim were delivered, and one defence was delivered in the consolidated actions in which it was pleaded, "The defendants bring into court the sum of 400*l.* and say that, whatever view the court may take of the facts, the same is more than sufficient to satisfy the claims of the plaintiffs in this consolidated action."

The owners by their reply put the defence in issue, including the sufficiency of the tender, but no reply was delivered on behalf of the masters and crews. The court held the tender sufficient and apportioned it equally between the two tugs.

It was then contended for both sets of plaintiffs that the tender was bad as being a lump sum tender in respect of two separate claims and, *contra*, for the defendants, that the tender was good, and the defendants therefore entitled to costs as from date of tender. It was further contended by counsel for the masters and crews that they were entitled to the costs of separate representation, and evidence was given by Mr. James Sexton, M.P., secretary of the National Union of Dock Labourers, that the masters and crews of all tugs in the Mersey had combined to form a tug section of that union for the purpose of defending their interests in salvage cases; that in many cases tug owners on the Mersey had agreements with shipowners not to claim salvage in any case, but to accept payment at the ordinary towage rates, and that in such cases the crew did not get the advantage of salvage; that the men were not dissatisfied where in salvage actions the award was apportioned by the court as between the owners and crews of tugs or where actions were settled out of court and the apportionment was arrived at by mutual arrangement; but that the union considered that the men had a right to be separately represented in all salvage cases.

Stephens, K.C. and *G. P. Langton* for the owners of the two tugs.

Dunlop, K.C. and *G. J. Lynskey* for the masters and crews.

Batten, K.C. and *A. T. Bucknill* for the defendants.

HILL, J. (after stating the facts).—In this case the question is whether the plaintiffs should be condemned in costs or allowed no costs after the date of the tender or some later date.

Two points were argued. First, it was said for the plaintiffs that the tender was bad because it was a tender of one sum to answer several claims. The owners of the two tugs joined in one writ, but the owners were different persons. The masters and crews of the two tugs joined in a second writ. The two actions were consolidated. Such consolidation was according to the almost invariable practice of the court, and in the present case was beyond all question properly ordered. Is it a bad plea to plead a lump sum tender in consolidated salvage actions? I hold that it is not a bad plea. If it is embarrassing to the plaintiffs they can ask for particulars, and in a proper case they will obtain an order directing the defendants to apportion the lump sum. See *The Burnock* (110 L. T. Rep. 778; 12 Asp. Mar. Law Cas. 490), which laid down no new practice, but is only an illustration of an existing practice. The judgment in *The Burnock* clearly recognises that the plea is good, for it considers the circumstances in which defendants will be ordered to give particulars apportioning the payment and the circumstances in which they will not. So in *The Lee* (60 L. T. Rep. 939; 6 Asp. Mar. Law Cas. 395) it was never suggested that the plea was bad. I was referred also to *Benning* v. *Ilford Gas Company* (97 L. T. Rep. 102; (1907) 2 K. B. 290), a case in which several plaintiffs had joined under Order XVI., r. 1, in respect of separate causes of action arising out of the same transaction.

But I prefer to rest my decision upon the Admiralty practice and the Rules of Court as applied to the Admiralty practice. Consolidation in Admiralty is an old practice of the court, and Admiralty actions, especially salvage, damage, and wages actions, have features of their own which are not found in any actions in the other divisions of the High Court of Justice: (see *The Maréchal Suchet*, 11 Asp. Mar. Law Cas. 553; 74 L. T. Rep. 789; (1896) P. 233). I think the plaintiffs' objection to the plea as a plea fails.

The second question is this: The plea being good, and the defendants having succeeded upon it, it was said for the defendants that they were entitled to costs from the date of payment in. Here again the peculiar features of a salvage action and of consolidated actions in Admiralty must be considered.

The Lee (6 Asp. Mar. Law Cas. 395) case shows that where the defendant has paid in one sum to answer several consolidated claims, he runs the risk that the judge may say that it was reasonable for the plaintiffs to go on to trial, even though the tender is upheld. And in salvage actions, until the values are proved or agreed, the plaintiffs always have a difficulty in arriving at a conclusion whether the tender is sufficient—a difficulty which is peculiar to salvage actions. It is considerations such as these that make it essential that the court should not fetter itself by any hard rules in regard to costs, and should exercise its discretion judicially with reference to the particular facts of each case. In the circumstances of this case, and especially having regard to the fact that the affidavit of values was only handed to the plaintiffs on the day of the trial, I allow the plaintiffs their costs. It is said that the affidavit was not sworn earlier because of the illness of the gentleman who swore it. That is the misfortune of the defendants; it does not, in my view, prejudice the plaintiffs.

There is a further question. I was asked to make an order for separate representation of the masters and crews of the two tugs who were represented by two counsel, separately instructed. As I have already stated, the masters and crews issued a separate writ. This was in accordance with a practice adopted in the Mersey during the last few years, whereby masters and crews of Mersey tugs refuse to join in salvage actions brought by tug owners and insist upon instructing separate solicitors and upon issuing a separate writ. The actions were, according to the practice of the court, consolidated by order and the conduct of the consolidated actions given to the owners of the tugs. Of course, where actions are consolidated it is for the proper officer of the court to determine who should have the conduct, and he has to have regard to the various interests and other matters in deciding in any particular case who should have the conduct. In this particular case, as I have said, he decided that the owners of the tugs should have the conduct.

The object of consolidation is to save costs. In *The Jacob Landstrom* (4 Asp. Mar. Law Cas. 58; 40 L. T. Rep. 38; 4 Prob. Div. 191, 193), Sir Robert Phillimore quoted Dr. Lushington in the case of *The William Hutt* (2 L. T. Rep. N. S. 448; Lush. 25, 27), where Dr. Lushington said: "According to my knowledge, the universal practice of the court has been to consolidate actions where the decision of each action depends on precisely the same facts, and in salvage suits the court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter."

Barnes, J., in *The Maréchal Suchet* (*sup.*), emphasises the second consideration. That object, the object of saving costs, would be defeated and the saving of costs reduced to a minimum if each of the salvors could, whatever the circumstances of the case, insist that he was entitled to be separately represented, instruct separate solicitors and separate counsel and charge the costs so incurred upon the defendants, the owners of the salved property. In proper cases it is the practice of the court to allow, as against the defendants, the costs of separate representation, sometimes by one counsel and, more rarely, by two. It depends upon the circumstances of the case. But separate representation at the expense of the defendants is not a matter of right, and it is not, and ought not to be, allowed unless there is some good and sufficient reason why the several plaintiffs in the consolidated actions cannot be properly represented jointly. If, as against the defendants, the interests of the plaintiffs are identical, or substantially identical, there is no reason why the plaintiffs cannot be properly represented jointly.

In the present case, as against the defendants, the interests of the owners and of the master and crew of the *Knight Templar* were absolutely identical, and the interests of the owners and of the master and crew of the *Expert* were absolutely identical.

There could be no conflict as to the services of the masters and crews as distinguished from the service of the tugs. Nothing was alleged in the statement of claim of the masters and crews to suggest any special or extraordinary services of the masters and crews which might call for separate treatment. The statement of claim as it stands might have been delivered as the statement of claim of the owners, masters and crews. Nothing was added to the information of the court by the evidence called for the masters and crews—in fact, only one master, and no one else, was called for the second plaintiffs on the issues against the defendants. The owners, masters and crews had a common interest in making out the service to be as good as possible, and in obtaining as big an award as possible. As against the defendants, they were in no sort of conflict *inter se.* In such circumstances it would, in my judgment, be most oppressive if the defendants were made to bear the costs of two-fold representation, two sets of counsel, two solicitors' attendance, two briefs.

If in such a case as the present any conflict can at any time arise between tug owners and the masters and crews of tugs, it can only be a conflict in which the defendants are not interested, namely, as to apportionment. In the present case no real conflict could arise for, first, there were no special circumstances, and the sort of proportion allowed by this court in ordinary cases is familiar to all; and, secondly, I was informed that there is in the Mersey an agreed scale between owners and men. But if any difficulty as to apportionment was anticipated, the masters and crews could always protect themselves by giving no authority to ask for apportionment at the hearing, and then, failing agreement with the owners, taking proceedings for apportionment. The court is always zealous to protect masters and crews in respect to salvage services, and will see that no injustice is done to them.

Further, I cannot in the present case hold that the defendants have brought a two-fold representation upon themselves by tendering a lump sum.

Some evidence was given (I am not sure that I should have admitted it, but I was unwilling to shut it out) as to the reasons why the masters and crews desire separate representation, but they seem to me to be quite irrelevant to the question I have to decide. Masters and crews of tugs are apprehensive that tug owners may not claim salvage in cases where one of their regular customers owns the salved property, or for some other reason they may think it good business not to put forward a claim where salvage has been rendered, and that that will prejudice the claims of the masters and crews. But if that happens the masters and crews can always protect themselves. If the owners do not sue, the masters and crews can. Later on I shall be dealing with an action in which the masters and crews of tugs are bringing a suit, the owners not having put forward a claim. [The learned judge is referring to another case set down for trial in the same week.]

The court will always protect masters and crews and see that no injustice is done to them, and that their claims are carefully considered whether the owners are suing or not. When a case comes before the court it is acknowledged that masters and crews get the consideration they desire, and it is proper to observe in this case that the only master who was called stated that he did trust his owners and had in the past joined in actions with them.

The result is that in this case I can see no reason at all for allowing separate representation. On the contrary, I see very good reason for disallowing

it. I hope in future that masters and crews of tugs upon the Mersey, unless there is some very good reason, will see fit to join with their owners in salvage actions. I cannot compel them to do so, but that is the hope I express. I believe they will get proper treatment from their owners, but I am sure they will get proper treatment from the court.

The result will be that the plaintiffs, who were given the conduct of the actions, the tug owners, will have their costs, and with regard to the masters and crews I refuse separate representation and make no order as to their costs.

Solicitors: *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool; *Vizard, Oldham, Crowder*, and *Cash*, agents for *G. J. Lynskey* and *Son*, Liverpool; *Downing, Handcock, Middleton*, and *Lewis*, agents for *Middleton* and *Co.*, Sunderland.

Monday, April 26, 1920.

(Before HILL, J.)

THE P. L. M. 8. (*a*).

Collision—Proceedings not commenced within two years—Motion to set aside writ—Maritime Conventions Act 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

In an action brought in 1916 *by the plaintiffs to recover collision damage sustained by their vessel, the defendants in that action pleaded* (inter alia) *that the collision was caused by the negligence of the* P. L. M. 8 (*then the* Virginia), *against which vessel they instituted proceedings in Jan.* 1918. *At the trial of both actions in March* 1920 *the* P. L. M. 8 *was found alone to blame. The plaintiffs at once instituted the present action to recover damages from the owners of the* P. L. M. 8. *The plaintiffs had had ample opportunities of commencing proceedings against the* P. L. M. 8 *within two years of the collision. The defendants moved to set aside the writ.*

Held, that the action was not maintainable.

Held, also, that in the circumstances the court ought not to exercise the discretion given to it by sect. 8 *of the Maritime Conventions Act* 1911 *for an extension of time.*

MOTION to set aside a writ.

The facts in the case appear in his Lordship's judgment.

Lewis Noad for the plaintiffs.

G. P. Langton for the defendants.

April 26.—HILL, J.—This is a motion for an order that the writ issued herein and the service thereof be set aside, and the conditional undertaking to appear and give bail be discharged, and the appearance entered under protest on behalf of the defendants be struck out on the ground that the proceedings herein are not maintainable under the Maritime Conventions Act 1911, the same not having been commenced within two years of the alleged cause of action, the period provided for in the Act.

On the 15th Sept. 1916 a collision occurred between the steamship *Port Hacking* and the steamship *Clermiston*. The *Port Hacking* sued the *Clermiston*. The *Clermiston* pleaded that the fault was the fault of the *Port Hacking* and, secondly, that the fault was the fault of a third steamship, the *Virginia*, now the *P. L. M.* 8, and the *Clermiston* counter-claimed against the *Port Hacking*. The *Clermiston* also sued the *Virginia* in a separate action. The *Port Hacking* did not at that time bring any action against the *Virginia*.

The trial of both these actions, between the *Port Hacking* and the *Clermiston*, and between the *Clermiston* and the *Virginia*, took place on the 5th March 1920. I found in both actions that the fault was solely that of the *Virginia*. Upon this the *Port Hacking*, which, as I have said, had so far not sued the *Virginia*, on the 9th March 1920 issued a writ against the *Virginia*, and the solicitors for the *Virginia* gave a conditional undertaking to put in an appearance and to give bail.

The *Virginia* now moves to set aside the writ and service and asks that the undertaking be discharged and the appearance set aside, on the ground that the action by the *Port Hacking* against the *Virginia* is barred by sect. 8 of the Maritime Conventions Act 1911. Upon that the *Port Hacking* asks the court to extend the time under the proviso to sect. 8.

It is clear upon the affidavits that have been filed that the second part of the proviso, the obligatory part of it, is not applicable. The *Virginia* at the date of the collision, the 15th Sept. 1916, was American-owned. She was on the 27th April 1917 transferred to French owners. Since then she has been many times within the jurisdiction—thrice in 1917 and many times in 1918 and 1919; and she was not under requisition, and therefore she could have been effectively arrested if a writ *in rem* had been issued against her.

The question, therefore, is: Ought the court to exercise its discretion under the first part of the proviso to sect. 8? Now, it must be remembered that the Act gives the defendants a right, and it is a right that can only be taken away on sufficient grounds. What are the grounds which are alleged? In an affidavit filed on behalf of the plaintiffs it is said: "By reason of the delay in getting the pleadings closed in the action by the owners of the *Clermiston* against the owners of the *Virginia*, to the delay in obtaining the evidence of witnesses who had been dispersed, and to the unusual length of time which elapsed (as in many other Admiralty actions arising out of collisions during the war) before the case could be conveniently fixed for trial, the plaintiffs in the present action were unable to institute proceedings against the defendants, the owners of the *Virginia*, within the two years of the date of the collision."

So far as the pleadings go, the important pleading from the point of view of the present matter is the defence of the *Clermiston*, which was delivered on the 8th Dec. 1916, and which, as I have said, alleged that the collision was caused by the fault of the *Virginia*, though also attributing fault to the *Port Hacking*. I have no specific information as to the delay in obtaining the evidence of the witnesses. When the witnesses for the *Port Hacking* were examined in the two earlier actions (the examination took place in Jan. 1920) they in substance put the blame on the *Virginia*.

I can see no reason why that information could not have been obtained (supposing it was not obtained) from the witnesses for the *Port Hacking* at a much earlier date than before the two years had expired. The delay in the trial of those

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

actions was undoubtedly unfortunate for the present plaintiffs. If they had been tried within two years I dare say that the plaintiffs would have issued their writ against the *Virginia* within two years.

But taking all these matters together, they do not seem to me to constitute a ground, or any sufficient ground, why the action should not have been brought within two years, or why I should exercise a discretion to deprive the defendants of a right which they have undoubtedly acquired by lapse of time. It is said that to let the *Virginia* off will work an injustice, because the blame has been found to rest with the *Virginia*. That is true enough in a sense, but it will equally work an injustice if I deprive the defendants of the legal right of limitation which they have got.

Therefore, I do not see any ground upon which I can deprive the present defendants of their right to say that the action is statute-barred.

It is also said by the defendants that difficulties would arise because they were insured in a club and no provision has been made for this claim in the accounts of the club, and that it might be very difficult to get the club to pay at this late stage if the *Port Hacking* should obtain judgment. I am not so much impressed by that, though it is a matter to be taken into consideration. I think, however, that it is doubtful if the club has finally closed its accounts for the year 1916, and therefore I do not attribute very much weight to that objection.

The result is that I must refuse the application of the present plaintiffs to grant an extension of time. The Act says that "no action shall be maintainable." I do not think that that means that no writ may be issued, but that if the statutory limitation has expired the action shall not be maintainable.

Therefore, I think the proper order is not that the writ should be set aside, but that the action is not maintainable. That in effect is just as if a preliminary objection had been raised at the trial and decided against the plaintiffs, and the result is the same as if I had set aside the writ. The motion of the defendants succeeds, with costs.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*.
Solicitors for the defendants, *Holman, Fenwick*, and *Willan*.

May 18 *and* 19, 1920.

(Before Sir HENRY DUKE, P.)

THE NAXOS AND OTHER SHIPS. (*a*)

Prize—Bonâ fide *sale to neutral of enemy cargo—Effect of option to reject in contract—Completed voyage.*

A German steamship had been lying in refuge at Lisbon, laden with certain goods since the outbreak of war. The goods were owned by a company registered and carrying on business in Holland, though ninety-eight of its hundred shares were owned by Germans domiciled in Germany.

On the 14*th Feb.* 1916 *a contract of sale of the goods was made by the company with Dutch manufacturers who were buying* bonâ fide *for their own needs. On the* 9*th March* 1916 *Portugal declared war, as an ally, and later the German steamship was requisitioned and the goods landed on the quay. On the* 14*th March* 1916 *the ninety-eight shares in the company owned by the German subjects were assigned to a citizen of the Netherlands. In Nov.* 1916, *in pursuance of the contract of sale, the goods were shipped from Lisbon for delivery at Amsterdam in three vessels under three bills of lading, consigned as by the Dutch consul at Lisbon to the Netherlands Oversea Trust. Under the original bills of lading, which were two in number, the goods were consigned by the company for delivery to their order at Rotterdam.*

Held, following The Baltica (11 *Moore P. C.* 141) *that claimants, the Dutch manufacturers, migh at the date of their contract have acquired a good title to the goods which would have defeated the right of capture. But that as the contract made contained a clause enabling the buyer to refuse acceptance of the goods whereupon the seller should take back the goods and repay the purchase price there was no such absolute disposal of the goods by the vendor as would defeat the right of capture.*

The Bawean (14 Asp. Mar. Law Cas. 255; 118 *L. T. Rep.* 319; (1918) *P.* 58) *considered.*

The Baltica (*sup.*) *followed.*

THIS was a cause for the condemnation of cargo.

Clement Davies for the Procurator-General.

R. H. Balloch for the claimants.

Artemus Jones, K.C. and *Wilfred Lewis* for the Netherlands Oversea Trust.

The facts were fully set out in the course of the judgment.

In addition to the cases referred to in the judgment, the following case was cited in argument:

The Hamborn, 14 Asp. Mar. Law Cas. 204, 461; 121 L. T. Rep. 463; (1919) A. C. 993.

May 19.—Sir HENRY DUKE, P.—This is a claim by a Dutch chemical manufacturing company to have paid out of court the proceeds of sale of certain parcels of magnesite, which were taken in prize out of the three steamships in the course of a voyage from Lisbon to Rotterdam, the goods having formed part of the cargo of the German steamship *Naxos*, of the German Levant Line. The *Naxos* at the outbreak of war had been on a voyage from the Eastern Mediterranean to Rotterdam with a cargo of magnesite, and had been lying in a port of refuge, viz., Lisbon, from the outbreak of war until transshipment of the various parcels of cargo to the three vessels in question. The arguments proceeded upon an admitted case as to the condition of the goods in question at the time the *Naxos* took refuge at Lisbon. It was a German ship, and the goods by reason of the constitution of the company which chartered the ship were enemy goods. The company who were the owners of the goods were the Internationale Magnesiet Werken. It was incorporated with 100 shares, of which ninety-eight were held by one German subject and two were held by a near relative, who managed the concern.

In that state of facts it was indisputable by reason of decisions arrived at during the war—*Daimler Motor Company* v. *Continental Tyre and Rubber Company (Great Britain) Limited* (114 L. T. Rep. 1049; (1916) 2 A. C. 307) and other cases—that the goods on board the *Naxos* were enemy goods, and if they had been captured on the voyage to Lisbon or elsewhere these goods would have been condemned as prize. The questions in the case arise with regard to transactions which took place

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

after the *Naxos* had been a long time laid up at Lisbon. They were transactions in good faith; there is no question about that. The claimants are chemical manufacturers in Holland, carrying on an old-established business, and they were sorely in need of magnesite for the purpose of their trade, and when they negotiated with the Internationale Magnesiet Werken they negotiated for the purpose of securing supplies. The question is whether, having in good faith entered into a contract with regard to the goods, they acquired such title in the goods that at the date of capture the goods were their goods and not, in contemplation of the law of prize, the goods of the enemy owner.

The contract which was relied on was made on the 4th Feb. 1916, and the first shipment was in November, the second in Dec. of 1916, and the third in Jan. 1917. The bills of lading were dated the 24th and 26th Oct. and the 2nd Nov. Various events occurred between the 4th Feb. 1916, and the sailing of the three vessels, and two which were particularly considered during the course of the arguments were the entry of Portugal into the war as one of the Allied Powers, which dates from the 9th March 1916, and the change in the ownership of the shares of the Internationale Magnesiet Werken. All I know of the latter is contained in Mr. Greenwood's affidavit, that he has ascertained that what purported to be an assignment of the ninety-eight shares had been made on the 14th March 1916, to a citizen of the Netherlands.

I have come to the conclusion that the change in the constitution of the shareholding of the company has no material effect in this case. The main questions raised were the questions whether effective transfer of the property in the goods could be made at the time and in the circumstances when the transfer was made, and whether the transfer was a good one to defeat the right of capture of a belligerent. Two bills of lading were made by the original consignors—the Internationale Magnesiet Werken, and the consignees were the same firm—to their order to be delivered to Amsterdam. The three bills of lading under which the goods were shipped from Lisbon for delivery at Amsterdam, contained the name of the Dutch Consul at Lisbon as the shipper, and the consignees were the Netherlands Oversea Trust. The identity of the shipper is not disclosed, and they are made out to the order of the consignee, who, on the face of them, does not purport to be the true consignee of the goods in the sense that it was a consignment of goods which were to pass into the ownership of the consignee, if not already so passed.

As to the first question, whether the transfer of the goods could have been made at the time and in the place when the transfer was made, Mr. Davies, for the Crown, relied upon the judgment of my predecessor, Sir Samuel Evans, in the case of *The Bawean* (*sup.*). He submitted that no transfer of these goods, until the voyage on which they had been embarked at the Levantine ports was a completed voyage, could be an effectual transfer so as to defeat the right of capture. I said at the time, and I still think that that proposition is a novel one. There is colour for it in various judgments in Prize but I have come to the conclusion that it is a proposition which is too wide to be an accurate statement of the law in regard to the right of an enemy owner of goods to transfer the property in them after shipment and before the arrival at the original port of destination. The subject is one which has beeen discussed from time to time.

The principal modern authority is the case of the *Baltica* (11 Moore P. C. 141, 149), judgment by the Privy Council in 1857, where a principle less sweeping than that contended for on behalf of the Crown was stated to be a true expression of the rule. The contention was that so long as the original voyage is incomplete there is an indefeasible right to capture. It is hardly necessary to point out how very comprehensive is that alleged right of capture which seems to attach for the duration of any war—the right of capture in respect of any enemy goods which have once been put on shipboard and have not reached the port for which they were destined with no abandonment of the voyage and no transfer of the ownership. If that contention truly represents the law it could be effectually made. I have said that I think that statement is too wide, having regard to the judgment of Lord Stowell, who laid down the principle which was stated anew in the case of the *Baltica*. Lord Stowell clearly recognised the possibility of a determination of the voyage upon which the vessel had originally entered.

In the case of the *Danekebarr Africaan* (1 Christopher Robinson, p. 107) Lord Stowell held that the ship was enemy property, that she had been dispatched upon the voyage as an enemy ship, and that she did not change her character in transit; he seemed to indicate a clear recognition of the principle that, although the original voyage has not been completed, the presence of the vessel or the goods on board a vessel in a port of safety such as a neutral port puts the owner of the ship or goods in a position to decide for himself as to the destination of his goods and as to the ownership of them, and in a position to abandon the original enterprise.

The same question arose in another case which Lord Stowell tried. It was a case where hides which were Spanish property—Spain being at that time at war with this country—were consigned to a Portuguese port on the Tagus. The vessel was under Portuguese convoy and the goods were brought across the Atlantic and discharged in the Tagus at a place where Spanish goods might be discharged. They were subsequently re-dispatched in coasting vessels to Spain, so that the transit was from a Spanish owner in America to a Spanish owner in Europe. The question arose, what was the effect, first, of the delivery in the Tagus? It was held that although there had been delivery into Allied waters under convoy of friendly ships, enemy character attached to the goods and they were subject to confiscation and they were confiscated. Lord Stowell, in the course of his judgment, considered whether the change in the property in these goods could have taken place at the Portuguese *entrepôt*, and he conceived the possibility of an effective transfer of the goods in the friendly port.

In the case of another parcel of hides, dispatched under the same convoy, there was a claim by a merchant at Emden, who prayed leave to admit further evidence. In considering this, Lord Stowell said:—"If they were going actually to Emden there had been a termination of the original voyage." That seems to indicate the view of Lord Stowell that, although the destination had been originally an enemy one, although the port on the Tagus had been merely a port of discharge for re-shipment, nevertheless, if there had been

abandonment of the enemy enterprise at that time and a true interposition of neutral ownership, the result would have been to have defeated the claim for prize.

It seems to me that the claimants are right in their contention that at Lisbon at the time when they entered into the contract it was possible that they should acquire good title to this property, which would have defeated the right of capture. The next question is whether the transfer did defeat the right of capture. That raises the question of what is in truth required for that purpose. To my mind the law is sufficiently stated in the passage referred to from the judgment of Sir Samuel Evans in the *Bawean*. It was stated in the *Baltica*, and Sir Samuel Evans did not intend to depart, I am satisfied, from the rule laid down. He said it was quite clear law according to the Prize Courts in this country and America, and, he thought, in Germany also, that goods which belonged to an enemy when once shipped and become subject to the risk of capture at the hands of a belligerent, retained their enemy character until they reached their destination, and no transfer to a neutral would be effective so as to defeat the right of capture unless the transferee was actually in possession of the goods. As to the requirements for an effective transfer, what is stated is that there must be a transfer, and the transferee must have actually taken possession of the goods. In the case of the *Sechs Geschwistern* (4 Christopher Robinson, p. 101), Lord Stowell said: "The rule which this country has been content to apply is that property so transferred must be *bona fide* and absolutely transferred, that there must be a sale divesting the enemy of all further interest in it, and that anything tending to continue his interests vitiates a contract of this description altogether."

That statement of the law was considered in the case of the *Ariel* (11 Moore, P.C., 119), and counsel adopted the exact language of the statement by Lord Stowell. What is required is, I gather, that once and for all the enemy owner must put off his whole ownership and interest in the goods, and that that act of transfer of the whole of his right and interest in the property must be accompanied by a present delivery. It is not until there is a complete transfer to that intent and a delivery following upon that transfer that the right of capture is defeated. Now those are the principles upon which I find myself bound to proceed in examining the transaction in this case.

In the claim put forward by the claimants they do not state the origin of their interest in the goods. They set up their alleged right to them, but there is no root to the title of the claimants except that which is found in the agreement of the 4th Feb. 1916. It was suggested yesterday that there were acts of the German-owned company during the year 1916 which gave an additional effect to this transaction of Feb. 1916. It was said that the company, although an enemy company at the date of the contract, had become a neutral company at the date of the transfer of these goods.

I do not agree with or appreciate the whole effect of that proposition. The transaction sought to be relied on was one of those transactions of an elusive character which have always been held in the Court of Prize to be insufficient to defeat the rights of a captor. It has been said that the reason why paper transactions effected during a voyage of a ship cannot be examined as against the right of the captor, is that it is almost impossible to ascertain the truth of such cases; that the fabrication of a case is simple, and that an examination of it is almost impossible.

If that is the test in a commercial transaction of an every-day kind, I ask myself how is it possible that a transaction such as that relied upon—a change of ownership in the shares of the company, with its effect upon the disposition and management of the company—can be set up as an answer to the right of capture, and how it may be regarded in the Court of Prize as an answer to the captor.

It is a process that might entail persons claiming property, as that of an enemy company, entering into investigations many times in the course of a single voyage. It is a process that lends itself to fraud—I do not think there was any fraud in this case—but I decline to examine or to consider whether in the course of the transport of these goods, the German owners had transferred their character. I think the case must be dealt with on the footing that the transfer of the goods took place, and that the agreement of title is the agreement of the 4th Feb., and, if there is no good title on the transaction based on that agreement, there is no good claim.

The agreement is an agreement by which the parties declare that they have agreed in reference to the sale and purchase of 1000 tons of raw magnesite. They declare it to be purchased lying in the steamship *Naxos*, at Lisbon, and that all charges and expenses arising through release, delivery, unloading, loading and transport of the goods, as well as the expenses charged by the trust company, shall be borne by the purchaser, so that no expense of any description whatever should be upon the vendor. They fix the price and arrange that half shall be paid as soon as the seller has produced evidence that the goods will be released by the Portuguese Custom House authorities, and no objection is raised by the Deutsche Levante Linie against transhipment, and it is certain such transhipment can take place; that the second instalment shall fall due as soon as the goods arrive and on the approval of the goods by the purchaser, or directly it is known that the ship and cargo are lost or are seized by one of the belligerents, or, at most, not later than two months from the payment of the first instalment, irrespective of whether the goods have been shipped or not; the transloading shipment and so forth, the agreement proceeds, shall be carried out on behalf of the vendor, and on account and at the risk of the purchaser.

Then there was a second clause which seems to me to be very material in relation to the matter in question. It states that if the goods are unsuitable the buyer shall, on the arrival of the goods, have the right to refuse to accept the parcel, and the seller shall be bound to take back the magnesite and repay the amount of the purchase price, increased by the amount of the sea freight to a maximum of 30*s.* per ton, and the vendor and purchaser shall be entitled to cancel the contract before the first instalment is paid if it appears that by any prohibition it is rendered impossible.

These two clauses seem to me to raise very serious questions as to the alleged title of the claimants in this case. As to the right to repudiate the contract, that was a right to be exercised before transhipment at Lisbon, but I am not sure that it has any conclusive effect. It introduces considerations as to whether this is an absolute disposition of

the goods, which must be taken into account with other general considerations arising from the agreement.

But with regard to the clause which enables the buyer to refuse acceptance of the parcel at Amsterdam, it seems to me that that is a much more serious matter. I put the question to myself in this way: Assume these goods to be transhipped in Lisbon on board a neutral vessel and to have been found at sea under such a Bill of Lading as is here in question—a Bill of Lading by a nominal consignor with a nominal consignee and not an actual consignee—and with an agreement for sale which contained a provision that on arrival at the port where the vendor and purchaser both have their establishments, it should be optional for the purchaser on ascertaining the facts to disclaim the property in the goods, could it be said there was such an absolute disposition of these goods by the enemy vendor as satisfied the test laid down by Lord Stowell and re-tried by the Privy Council in the case of the *Ariel?*

I put aside the other uncertainty in this transaction, but it seems to me there was an option by the terms of the last clause in the enemy vendor. That being an interest reserved in the enemy vendor, the result is that I am bound to hold that this was not an effective transfer in the course of the voyage on which the goods had entered which defeated the right to capture; that the right of capture was existent and was duly exercised, and upon these grounds I come to the conclusion that this claim on behalf of the Crown must be allowed and the goods condemned as good and lawful prize.

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

Solicitor for claimants and for the Netherlands Oversea Trusts, *Albert M. Oppenheimer.*

PRIZE COURT.

Wednesday, Jan. 14, 1920.

(Before Sir HENRY DUKE, P.)

THE VALERIA. (a)

Prize Court—Enemy vessel—Capture in neutral territorial waters—Impossibility to bring captured vessel into British port — Sinking of vessel — —Unintentional violation of territorial rights— Claim by neutral Power—No order for restitution or damages — Hague Conference 1907, *Convention XIII., art.* 3.

An enemy vessel was captured in neutral territorial waters, the captors acting bonâ fide *and without negligence. Subsequently the vessel was sunk by the captors.*

On a claim by the neutral Government for restitution of the value of the ship and for damages and costs, it was held that, since the captors acted reasonably, honestly, and without negligence, the claim for restitution of value and for damages and costs failed, although a claim for the restitution of the ship, had she still been afloat, would have succeeded.

THIS was a case in which the Norwegian Government claimed restitution in respect of a German steamship, together with damages and costs. The case was part heard on various occasions in 1919, on many dates before the former President (Lord Sterndale), and it now came on for judgment.

The *Valeria* was a German steamship, and whilst on a voyage from Narvik, in Norway, to Hamburg, in Germany, laden with a cargo of iron ore, she was captured by H.M.S. *Glendale.* In July 1919, when the case was before Lord Sterndale, it was found that the *Valeria* had, in fact, been captured within Norwegian territorial waters; but it was also proved that, although there had been a violation of Norwegian neutrality by reason of the capture, such violation had been quite unintentional, as the commander of the *Glendale* honestly believed that at the time of the capture he was on the high seas. Whilst crossing the North Sea after the capture heavy weather was encountered, and as it became impossible to bring the *Valeria* into port she was sunk by gunfire. It was in respect of the violation of Norwegian neutrality that the Norwegian Government now put forward a claim for the value of the *Valeria* and her cargo, together with damages and costs.

The contention put forward by the Norwegian Government was that there had been an act of trespass on the part of the *Glendale*, and, as the German vessel had been wrongfully seized, the British Government were responsible for whatever happened afterwards. The seizure was wrongful, in the first instance, and the neutral Power was bound to demand back what had been wrongfully taken within the borders of her territorial rights. [Art. 3, XIIIth Hague Convention, was cited.]

The contention for the Crown was that the capture of the *Valeria* was rightful as between the British Government and the German Government, and that a neutral Government could not interfere in a case where it had been shown that the infringement of territorial rights had been made under an honest mistake.

The material articles of Convention XIII. of the Hague Conference 1907, which was signed and ratified by Great Britain and Norway, are as follows:

1. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

2. Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

3. When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

Butler Aspinall, K.C. and *Balloch* for the Norwegian Government.

Sir *Gordon Hewart* (A.-G.) and *Dunlop*, K.C. for the Procurator-General.

In the course of the arguments and the judgment the following cases were cited:

The Betsey, Roscoe's English Prize Cases, vol. 1, 63; 1 Ch. Rob. 93;
The Twee Gebroeders, Roscoe, vol. 1, 286; 3 Ch. Rob. 162;

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

The Catherine and Anna, Roscoe, vol. 1, 336; 4 Ch. Rob. 39;
The Der Mohr, Roscoe, vol. 1, 395; 4 Ch. Rob. 314;
The Maria, Roscoe, vol. 1, 401; 4 Ch. Rob. 348;
The Vrow Anna Catharina, Roscoe, vol. 1, 412; 5 Ch. Rob. 15;
The Anna, Roscoe, vol. 1, 499; 5 Ch. Rob. 373;
The Purissima Conception, 6 Ch. Rob. 45;
The John, Roscoe, vol. 2, 232; 2 Dods. 336;
The Anne, 3 Wheaton, 435;
The Zamora, 13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;
The Bangor, 13 Asp. Mar. Law Cas. 397; 114 L. T. Rep. 1212; (1916) P. 181;
The Düsseldorf, 14 Asp. Mar. Law Cas. 478; 122 L. T. Rep. 237; (1919) P. 245.

Cur. adv. vult.

Sir HENRY DUKE, P.—This is the claim of the Consul-General for Norway on behalf of His Majesty the King of Norway for restitution in value of the German steamship *Valeria* with damages and costs. The *Valeria* was captured by an armed British trawler, H.M.S. *Glendale*, on a voyage from Narvik, in Norway, to the port of Hamburg with a cargo of iron ore. In crossing the North Sea towards Lerwick the commander of the *Glendale* encountered bad weather, and he deemed it necessary to abandon and to sink the *Valeria*. The ground of the present claim is that the capture of the *Valeria* was made within the territorial waters of Norway. Claims which were made on behalf of the German owners of the *Valeria* and of her cargo respectively have been struck out. A claim which was lodged on behalf of the Norwegian Customs officers and pilots who were on board the *Valeria* when captured will, I believe, be disposed of by agreement.

At the hearing of this case on the 17th July 1919 upon the question of the locality of the capture, the President, Lord Sterndale, found that the place of capture was within the territorial waters of Norway, but he found, further, that the violation of Norwegian neutrality had been unintentional, and that the captor honestly and reasonably believed that at the time of the capture his vessel and the *Valeria* were outside territorial waters. Upon these findings judgment is claimed on behalf of the Norwegian Government for the value of the *Valeria* and her cargo, and for damages and costs.

No allegation is made of misconduct or negligence on the part of the *Glendale* in the management of the *Valeria* after capture. The claim which is made is based upon the broad proposition that the captor was a wrongdoer and therefore held and dealt with the captured ship and cargo at his personal risk. The argument necessarily went to the length also of maintaining that if and when liability should be established against the captor, any damage sustained must be made good by the British Crown. It is unnecessary to consider the questions which this contention might be found to involve, as counsel for the Procurator-General has consented that the proceedings shall be deemed to have been amended by adding the commander of the *Glendale* as a party.

The rule of international law which is relied upon in support of the claim for restitution is that which was formulated at The Hague Conference in 1907 in Convention XIII., concerning the rights and duties of neutral Powers in naval war. Art. 3 of that convention deals with the case of capture in neutral waters, and runs thus: "When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the Prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power the captor Government, on the demand of that Power, must liberate the prize with its officers and crew."

The case of *The Dusseldorf* (*ubi sup.*), heard in this court in May 1919, is an instance in which effect was given at the instance of the Norwegian Government to the rule which is thus expressed. A German vessel which had been captured in Norwegian waters was there released upon the claim of His Majesty the King of Norway by delivering it in the port of Bergen, and, as was stated by counsel in the present case, upon the authority of the claimant, was forthwith handed over to the German owners. The rule, which was illustrated by the decision in the case of *The Dusseldorf* (*ubi sup.*) is not of recent origin. Lord Stowell states it with much emphasis in the case of *The Vrow Anna Catharina* (*ubi sup.*): "When the fact—*i.e.*, of capture in neutral waters—is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy."

There are no exceptional circumstances in the case of the *Valeria* such as were considered in the American case of *The Anne* (*ubi sup.*), and it was not disputed on the part of the Procurator-General that if the *Valeria* had still been afloat she must have been released at the suit of the present claimant, notwithstanding that no claims of her enemy owners could have been admitted: (see *The Bangor*, *ubi sup.*). The question now—the release of the *Valeria* being impossible—is whether there is a rule of International Law enforceable in this court which requires that restitution of her value should be made. Convention XIII. of the Hague Conference does not deal with the matter. Convention XII., which contemplated the establishment of the International Prize Court, contained provisions in art. 7 which might have been relied upon in support of the claim if they had received the assent of the Parliament of the United Kingdom. That assent, however, was never obtained.

The principles which are to govern the decisions of this court must be found, therefore, in the accepted authorities. Text-books and cases were relied upon on both sides. In the text-books the most precise statement is that contained in the passage in Hall's Treatise on International Law, 7th edit., at p. 662, where the author states that for a violation of neutral sovereignty "the redress which it is usual to enforce consists in a replacement in its anterior condition, so far as may be possible, of anything affected by the wrongful act."

Instances of recognition of such an obligation are found in the text-books: (Dana; Wheaton, 8th edit., pp. 526-528; Hall, 7th edit., pp. 662-663). But they are the results of diplomatic arrangements, and not of judicial decisions, and it is noteworthy that in various cases where vessels captured in violation of neutral sovereignty had been afterwards accidentally lost or destroyed, such an event appears to have been regarded in the diplomatic arena as making an end of the matter between the neutral complainant and the belligerent Power.

Two cases in the English Prize Courts which throw some light upon the question of principle are those of *The Betsey* (*ubi sup.*) and *The John* (*ubi sup.*). The *Betsey* was a neutral ship carrying neutral cargo which was captured by a British warship off Guadaloupe under circumstances which made her capture unsustainable. The captor had erroneously supposed that Guadaloupe was under blockade, and that the *Betsey* had broken the blockade. She was lost to the captor by enemy re-capture. In adjudicating upon a claim for restitution in value, Lord Stowell stated the test of a captor's liability under such circumstances in these terms: "What was the nature of the original seizure—was it so wrongful as to bring upon the seizor all the consequences of that strict responsibility which attaches to a tortious and unjustifiable possession?" And he rejected the claim. *The John* (*ubi sup.*) was an American vessel captured by a British warship in 1815 after peace had been concluded between this country and the United States, and in ignorance of that fact, and was lost by the captor at sea without negligence. The owners' claim for restitution in value was held by Lord Stowell to be barred by the fact that the capture was made in good faith. The decisive question was said to be: Was there *bonâ fide* possession in the captor, *i.e.*, possession which was "honestly taken under all the knowledge of rights which the party had or could have had upon due and practicable inquiry"? Lord Stowell also said that in such a case "the very title of *bonâ fide* refers to the integrity of the party rather than to the legality of the act," and added: "He errs *optima fide* if he acts honestly according to all the information he either had or could have procured."

In the case of *The Der Mohr* (*ubi sup.*) Lord Stowell is also reported as saying that for "loss at sea by accident only in bringing in" a captor who has made a "justifiable" seizure would not be liable to make restitution; the epithet "justifiable" being applied to the seizure in question, notwithstanding that in the event the vessel seized was held not to be condemnable as prize.

The present claim for restitution was founded rather upon an assumed analogy to cases of tortious possession under the English Common Law than upon any definite rule or precedent under International Law. The case of the captor was likened to that of a man who by mistake possesses himself wrongfully of a chattel not his own and loses it. Mr. Aspinall's illustration was that of a member of a club who inadvertently carries away the umbrella of another member. The analogy seems to me to fail in this, that the person supposedly guilty of such a conversion has no lawful authority or lawful duty to take any chattel other than his own, and is answerable in damages if he does, whereas the commander of a belligerent warship has such an authority and duty, and is not liable in damages in a Prize Court if he discharges his duty or uses his authority in good faith. The cases show, I think, that a personal claim of any owner of the ship or cargo now in question against the captor would have been disposed of by Lord Sterndale's finding that the capture was made in good faith and without gross negligence. Can the unintended encroachment of the captor upon the territorial waters of a neutral Power give to that Power a claim on behalf of enemy owners which under International Law neutral owners of a vessel seized in error would not possess? In my opinion it cannot, and I must pronounce against the claim for restitution in value.

With regard to the claim for damages, the infringement of Norwegian sovereignty is established, but this is not a wrong which gives a claim for pecuniary compensation cognisable in any court of law at present existing. Amends for such occurrences are not subject to judicial determination. The unintentional character of the offence has to be considered, therefore, in relation only to the claim which is set up for an award of damages in respect of the arrest and detention, and, if any part of that question is still open, the loss of the ship and cargo. So far as I am aware, such damages have only been awarded where a capture was made in wilful abuse of belligerent rights. The leading case is that of *The Anna* (*ubi sup.*), where, upon proof of the capture and oppressive detention in flagrant and deliberate breach of the neutrality of the United States of a ship and cargo claimed by United States citizens, Lord Stowell awarded damages and costs against the captor, the commander of a privateer, at the instance of the Government of the United States, the American Ambassador being the claimant.

A case which is like the present in the absence of wilful misconduct is that of *The Twee Gebroeders* (*ubi sup.*). The ship there in question—a Dutch vessel—was captured in the Eastern branch of the Ems while engaged in running the British blockade of the port of Amsterdam, then in enemy occupation. Claim for her release was made by the Government of Prussia on the ground that the boats which made the capture had been dispatched from a British vessel lying within the territorial waters of Prussia. The boundaries between Prussian and Dutch waters in the Eastern Ems were, it appeared, difficult of determination, and Lord Stowell, finding that the error which vitiated the capture was attributable to misapprehension or mistake, said, "It was very different from a case of actual attack in clear neutral territory," and upon this ground ordered the release of the vessel, without damages or costs. The findings of the court upon the trial of the question of fact in the present case bring the case within the authority of the decision in *The Twee Gebroeders* (*ubi sup.*), and no damages should be awarded in respect of the capture of the *Valeria*.

There remains the question of costs. Applying the principles stated in the judgment of the Privy Council in the case of *The Zamora* (*ubi sup.*), the Crown submits to pay such costs as may be awarded in the exercise of the discretion of the court pursuant to the Prize Rules 1914 (Order XVIII., r. 1). The Crown also accepts the liability for costs which, under the established practice of the court, might, without the Rules of 1914, have been awarded against the captor. The principal facts in relation to the question are that the capture in violation of neutral rights was not made by order of a Minister of the Crown, or intentionally or knowingly on the part of the captor; that the loss of the *Valeria* without negligence was known at all material times to the claimant; that the Procurator-General was in the wrong in his contention at the trial as to the question of the locality of capture; and that the claimant is found by this judgment to be in the wrong as to the question of restitution in value and of damages. The claimant is entitled to have a declaration that the capture of the *Valeria* was

made in Norwegian waters, and I so decree; but, having regard to the general principles which govern liability for costs in prize, and to the result of the litigation as a whole, I make this declaration without an award of costs to either party.

Solicitors for the Norwegian Government, *Waltons* and *Co.*

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

House of Lords.

May 7, 10, 11, 13, 14, *and July* 12, 1920.

(Before Lords CAVE, ATKINSON, SHAW, SUMNER, and WRENBURY.)

BRITAIN STEAMSHIP COMPANY LIMITED *v.* THE KING; GREEN *v.* BRITISH INDIA STEAM NAVIGATION COMPANY LIMITED; BRITISH INDIA STEAM NAVIGATION COMPANY LIMITED *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LIMITED; THE PETERSHAM; THE MATIANA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance — F.c. and s. clause — Warlike operations—War or marine risk.

Appeals from Court of Appeal in the cases of the vessels P. *and* M.

The owners of the P., *which vessel was sunk by collision with another merchant vessel when both ships were navigating without lights in obedience to war emergency regulations, claimed compensation from the Admiralty Commissioners to whom the* P. *was chartered. Under the charter-party the Admiralty assumed liability for the losses excepted from the usual marine policy by the f.c. and s. clause.*

In the case of the M. *the vessel was insured against war risks in addition to her usual marine policy. The dispute was in substance whether a loss sustained whilst the vessel was sailing in convoy, accompanied and controlled by warships, was a loss excepted by the f.c. and s. clause of the marine policy.*

Held (*Lord Cave and Lord Shaw dissenting in the case of the* M.), *that the loss of neither vessel was approximately caused by hostilities or warlike operations, and that the loss in both cases was due to a marine, not to a war, risk.*

Sects. 30 *and* 31 *of the Naval Discipline Act* 1866 *and the relationship between convoy and escort considered. The nature of warlike operations discussed.*

Decisions of the Court of Appeal (*reported* 14 *Asp. Mar. Law Cas.* 507, 513; 121 *L. T. Rep.* 553, 559; (1919) 2 *K. B.* 670) *affirmed.*

APPEALS consolidated which raised the question whether the loss of the ship in the one case by collision and in the other by stranding on a sunken reef was, in the circumstances fully dealt with in the judgments of their Lordships, "a consequence of hostilities or warlike operations" or was the result of a marine risk not falling within that description.

In the first appeal the appellants, the Britain Steamship Company Limited appealed from an order of the Court of Appeal (Warrington, Duke, and Atkin, L.JJ.) (*sup.*) which dismissed their petition of right in respect of the loss of their steamship the *Petersham*. The court decided that the collision which sunk the *Petersham* was alone due to her being navigated at night without lights in accordance with Admiralty Regulation No. 37 made under the Defence of the Realm Regulations. She was requisitioned by the Admiralty on the terms of a charter-party known as T. 99, clause 19 of which 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 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."

In the second case the steamship *Matiana*, belonging to the British India Steam Navigation Company Limited, while homeward bound on a voyage from Egypt with three other merchant vessels which were being navigated in convoy under Admiralty control, the escort being four warships, stranded in the Mediterranean on the Keith Reef at midnight on the 1st May 1918. After laying 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 Bailhache, J. found as a fact that 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 war policy 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."

The Court of Appeal decided in the case of the *Petersham* 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 the existence of a state of war, and was not of itself a warlike operation simply because of the existence of war conditions, and, distinguishing the case from that of *British and Foreign Steamship Company Limited* v. *The King* (14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879), affirmed the judgment of Bailhache, J., who dismissed their petition of right claiming from the Crown for the loss of the ship.

In the case of the *Matiana* the Court of Appeal 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 they held, reversing the decision of Bailhache, J., that the underwriters of the marine risk policy were liable.

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

From that decision the underwriters of the policy, Green and others, appealed, and there was a cross-appeal by the owners of the ship, the respondents to that appeal being the underwriters of the war risk policy.

In the first appeal:

MacKinnon, K.C., *R. A. Wright*, K.C., and *C. Robertson Dunlop*, K.C. for the appellants.

Sir *Gordon Hewart* (A.-G.) and *Norman Raeburn*, K.C. for the Crown.

In the other appeals:

R. A. Wright, K.C. and *Claughton Scott* for the marine insurers, Green and others.

MacKinnon, K.C. and *Lewis Noad* for the ship-owners, the British India Steam Navigation Company.

Butler Aspinall, K.C. and *Norman Raeburn*, K.C. for the War Risks Insurance Association.

The House took time for consideration.

July 12. — The following judgments were delivered:—

Lord CAVE.—These appeals raise the same question, namely, whether the loss of a ship, in the one case by collision, in the other by stranding, was a consequence of hostilities or warlike operations, or was the result of a marine risk not falling within that description. The facts of the two cases differ, but, as they must be decided on the same general principles, they have conveniently been heard together.

The appeal in the *Britain Steamship Company* v. *The King* arises out of the loss on the 6th May 1918 of a British merchant vessel, the steamship *Petersham*. This vessel, which belonged to the appellants, the Britain Steamship Company, was at the date of her loss in charter to the Admiralty under a time charter in the form known as T. 99. The charter-party contained the following clauses: "(18) 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. (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."

On the night of the 6th May the *Petersham* was on a voyage from Bilbao to Glasgow with a cargo of iron ore, and, in accordance with an Admiralty regulation made under the Defence of the Realm Regulation No. 37, was proceeding without navigation lights. At 11.20 p.m., when off Trevose Head in Cornwall, she was run into and sunk by a Spanish merchant vessel, the steamship *Serra*, which was on a voyage from Swansea to Bilbao with a cargo of patent fuel. The *Serra* was also sailing without lights, and the case has been argued upon the footing that she also was bound by the Admiralty regulation to dispense with navigation lights. The night was very dark, and it has been found that owing to the absence of lights the collision could not have been avoided by the exercise of reasonable care and skill on the part of those on board the two vessels. There is nothing to show for what purpose the iron ore was intended to be used, nor is there any evidence that any hostile vessel was, or was believed to be, in the neighbourhood at the time of the collision.

A petition of right brought by the owners of the *Petersham* against the Crown for reimbursement was dismissed by Bailhache, J. on the ground that the loss of the vessel was not a consequence of hostilities or warlike operations within the meaning of clause 19 of the charter-party, but fell within clause 18, and his decision was affirmed by the Court of Appeal. The owners have appealed to this House.

The *Petersham* was lost by collision, and any liability on the part of the Admiralty is therefore expressly excluded by clause 18 of the charter-party, unless the collision was a "consequence of hostilities or warlike operations" within the meaning of clause 19 of the same document. In order to establish the latter proposition, it is necessary to show, first, that there were hostilities or warlike operations which could have caused the collision; and, secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations. The rule, long established in cases relating to marine insurance and embodied in sect. 55 (2) of the Marine Insurance Act 1906, that an insurer is not liable for any loss which is not proximately caused by a peril insured against, applies with full force to a clause such as that which is now under consideration: (see per 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. 259, at p. 289; and per Lord Halsbury, C. in *Andersen* v. *Marten*, 11 Asp. Mar. Law Cas. 85, at p. 87; 99 L. T. Rep. 254; (1908) A. C. 334, at p. 340).

It appears to me that in the case of the *Petersham* the appellants fail to show that there were in fact any hostilities or warlike operations to which the loss of the vessel can be attributed. The word "hostilities" connotes operations of war, which may be either offensive or defensive, and may be undertaken either by the vessel immediately concerned or by an enemy or friendly force. The expression "warlike operations" is said to have been added in order to cover cases where similar acts were done, but no actual outbreak of war had occurred, but, however that may be, the effect of the addition is somewhat to extend the category of acts referred to even where a war is in progress, and the appellants throughout their argument relied upon the expression "warlike operations" as the wider of the two expressions. But, in order that the words may apply, there must be some act of war or of a warlike character which could have caused the loss sued upon. Here there was no such thing. So far as is known, there was no enemy ship anywhere in the neighbourhood; and the mere fact that a submarine war was being waged by Germany cannot possibly be regarded as a proximate cause of the collision of those two vessels. No friendly warship was near. Both the *Petersham* and the *Serra* were proceeding upon a peaceful mission, and their desire was not to engage in, but by all means to avoid, warlike operations. It was suggested that sailing without lights in time of war was itself a warlike operation, but that contention appears to me incapable of being sustained. The

lights were extinguished in order to avoid the enemy, and there is a well-established difference between a peril insured against and an action taken for fear of such a peril: (see *Becker, Gray, and Co.* v. *London Assurance Corporation*, 14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101). Nor can the Admiralty regulation, which was of general application, be said to be an operation of any kind. No doubt the risk of collision was greater by reason of the absence of lights, but it remained a sea risk, though increased by war conditions.

The case of *British and Foreign Steamship Company* v. *The King* (14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879) was relied upon. But that case is clearly distinguishable, as it was there admitted on behalf of the Crown that sailing without lights at night was a warlike operation, and the decision proceeded upon that footing. No doubt the admission could readily be made in that case, as both the vessels concerned, the *St. Oswald* and the French battleship *Suffren*, were proceeding to evacuate troops from Cape Helles, and were therefore very plainly engaged in warlike operations. But the admission can have no effect in other cases. The decision of the Court of Appeal in *Inui Gomei Kaisha* v. *Bernardo Attolico* (reported in Lloyd's List of the 20th July 1918, p. 114) turned, not on the absence of lights, but on negligence.

In the case of the *Petersham*, therefore, I am clearly of opinion that the decision appealed from is right and that the appeal should be dismissed with costs.

The second appeal, *Green* v. *British India Steam Navigation Company Limited*, and the supplemental appeal arise out of the loss on the 1st May 1918 of a British merchant vessel, the steamship *Matiana*, which was the property of the British India Steam Navigation Company. This vessel was insured with underwriters against the usual marine perils, including perils of the seas, the policy containing the usual f. c. and s. clause which, so far as material, was in the following terms: "Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat, barratry, piracy, riots, and civil commotion excepted, and also from all consequences of hostilities and warlike operations, whether before or after declaration of war." She was also insured with the Liverpool and London War Risks Insurance Association against war risks, the material clause in this policy insuring the vessel against "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 and warlike operations by or against the King's enemies, whether before or after declaration of war." On the 24th April 1918 the *Matiana* left Alexandria for a British port with a cargo of cotton. At that time sailing under convoy was compulsory, and the *Matiana* with three other merchant ships sailed under convoy with an escort of four of His Majesty's ships. By sect. 46 of the Naval Prize Act 1864 and sect. 31 of the Naval Discipline Act 1866, the master of a vessel sailing under convoy is bound under a penalty to obey the orders of the officer commanding the escort in all matters relating to the navigation of his ship, and those orders may be enforced (if need be) by force of arms. On the 1st May the convoy was traversing a part of the Mediterranean between Sardinia and Cape Bon, which was usually infested with submarines, and was steering a course more northerly than that which is usually adopted in time of peace. Just before dark, the convoy then sailing N. 30 W., the senior naval officer in command of the escort gave orders that on a given signal the course should be changed to N. 81 W. This signal was given at 9.30 p.m., and the course was changed accordingly. At 10 p.m. the order was given to zigzag. The merchant vessels were proceeding in line abreast, the escorting ships being round about the convoy. At about 12.15 a.m. the *Matiana*, which was the second ship from the left, struck a small reef called the Keith Reef, which is unlighted. The night was calm, and no breakers were seen before she struck. Some eleven hours later she was torpedoed, but it has been found that the ship was lost as a consequence of the stranding, and that the fact of her being torpedoed made no difference in this respect. The reef is shown on the Admiralty chart with the words "generally breaks," and on the large-scale chart there is a note that "as the currents are uncertain, both in strength and direction, and the reef not always visible, care should be taken to give all these dangers a wide berth." The master of the *Matiana* gave evidence that at the time of stranding he believed that his vessel was some nine miles to the south of the Keith Reef. The naval officer in command of the escort was not called to give evidence.

An action was brought by the owners against the Liverpool and London War Risks Insurance Association, and alternatively against the marine risk underwriters, to recover the loss. Bailhache, J. found that no negligence was proved either on the part of the master of the *Matiana* or on that of the King's officer; and, being of opinion that sailing under convoy was a warlike operation and that the loss was directly due to that operation, he gave judgment against the War Risks Insurance Association. On appeal, the Court of Appeal reversed this decision and gave judgment for the war risk underwriters and against the marine risk underwriters. The marine risk underwriters appealed to this House; and thereupon the owners gave a counter-notice of appeal claiming that, if the marine underwriters were not liable for the loss, the war risk underwriters were so liable, and these two appeals have been consolidated. There is no doubt that the owners are entitled to be compensated by one set of underwriters or the other, and the only question is on which side the liability falls.

In order to determine this question it is first necessary to inquire (as in the former case) whether there were any hostilities or warlike operations which could have caused the loss. I think there were. No enemy craft is known to have been in the neighbourhood at the time of the stranding, and the loss cannot be attributed to hostilities on the part of the enemy. Nor in my opinion is it correct to say that the *Matiana* was herself engaged in any warlike operation. It is true that she was being convoyed by warships; but that was done for her protection against possible attack, and she herself formed no part of any attacking or defending force. In this respect I agree with Atkin, L.J., who says: "It appears to be 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 peacelike operation of conveying merchandise by sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding."

But in my opinion the British warships which formed the escort of the convoy were engaged in a warlike operation. It has been said that almost any movement of a warship of a belligerent Power by sea in time of war is a warlike operation; and that term would certainly appear to cover an expedition undertaken by vessels of war in wartime for the protection of merchantmen against the enemy.

But, assuming this to be the case, there remains the crucial question whether the operation of the convoying vessels was the proximate or direct cause of the loss of the *Matiana*. I think it was. The inference which I draw from the facts above stated is that the loss was the direct consequence of the orders given by the naval officer in command to take the course which he prescribed. No doubt the existence of the reef and its surrounding currents was a condition without which the vessel would not have stranded; but the true cause of the stranding was the act or event which brought the vessel within their dangerous influence. If she had been driven upon them by a storm or by hostile pursuit, or had been brought there by the negligence of those on board, the loss would have been properly described as caused, not by the reef or its currents, but by the storm or by the enemy or by bad seamanship, as the case might be. In fact, she was compelled to enter the area of danger by the orders of the officer commanding the escort, which she had neither the right nor the power to disobey; and I think the true conclusion is that those orders were the direct and determining cause of her loss.

It is contended that, even if this be so, it does not follow that the loss was a consequence of warlike operations, as the giving of an order cannot in itself be an operation. Perhaps it cannot, if the order stands alone. But in the present case the orders were a part of the convoying operation, which included the choice of the route, the setting of the course, and the precautions taken on the voyage; and I do not think that the transaction can be split up and treated as in part an operation and in part something other than an operation. It was the duty of the commanding officer, for the protection both of the warships under his command and of the merchant vessels under his care, to direct the course of the convoy as he thought best; and in doing so he was but carrying out the operation with which he was charged. In my opinion, therefore, the loss was a consequence of warlike operations within the meaning of the war risk policy.

The Court of Appeal came to a different conclusion, and it remains to consider the reasons upon which their decision was founded. The judgment of Warrington, L.J. was mainly based on the view that neither the escorting nor the escorted vessels were engaged in a warlike operation; and I have already given my reasons for holding that the escorting vessels were so engaged. But the learned Lord Justice added: "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."

Duke, L.J. did not deal expressly with this point, but Atkin, L.J. expressed his view as follows: "The actual loss was caused by an ordinary sea peril, 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 would not be calculated. It was not proximately caused by the order. It was precisely the kind of mischance that constitutes a marine peril when voyaging an unknown or uncharted route. No doubt, by taking the course she was ordered, she was exposed to the risk of striking the 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."

I feel the force of this reasoning, but, with great respect to the learned Lords Justices, I think it gave too little weight to the special facts of this case. No doubt the loss was actually caused by stranding, but it is necessary to look beyond that fact and see what caused the vessel to strand. The position of the reef and the dangerous nature of the currents surrounding it appeared upon the chart and were known to everyone; and but for the orders of the naval officer the *Matiana* would not have found herself anywhere near them. The naval officer was not called, and we do not know why he gave the order to turn at the moment when it was given. He may have been out of his reckoning at that moment, or he may have under-estimated the effect of the tide or the currents on vessels pursuing a zigzag course. He may even (as Bailhache, J. suggests) have run the risk of the rocks to avoid some submarine danger known to or suspected by him. But in any case he set the course which took the *Matiana* into the area of danger. Having entered the area she could not by any exercise of seamanship on the part of her officers have avoided the rock which was submerged and invisible. Her striking was not a mischance due to the ordinary perils of the sea. It may not have been the inevitable, but it was the not improbable, consequence of the order given by the naval officer, and was its actual result. If I may borrow the apt illustration used by Atkin, L.J. in a passage which I have already cited from his judgment, I should sat that, if a shepherd in order to avoid the wolf were to drive his sheep along a path leading to a precipice down which they fell, the loss of the flock would be a direct consequence of his pastoral operations. Here the escort (either by reason of some error or for some other cause) shepherded the *Matiana* into a course which led to the reef, snd her stranding was the result.

The authorities, so far as they go, support the above conclusion. In *Ard Coasters Limited* v. *The King* (35 Times L. Rep. 604; affirmed on appeal, 36 Times L. Rep. 555) a trading vessel was accidentally run down by a British destroyer engaged in patrolling for submarines, and in *Richard de Larrinaga* v. *Admiralty Commissioners* (14 Asp. Mar. Law Cas. 572; 122 L. T. Rep. 551; (1920) 1 K. B. 700; affirmed on appeal, 123 L. T. Rep. 485; (1920) 3 K. B. 65), a vessel was lost by collision with a warship which was on her way to take up a convoy. In each case it was held by the Court of Appeal that the loss was the direct consequence of a warlike operation. Of course, those cases are distinguish-

able from the present, as in each of them the warship came into actual collision with the vessel which was lost; but they are useful as showing that a warship may be engaged in a warlike operation though no attack upon or by the enemy is impending or immediately apprehended, and also that an accident which is not the inevitable or calculable result of the course taken by a warship may yet be the direct consequence of her action.

Upon the whole, I have come to the conclusion that the loss of the *Matiana* was a "consequence of hostilities or warlike operations"; and accordingly that the war-risk underwriters are liable; and I would set aside the order of the Court of Appeal in this case and restore that of Bailhache, J., with costs here and below.

Lord ATKINSON.—It has long been firmly established as a rigid principle of the law of marine insurance to be unfailingly applied, that in order to recover on a policy damages for the loss of a ship by one of the perils insured against that peril must be proved to have been the direct and proximate cause of the loss.

The *Petersham*, a cargo-carrying ship, was lost on the 6th May 1918, in consequence of a collision with another ship, the Spanish steamship *Serra*. Collision at sea is *primâ facie* a sea risk. The burden of rebutting that presumption rests in this case upon the suppliant. Whatever be the true meaning of the words "hostilities" and "warlike operation," as used in clause 19 of the charter-party known as T. 99, under which the *Petersham* was chartered, the suppliants can, on the facts proved, only recover the damages sued for by establishing affirmatively that this collision was not a sea peril, but was the direct and proximate consequence of an act of "hostility" or of a "warlike operation," or, in other words, that an act of "hostility" or a "warlike operation" was the direct and proximate cause of the loss. I concur with Atkin, L.J. in thinking that the word "hostilities" connotes the idea of belligerents properly so called, enemy nations at war with one another, and is used to describe the operations, offensive, defensive or possibly protective of the one against the other, in the conduct of their war. I also concur with him in thinking that the words "warlike operations" have a much wider reach, and not only include "hostilities," but cover, even where a state of war does not exist, operations of such a general kind or character as belligerents have recourse to in war, as, for instance, where combative operations are undertaken to suppress a rebellion against an allied or friendly Power, or where the territory of a nation may "before war has been declared" require, in anticipation of attack, to be protected by such defensive measures as laying down mines. The transfer of the combative forces of a Power from one area of war to another, or from one part of an area of war to another part for combative purposes would, I think, be a "warlike operation" within the meaning of this charter-party, as would also be the patrolling by the ships of war belonging to a nation of the sea coast of that nation, or an allied nation for the purpose of preventing invasion, or even for the purpose of protecting from hostile attack by enemy vessels the lives and property of the inhabitants of sea-board towns. If, in the course of this patrolling, a ship of war collided with and sank a merchant vessel, the loss would, of course, be a direct consequence of a "warlike operation." If, however, the inhabitants of such a town, in order to prevent its being made a target for the fire of an enemy's vessels of war, chose voluntarily, or upon compulsion, to screen all their lights and bury their town in almost complete darkness, this wise measure of precaution could not, I think, with reason be described as a "warlike operation," though it might incidentally vastly increase the dangers attending locomotion in the streets and thoroughfares of the town. And just as I am of opinion that patrolling such as I have mentioned would be a "warlike operation," so also am I of opinion for the reasons I shall presently give more fully, that the shepherding, directing and protecting from possible attack by ships of war of convoyed merchantmen are on the part of those ships of war, though not on the part of the merchantmen convoyed, "warlike operations." Of course, if a merchantman chose to take combative action, such as attempting to ram an enemy submarine, that action would while it lasted be a "warlike operation." The sailing over the sea by a cargo-carrying ship from port to port is in its nature a peaceful adventure, whether undertaken by day or night, in war time or in peace time. But the dangers which in war time beset such an adventure, especially the danger of attack by enemy submarine, may not only justify, but absolutely require, that certain conditions should, as precautions against possible hostile attack, be imposed upon these merchantmen as to the mode and manner in which they shall carry out their adventures. One of those conditions is, that when sailing at night they shall not exhibit their regulation lights. It is a purely negative thing, not in any way combative or aggressive in character. The non-exhibition of those lights during darkness, no doubt, necessarily increases considerably the risks of collision since those who navigate such ships may, by reason of it, be rendered unable to see an approaching ship in time to manœuvre so as to keep clear of her, but as a recompense it is designed and presumably calculated to protect her to a considerable degree from submarine attack. The lights both of the *Petersham* and the Spanish ship were concealed when they collided. The collision, no doubt, was brought about by that concealment; neither ship has been found guilty of negligence. I do not think, however, that a voyage such as that upon which each of these ships was engaged—a voyage which in time of peace would be treated as an ordinary maritime adventure—becomes either a "hostility" or a "warlike operation" within the meaning of this charter-party, merely because of the fact that, as a precaution against possible attack, she is compelled not to exhibit her regulation lights during the night, even though consequences indicated should follow from this concealment. Mr. Wright on behalf of the suppliants contended (1) that the making by the Admiralty of an order that vessels should, when voyaging, not exhibit their "regulation lights" was in itself a "warlike operation," and (2) that even if not, obedience to such an order, if rendered, was a "warlike operation." Such orders are no doubt made for the purpose mentioned during war; but neither the making of them nor the obedience to them is, in my view, a "warlike operation" within the meaning of the charter-party.

The case of *British and Foreign Steamship Company Limited* v. *The King* (14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2

K. B. 879), referred to in argument as the *St. Oswald's* case, is in all essentials fundamentally distinguishable from the *Petersham* case. In that case the vessel which was lost was requisitioned by the Admiralty and bound to obey the orders given through its accredited officers. She was, at the time of her loss, employed in obedience to these orders on a service which was in its very nature a "warlike operation," namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship the *Suffren* she had not got these troops on board, but she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board. This circumstance does not, in my view, alter the character of the operation she was at the time of collision performing. Again, the *St. Oswald* was sunk in an area of naval warfare by an Allied warship presumably engaged at the very time in carrying out "warlike operations." From whatever point of view the disaster be regarded it was, I think, the direct and proximate consequence of a "warlike operation." The decision in it has no application to the case of the *Petersham*. In the latter case the appeal, I tnink, fails and should be dismissed with costs.

The case of the *Matiana* is one of an entirely different character from both these cases. It presents much greater difficulties. These difficulties are somewhat increased by the fact that the senior naval officer who commanded the ships of war convoying the four merchantmen of which the *Matiana* was one, and gave the orders as to the courses the latter should follow, was not examined as a witness.

The war risk policy dated the 13th March 1918 effected on the *Matiana* with the Liverpool and London War Risk Association Limited contained the following Clause No. 9: "The said ships shall be deemed to be at all times fully insured against all perils covered by an ordinary Lloyd's policy with collision clause attached and containing an f.c. and s. clause in the following terms: "Warranted free from capture, seizure and detention and the consequences thereof, or any attempt thereat, barratry, piracy, riots and civil commotion excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." Shortly after midnight on the 30th April 1918 the *Matiana* ran upon the Keith Rocks, on which there were no lights, and the night being calm there were no breakers which might have been observed by those on board the vessel as she approached these rocks. She was next day, at about 11.30, struck by a torpedo, but Bailhache, J., sitting in the Commercial Court, before whom the case first came, held that the position of the *Matiana* was hopeless from the first, and that even if she had not been torpedoed she would have become a total wreck. This finding of fact has not been appealed against. He also found that the master of the *Matiana* was in no way to blame for the position in which he found himself, and that no negligence was proved against the naval officer in charge of the convoy. The question for decision upon this appeal then is whether on the facts proved the loss of this vessel was due to a marine risk or to a war risk, and this, in the result, admittedly depends upon whether a "warlike operation" was or was not the direct and proximate cause of her loss. Bailhache, J. found that the loss was due to a war risk and gave judgment accordingly against the Liverpool and London War Risks Insurance Association Limited, the underwriters under the war risks policy already mentioned, and in favour of the underwriters under a marine risk policy.

The case before Bailhache, J. is reported (120 L. T. Rep. 275; (1919) 1 K. B. 632). From this report he seems to have based his decision on the view that to sail with a convoy is in itself a warlik e operation, not only on the part of the ships of wa which compose the convoy, but also on the part o the merchant ships convoyed, and that no negligence contributing to the disaster having been proved either against the master and crew of the *Matiana* or those of any of the ships of war, the loss of the *Matiana* was a war risk. He states his view clearly in the following passage of his judgment: "To sail in convoy is in my opinion a 'warlike operation.' The assembling of the ships to be convoyed, and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen, and the precautionary measures taken on the voyage must all be taken together as all parts of a 'warlike operation.' In this case vessels pursued a zigzag course through a submarine infected area and some thirty miles to the northward of the ordinary peace-time course. The stranding happened in the course of this 'warlike operation,' and subject to another point made by the war risk underwriters was directly due to it."

With all respect, I am quite unable to concur in the learned judge's view that the merchant ship convoyed, whose task was simply to sail peacefully on the course they might be directed to follow, and to keep their proper places in the convoy, became so identified with the ships of war directing and protecting them as to be treated as members of a joint flotilla engaged in a common enterprise. I concur with Atkin, L.J. in thinking that tne learned judge treats, as he said, the sheep and the shepherd as both engaged in the operation of shepherding. The duties and proper tasks of convoying warships and the ships they convoy are respectively indicated in sects. 30 and 31 of the Naval Discipline Act of 1866 (29 & 30 Vict., c. 109). The naval officers are to diligently perform the duties of convoying and protecting the ships they are appointed to convoy according to instructions, to defend these ships and the goods they carry without deviation, to fight in their defence if they are assailed, and not to abandon them or expose them to hazard. Every master or other officer in command of any merchant or other vessel convoyed is bound to obey the commanding officer of the ships of war in all matters relating to the navigation or security of the convoy, and is also bound to take such precautions for avoiding the enemy as may be directed by this commanding officer. It does not appear, however, that this latter officer has any power to require the master officers or crew of any merchant ship which is being convoyed to take combative action against a vessel of any kind, or to join in such action if taken by all or any of the ships of war. The *rôles* of the two classes of ships while being convoyed are entirely different in nature and character, That of the ships of war is protective and. if need be, combative, that of the merchantmen is not at all combative; and, as far as the circumstances permit, is as peaceful in nature and character as would be their enterprises in time of peace.

If this latter be the correct view, as I think it is, then, in order that the underwriters of the war risk policy may be made liable, the "warlike operation" which is the proximate cause of the loss of the *Matiana* must have been something which was done by the attendant warships or their officers. The loss of a ship by striking or grounding on rocks is, as I have said, *primâ facie* a marine risk. The burden of proving that it is in this case a war risk rests upon the owners of the *Matiana*, or on the underwriters under the marine policy. The question for decision resolves itself, I think, into this: Has that burden been discharged by the evidence given in the case? Warrington, L.J. sums up the evidence with accuracy and sufficient fulness to enable one to decide that question. He says (14 Asp. Mar. Law Cas., at pp. 508-9; (1919) 2 K. B., at p. 680): "The steamship lost was bound from Egypt with cotton. 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 9.3 p.m., under the orders of the senior naval officer, the course was changed from N. 30 W. to N. 51 W. The ships had been warned earlier in the evening that this change of course would be made. At about 12.15 a.m. the *Matiana* struck a small reef called the Keith Reef, which is unlighted. Her master believed that at 9.3 p.m. his position was such that a course of N. 51 W. would have taken him nine miles to the southward of Keith Reef. The naval officer in command was not called, and nothing 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 zigzag from 10 p.m. until the accident occurred. The master says, however, that notwithstanding this he was keeping a correct mean course of N. 51 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 from 9.3. There was no evidence given showing how it came about that she struck the rock without going south of it, neither was there any evidence to show that 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 course prescribed was ordered not for the purpose of avoiding or resisting attack by a particular enemy whose presence was unknown, but as part of a series of precautionary measures taken for the safety of merchant ships in waters in which enemy craft might not improbably be encountered."

The learned Lord Justice, at p. 684, 14 Asp. Mar. Law Cas., at p. 510, expresses the opinion that there was no "warlike operation" in this case of which it could be said that the loss was the consequence, but on the following page he says: "I think it was incumbent on those who seek to throw the loss on the war risk 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 order or by the master's obedience to it. The plaintiffs, in fact, leave it doubtful 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."

Duke, L.J., after assuming that the naval vessels of the convoy were engaged in a warlike operation, says (14 Asp. Mar. Law Cas., at p. 515; (1919) 2 K. B., at p. 690): "I am satisfied that in point of fact the *Matiana* was never ordered to do, never did, and never participated in any warlike operations or belligerent act. She never lost her character of a ship carrying merchandise."

Atkin, L.J. says (at p. 698, 14 Asp. Mar. Law Cas., at p. 516): "It appears to me fallacious to identify the merchant ships sailing with the convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting the non-combatant vessels from the enemy. The merchant vessels are engaged in the peaceable operation of conveying merchandise at 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 commanders of the warships. And on the next page he says: "But the fact that the non-combatants are in particular instances, or in particular areas, made subject to the orders of combatant officers does not appear to me sufficient ground for inferring that while obeying those orders they are engaged in combative action of warlike operations. . . . I have come to the conclusion that the *Matiana* was not engaged in a 'warlike operation.' But this in itself is not sufficient to decide the case, for it was urged that at any rate the loss was the consequence of a warlike operation by the commander of the escort in controlling the course of the ship. I doubt very much whether the giving of an order can itself ever be an operation. That which is done under it is the operation. But I will assume that in giving the order, when he (the commander) did, to take a particular course he was performing a warlike operation. Was the loss the consequence of it? The actual loss was caused by an ordinary sea peril—stranding. It seems to me impossible to say that the naval officer directed her (the *Matiana*) on the reef, or that her striking was the inevitable or even probable consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not proximately caused by the order. . . . No doubt by taking the course she was ordered to take she was exposed to the risk of striking the reef; but in my view the true result of the order was to expose the ship to a great chance of suffering a loss from marine peril."

I entirely concur in the views thus expressed by Atkin, L.J. I think the owners of the *Matiana* and the underwriters of the marine policy have failed to discharge the burden which rested upon them, that in this case, as in that of the *Petersham*, the appeal fails and should be dismissed with costs.

Lord SHAW.—I think both of these cases are accompanied with great difficulty. The refinement of distinction between them and others, and especially between these two themselves, perplex the mind.

In result I have come to be of opinion that the loss of the *Petersham* was approximately caused by a peril of the sea.

It is no doubt true that when she and the *Serra* on the night of the collision were sailing without lights they were doing so in conformity with a general regulation issued by the authorities in consequence of the existence of a state of war. The results of lights being exposed would have been to place valuable British assets at the mercy of the submarine or other armed naval forces of the enemy; and the saving of these assets from falling into enemy hands or from being destroyed by enemy power was an object which, in a general sense, might be subsumed under the term of defence of the realm. Accordingly during the period of war the authorities charged with the subject, whether naval, military, or civil, were entitled to promote that defence by the issue of regulation and order. I do not see my way, however, to hold that the issue of such orders or regulations converted risk of collision, which under an ordinary policy falls within the category of a sea risk, into an exception from that category. The sailing without lights added to the quantum of that sea risk; it made the chance of collision greater, but I agree respectfully with the courts below, and especially with the view of Atkin, L.J., upon this point in thinking that it did not convert the risk into one arising as a consequence of hostilities or warlike operations.

Sects. 18 and 19 of the time charter-party T. 99 have already been cited. From sect. 18 it is seen that the loss of a steamer in collision is classed alongside of any other cause arising as a sea risk; while sect. 19 enumerates the risks of war which are taken by the Admiralty. They mention capture, seizure and detention and the consequences thereof or of any attempt thereat except piracy, and proceed: "and also from all consequences of hostilities or warlike operations whether before or after declaration of war." It appears to me that it would require (a collision of two ships at sea having occurred) something more than a regulation or order for safety on the voyage, something of the nature of an actual and accomplished change of facts of the nature of an operation conducted in the course of hostilities of war, to lift the event of collision into the category of war risks. I accept accordingly the result reached by the courts below.

I reach a different result in the case of the *Matiana*. I think that the putting of a vessel under convoy, with all that that involves, is an actual and accomplished change of circumstances and an operation conducted in the course of hostilities or war. The loss of the vessel, in my humble opinion, did arise out of "the consequence of hostilities or warlike operations, and that the case is, therefore, from the scope of a maritime peril and falls within the war risk insured against."

It is in this view that I think it necessary to quote the terms of the Naval Discipline Act of 1866 which still bound the merchant shipping of this country during the recent war. Sect. 31 of that Act provides: "Every master or other officer in command of any merchant or other vessel under the convoy of any ship of Her Majesty shall obey the commanding officer thereof in all matters relating to the navigation or security of the convoy, and shall take such precautions for avoiding the enemy as may be directed by such commanding officer; and if he shall fail to obey such directions, such commanding officer may compel obedience by force of arms, without being liable for any loss of life or of property that may result from his using such force." It is difficult to figure language which more emphatically puts the naval commander of the convoy in control of the movements of the merchant vessel. To all intents and purposes it is the same as if he had placed on the convoyed ship a naval officer in command, as subordinate to himself.

In short, so far as the direction of the course of the vessel was concerned, the merchant captain and officers were no longer in control. The naval officers were. Not only so, but the orders of the commander of the convoy were clothed with the instant sanction of force. An order disobeyed might be followed by the guns of the convoy being levelled or fired against the offending vessel, and the officer is secured by statute against liability for any consequent loss of life or property.

I do not doubt that, so far as the ships acting as convoy were concerned, they were thus conducting a warlike operation. I think the decision in the case of *Ard Coasters* v. *The King* (35 Times L. Rep. 604; affirmed on appeal, 36 Times L. Rep. 555), to the effect that a warship patrolling in the course of her duty and thereby causing a collision with a merchant vessel, was a right decision. Suppose in the present case one of the ships acting as convoy had run down one of the ships convoyed. I can hardly doubt that that event would have been similarly found.

The case accordingly is narrowed to the distinction between ships which are acting as convoy and the ships which are themselves under convoy. I myself see great force in the view which Bailhache, J. so clearly expresses to the effect that all the vessels, those acting and those under convoy, must be treated as a unity. He concludes accordingly that they were all engaged in warlike operations. I respectfully agree with that learned judge. My Lords, it is not necessary, in my opinion, and I say this having fully in view repeated expressions of opinion in this case in the courts below, to postulate that the vessel to which the accident or calamity occurred was itself actually and individually engaged in hostilities or warlike operations. The policy does not say so. What it says is that the thing which is insured against is "the consequences of hostilities or warlike operations," but it does not say "in consequence of hostilities or warlike operations in which the vessel itself is engaged." I am humbly of opinion that, so far as ships under convoy are concerned, all these ships are, along with the ships acting as convoy, under a unified command, and that command issuing from the commander of the convoy is, as part of the direction of the convoy, a military operation. The consequence of it upon those merchant vessels to whom the command was issued was to place them compulsorily in a situation of peril in which unquestionably they would not have been placed but for the course thus forced upon them. These vessels might, of course, be said not in themselves to have been engaged in either hostilities or warlike operations, but that they suffered this peril, and in the case of the *Matiana* this loss, as a consequence of warlike operations, seems to my mind clear.

The first broad fact of this case is that if the *Matiana* had not been under convoy she would not have been in that part of the sea, where the peril of currents driving her on the rocks occurred. The vessel was stranded on Keith Reef, N.E. of Biserta to the north of the Gulf of Tunis. There is no disputing the case that at this time the

Mediterranean was the scene of very frequent submarine sinkings amounting to so many as five per day, and that there were "notorious tracts specially bad." Describing this "dangerous neighbourhood" in which was the Keith Reef, Captain Lane mentions the Riddlecombe Patch, the Hecate Patch, the Locust Patch, and Skerki Bank, and tells how in the ordinary course of navigation one would keep well clear of such a neighbourhood. In these circumstances, the naval authorities, acting no doubt to the best of their wisdom in trying circumstances, put the *Matiana* and three vessels under convoy, and the course of the convoy was steered into this unquestionably dangerous zone. A note on the chart is quoted by the witness mentioned to the following effect: "As the currents are uncertain both in strength and direction, and the reef not always visible, care should be taken to give all these dangers a wide berth." The evidence is quite clear that this was the rule of navigation with regard to that locality. In the ordinary course of navigation, merchant vessels will keep well clear of it, the witness saying: "We should not go anywhere near it, not in peace time." However, the captain says: "All the courses that I took were from the senior naval officer. He was the man who gave all the orders." Being questioned, "You were then, I take it, entirely under the direction of the senior naval officer? You could not yourself fix your vessel?" He answers, "No. He told us when he blew the whistle and gave the signal to alter our course. It was too dark to take stars or anything like that."

It is admitted that the vessel was exactly thus in the convoy when it—one of the four vessels convoyed—struck the reef. Be it that the ship was about nine miles to the southward of what was expected; it was in waters where the currents were so strong that a mistake of that kind was not unnatural, and against it the officers and crew of the *Matiana*, obeying naval orders, were helpless. Proper or ordinary navigation free from convoy would never have placed them or the ship within this danger zone.

I ask myself the question, what difference in principle it would have made if, instead of the seniour naval officer directing the course of the *Matiana*, that commander had put the *Matiana* in tow by a hawser from the stern of the *Clematis*, and guided her not only into the dangerous reach of the current, but towed her, unknowingly and in the dark, on to the rocks. I could not have seen my way to hold that the stranding did not then occur in consequence of a warlike operation; and I think that the same reasoning must be applied to the present case. The refinement is too great for me to appreciate it which would distinguish the loss of a vessel acting as convoy from the loss of a vessel, either physically convoyed as I have suggested by hawser or convoyed in her course by compulsory compliance with orders therefrom, taking and keeping her place and distance relative to the other ships of the expedition and according to the prescribed points of the compass.

On these grounds I am of opinion that the loss of the *Matiana* was an event which, in the language of the policy, arose from one of the consequences of hostilities or warlike operations. In my view the judgment of Bailhache, J. was correct and should be restored.

Lord SUMNER.—In the first of these two cases, that of the *Petersham*, the suppliants claim on a ship's time charter in form T 99. In the second case, that of the *Matiana*, the action is brought on a policy of insurance against all perils excluded from an ordinary Lloyd's policy by the f.c. and s. clause set out. The *Matiana* was insured at Lloyd's and her owners sued alternatively on the Lloyd's policy. Thus the owners of the *Matiana* recover on one policy or the other, and the dispute is between two sets of underwriters; in the case of the *Petersham* the owners bear the burden of failure themselves. It was not disputed that the claim on the charter-party was to be treated as a claim on a policy of insurance, nor were the differences in the wording of the clauses in the two cases alleged to establish any substantial difference between them for present purposes.

In effect the claim in each case is for a loss proximately caused by consequences of warlike operations. One ship was sunk in collision; the other stranded and never got afloat again. The risks excepted by the f. c. and s. clauses employed are, among others, risk of such collisions and strandings (which in themselves are losses by perils of the seas) as may be proximately caused by hostilities or warlike operations or their consequences. In each case therefore two questions arise: (*a*) Was the collision or stranding caused by any act or consequence of hostilities or by any warlike operations or consequence thereof, and, if so what? (*b*) Was it proximately so caused?

I will take the *Petersham* first. She was steaming at night without showing her lights, and met the *Serra*, which was doing likewise. Each failed to make the other out till it was too late. Each was peacefully sailing the seas on her lawful occasions, and the *Serra* was actually a neutral bound not to engage in any warlike operation. In showing no lights each was only doing what all ships did a few generations ago and what some ships did quite recently in unfrequented waters to save a little oil. Sailing the seas even under conditions of modern maritime warfare is not in itself the same thing as traversing a battlefield on land, though even that may be done on a peaceful errand. To go ahead in the dark may be foolish or wise, but it is not warlike, nor is it made warlike because what would otherwise be blameworthy is done in obedience to lawful commands. No doubt, the object is to avoid being seen if the enemy is present, but if no enemy is present the act is a precaution only and, fortunately, is not needed. The operation of the *Petersham* and the operation of the *Serra* were in each case peaceable; neither was doing anything warlike separately, nor were they doing anything warlike together. Nor, again, was the operation of those who issued the order warlike, though it was performed in time of war. It did not become a warlike operation merely because its object was to baulk warlike operations on the part of the enemy. I say nothing of hostilities because of actual hostilities there was no evidence at all Whatever may have been the case in *British and Foreign Insurance Company* v. *The King* (14 Asp, Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879) which turned on an admission by the Crown, I think that, in the circumstances of the *Petersham's* case, sailing without lights was neither a warlike operation nor was it the consequence of one. The fact is that each of these ships was making a peaceable voyage under

wartime conditions, and no more. Historically, it was due to the enemy's submarine campaign, but not as its proximate consequence.

As for the *Matiana*, she was sailing with convoy. She was bound to take her course from the senior officer of the convoy and did so; and, thanks to the set of a variable current, she came unexpectedly on to the Keith Reef. Her operation also was proceeding on her trading voyage. It is true she did so by an unusual route, but the deviation was justifiable and obligatory. She found in her way a rock, submerged and unlighted, which, in itself, was a marine peril. It was a moonlight night, and if there had been any wind she would probably have seen the break of the sea on the reef in time. As it was, a still night she had no warning and she stranded.

Why is such a stranding a consequence of warlike operations? The *Matiana* had to do as she was told, but she was not told to go aground either directly or indirectly. I think that the case of the *Matiana* can only be distinguished from that of the *Petersham* by dwelling on the facts, first, that she was in convoy, and second, that, in addition to general orders as to not exhibiting lights, she was under particular orders as to the course to be shaped and the stations to be kept. In brief, sailing with convoy is only sailing in company and is no more a warlike operation than sailing alone. If, for the sake of protection in case of danger, the *Matiana* had kept as close as she could to a King's ship casually encountered, she would still have been peacefully occupied. What difference is made by additional orders given *ad hoc* by the senior naval officer? It is suggested that the case is the same as if he had been on her bridge, had himself laid and directed her course and had her steered straight on to the reef. Even if it were so, I am by no means prepared to say that this would have sufficed. Not everything done by a King's ship or a King's officer, in time of war is necessarily a warlike operation or the consequence thereof. I refrain from discussing the particular cases cited of damage done directly by men of-war lest any case decided on their authority may be under appeal to your Lordship's House, and might seem to be prejudiced by anything said now. Collision between the *Matiana* and a man-of-war would have raised considerations which, whatever their value, do not arise now, but I think the sufficient answer to the above contention is that the case is not that of a King's officer being on the *Matiana* bridge in responsible charge of the helm. It is not a case of deliberately running her aground for some purpose of war. Her course and station having been prescribed some hours before, she was in her own officer's charge, and there is no evidence to show or to suggest that the avoidance of a local obstacle in her track was not left to them, or that her orders were to keep her course let the consequence be what it might. There is nothing to suggest that, if the rock had been visible, she was not entitled and bound to manœuvre so as to avoid it. Her officers were not to blame for they could not see it, but her inability to see the rock seems to me to be indistinguishable from the *Petersham's* inability to see the *Serra*; there was nothing warlike about it—the peril of it was of the seas. For the rest, the order given by an officer in company and in authority referring to a compass course does not really differ from an order given generally in Admiralty regulations; it is a special order, but it is an order to do or to refrain, like the general order as to lights. Warlike operations and hostilities generally prevailing supplied the reason for it, but even if it was a consequence of an operation of war, the stranding was not its proximate consequence.

The case of *Ionides* v. *Universal Marine Insurance Company* (1 Mar. Law Cas. O. S. 535; 8 L. T. Rep. 705; 14 C. B. N. S. 259) was relied on in this connection. It was argued, as I understood, that the illustrations given by Erle, C.J. were in point as showing that importance attaches to the presence or absence of negligence in the navigation of the vessel lost. Collation of the different reports, especially of that of the *Law Journal* with that in the Common Bench Reports, satisfies me that the allusion to negligence in the illustration of an escaping ship which takes a free channel but negligently runs aground, really meant that the channel was truly free, for escape by it was possible. This was proved by the fact that a better seaman would have made his escape by it. Hence the loss of the ship by stranding in the supposed case was not a loss by an attempt at capture, from which, try as he would, the captain had no escape. It was a loss by stranding, due to the helm action taken and the course laid, when the captain might have done otherwise, and the attempt at capture was a remote cause only. The fugitive ship, so far from being a lost ship from the beginning, as in the illustration of a ship hopelessly embayed or a ship deliberately stranded, was really a ship which could have escaped, just as in the illustration where the embayed ship escapes, thanks to a shift of the wind. To say that in Erle, C.J.'s illustration the captain's negligence showed that the ship was not stranded proximately by the attempted capture, is no warrant for arguing that a ship must be held to be lost proximately by warlike operations because she was put on the reef by misfortune and not by negligence. It is in this sense that I understand the observations about the trading ship's negligence in the *Larchgrove* and the *Ardgantock* by Roche, J. and Bailhache, J. respectively.

The remaining argument is that, at any rate, each loss is "attributable" to warlike operations, and hence fully within the clause, and the analogy of a loss by perils of the sea which is held to be irrecoverabie when it is artributable to the assured's own wilful act, was put forward. If that means that a loss not proximately caused by warlike operations but (remotely) attributable to them, is one for which the insurers are liable, in a case like the present, it is contrary to sect. 55 (1) of the Marine Insurance Act, for the policy contains no special provision to this effect unless the words "consequences of warlike operations" are pressed beyond anything that they will bear. It is stated in *Ionides* v. *The Universal Marine Insurance Company* (*sup.*) that "consequence is a compendious description of the perils to be expected and not a description relating to the loss; instead of saying what particular results are to be expected, the word consequence is introduced to denote the class of perils which may result from hostilities." In the clause as worded in the charter T. 99 the words "piracy excepted," formally adopted in 1898, show that consequence of capture, seizure and detention are perils insured against causing loss, as piracy is. Further, as Willes, J. says, in the *Ionides* case (*ubi sup.*) "the words 'all con-

sequences of hostilities,' refer to the totality of causes, not to their sequence." They are used to save a long enumerative description of incidents of capture, seizure or detention or of hostilities or warlike operations, as if one had said "all forms of hostilities or warlike operations of whatever kind," and some form or kind of hostility or warlike operations must have proximately caused the loss. Things of which it can be predicated that they were caused by hostilities are not themselves causes of loss additional to hostilities, or a new description of peril insured against, so that a remote consequence of hostilities would become a recoverable loss, if proximately caused by something itself describable as a consequence of hostilities. From the earliest time when this system of insuring was employed through all its forms, from the American War of Independence (*Tyrie* v. *Fletcher*, 1776, 2 Cowp. 688; 2 Dougl. 784), and *Loraine* v. *Thomlinson* (1779, 2 Dougl. 585) to the present time, what is insured by the war risks cover is some peril causing loss which would have been insured against by the Lloyd's policy, if it had not been excepted out of it by some kind of f.c. and s. clause, and "consequences of capture" were never perils insured against under that policy, but they were losses by perils insured against, if proximately caused. There is further no analogy to the case dealt with in the Act, sect. 55, 2 (*a*). That is an express provision in the Act and the expression precludes the implication of resort to the origin, to which a loss is "attributable," in any dissimilar case not within the express words. I see no connection between expressly disabling an assured from recovering for a loss, which, though in itself the proximate consequence of perils by the seas, is really self-inflicted by his ulterior wilful misconduct, and interfering with the statutory rule prescribed in sect. 55 (1) in a case where an event has happened without fault in any one, and the only question is whether or not it is within the insurance effected.

I think that the judgment of the Court of Appeal was right; that the suppliant's petition fails, and that the war risks underwriters were entitled to judgment in the action.

Lord WRENBURY.—I agree in the opinions expressed by my noble and learned friends Lord Atkinson and Lord Sumner and shall add only a few words of my own. In the case of each of these vessels the question is whether her loss was a consequence of hostilities or warlike operations within the words "all consequences of hostilities or warlike operations whether before or after declaration of war." As regards the former of the two vessels, the *Petersham*, she was lost by collision with the *Serra*, when both vessels in obedience to Admiralty orders were navigating at night without lights. As regards the latter, the *Matiana*, she was lost by running on the Keith Rocks when sailing in convoy and zigzagging with a view to defeating the operation of possible submarines. There were, in fact, no submarines known or suspected to be in the immediate neighbourhood, but the vicinity was one notoriously dangerous in that respect.

All the decisions have, I think, proceeded and in my judgment have rightly proceeded upon the footing that the word "hostilities" does not mean "the existence of a state of war" but means "acts of hostility" or (to use the noun substantive which follows) "operations of hostility." The sentence may be read "all consequences of operations of hostility (of war) or operations warlike (similar to operations of war) whether before or after declaration of war." To attribute to the word the longer meaning, viz., "all consequences of the existence of a state of war" would give the expression a scope far beyond anything which one can conceive as intended. To define the meaning of "operation" in this connection is, no doubt, a matter of great difficulty, and for the purpose of these cases is not, I think, necessary.

The question whether there was a warlike operation or not does not turn necessarily on the character of the vessels or vessel. Even a vessel of war is not necessarily engaged at every moment in a warlike operation. Again, the character of the cargo may be irrelevant. In the fact that the holds are filled with (say) cotton or with coal can be found no cause whatever for her (say) coming into collision. On the other hand, her cargo may be relevant. If the enemy be a civilised enemy who will do his best to sink a ship carrying troops or munitions of war but will also do his best not to injure a hospital ship, the fact that she bears the one character or the other may make all the difference in determining whether action taken against her or by her is a warlike operation.

If the case be a case of collision between two vessels and one of them is engaged in a warlike operation, that may be enough. This was the case in *Ard Coasters* v. *The King* (35 Times L. Rep. 604; affirmed on appeal, 36 Times L. Rep. 555), where a vessel was lost by collision in the dark with a destroyer which was on patrol duty for the purpose of intercepting hostile submarines, and in the course of that duty was turning across the route which vessels in that part of the ocean would normally and properly follow, with the result that she fouled the route of the Ard Coaster, which was close to her.

If the *British and Foreign Steamship Company* v. *The King* (14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879) is right (upon which I feel grave doubt) it must be on a similar ground. I feel great difficulty, however, in saying that from the mere fact that a vessel is a vessel of war and is steaming in her duty as such, it results that if she collides with another vessel and sinks her, the loss is in consequence of a warlike operation.

If there be only one vessel and she be not engaged in a warlike operation at all the words may still be satisfied. Thus, if the enemy has sunk a vessel in a fairway with a view to causing injury to any vessel which enters in ignorance of the fact, or if the enemy has placed false lights with a view to inducing a vessel to think she is on a course which she is not and a peaceful merchantman is consequently lost, the loss is a consequence of a warlike operation of blocking the fairway or deceiving the vessel. So if a vessel is lost by coming in contact with drifting mines, her loss is a consequence of the warlike operation of laying mines: (*Stoomvaart Maatschappij Sophie H.* v. *Merchant Marine Insurance Company*, 14 Asp. Mar. Law Cas, 497; 122 L. T. Rep. 295).

Again, a vessel not equipped for war at all may be engaged in a warlike operation if, as in *Macgregor* v. *Martin* (34 Times L. Rep. 504), she takes the offensive and attempts to ram what she supposes to be a submarine, and in so doing is injured. But the leading case of *Ionides* v. *Universal Marine Insurance* (1 Mar. Law Cas. (O. S.) 535; 8 L. T.

Rep. 705; 14 C. B. N. S. 259) draws a line, on one side of which lie cases such as those I have mentioned, and on the other lie cases such as those which are before your Lordships. For the present purpose the distinction may, I think, be stated as follows: If the operation relied upon as a warlike operation is one which creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against the risk, then the risk is not a war risk. But if the peril be directly due to hostile action, it is a war risk. Of the former of these, *Ionides* is an illustration. By reason of the war and for warlike purposes a light had been removed. Had it still been burning the master of the *Linwood* would have had the necessary warning to escape the danger into which he ran. The war did not create the risk but increased it. The cause of the loss was in going ashore. The loss was not a war risk. But, on the other hand, the vessel which tries to ram that which she believes to be an enemy vessel—the vessel which is rammed by a destroyer which is steaming in the dark without lights for a warlike purpose and which necessarily for the due performance of that duty, turns across the route which a vessel would normally and properly take in that neighbourhood and the vessel which is lost by striking a mine is lost by a new risk originating in and operative by reason of war.

To apply these principles to the two cases before the House: The *Petersham* was lost by collision by reason of navigation in the dark without lights. The risk of collision at night is an ordinary maritime risk. It was aggravated by the removal of the protection of the usual lights of navigation. This is governed by the principle of *Ionides*, which, I think, was right, and which in fact counsel have not attacked. The *Matiana* was lost by going on a reef when sailing in convoy. To sail in convoy is to increase the everyday maritime risk of collision whether with a fixed object or with another vessel, for vessels in a convoy are necessarily not far apart. But there was no new risk. The abandonment of navigation lights in the case of the *Petersham* by way of protection against attack by submarine—the sailing in convoy in the case of the *Matiana* by way of protection against the like attack are in principle similar. They are devices to give in time of war additional protection against an existing maritime risk. Their object is to give greater security to peaceful operations.

It has been argued that to sail in convoy is a warlike operation. It is an operation adopted in time of war, but this does not, I think, make it a warlike operation. Not offence only but defence also may, no doubt, be a warlike operation, but a precautionary measure is not in itself a measure of defence. If it becomes necessary to use the weapon of precaution, no doubt a defence may commence. Thus, if here submarines had been sighted, and the escorting vessel had ordered a notoriously dangerous course in order to avoid a peril of war, namely, submarine attack, and in consequence a vessel had gone on the rocks the case would, I think, have been different. But there was no such case.

Further, even if sailing in convoy were a warlike operation, the loss no doubt occurred in the course of, but how did it result in consequence of that operation? The ship went on the reef not because she was in convoy—surrounded, that is, by other ships—bound to act under the order of the escorting ship and so on, but because she did not know where she was and did not know of the danger.

There stated, quite shortly, are the reasons which lead me to the conclusion that in neither case was the loss a consequence of hostilities or warlike operations. In my judgment both the appeals should be dismissed with costs.

Solicitors for British Steamship Company Limited, *Holman, Fenwick,* and *Willan.*

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the appellants, *William Crump* and *Son, Waltons* and *Co.*

Solicitors for the respondents, *Rawle, Johnson,* and *Co.*, for *Hill, Dickinson,* and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, May 20, 1920.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THOMAS CHESHIRE AND CO. *v.* VAUGHAN BROTHERS AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Undisclosed risk—P.p.i. policy—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 4—*Principal and agent—Employment to make a void contract—"Void as against public policy"—Nominal damages.*

The plaintiffs were warehousemen, and employed the defendants, who were insurance brokers, to obtain for them a policy of insurance against loss by the non-arrival of certain cargoes which the plaintiffs were to receive into their warehouse. The defendants effected a policy, but failed to disclose to the underwriter that one of the risks against which the plaintiffs desired insurance was the diversion of the cargo by the order of the Government. On a slip attached to the policy there appeared a p.p.i. clause. The cargo was diverted by the Government, and the plaintiffs suffered substantial loss. In an action by the plaintiffs against the underwriter it was held that there was non-disclosure by the plaintiffs' agent, and the plaintiffs failed to recover on the policy. They accordingly commenced the present proceedings against the defendants for negligence and breach of duty. The defendants pleaded, inter alia, *that the policy which they were instructed to procure was void under sect.* 4 *of the Marine Insurance Act* 1906 *by reason of the p.p.i. clause, and by reason of the fact that the plaintiffs had no insurable interest.*

Held, by McCardie, J., (1) *that the defendants were negligent in failing to disclose the risk;* (2) *that the plaintiffs must, or ought, to have understood the nature of the p.p.i. clause;* (3) *that sect.* 4 *of the Marine Insurance Act* 1906 *must be taken to mean that a policy containing a p.p.i. clause is void, even if the party has an insurable interest;* (4) *therefore, in this case, it was unnecessary to inquire whether the plaintiffs possessed any insurable interest;* (5) *although it was probable that the under-*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

writer, had the full risks been disclosed to him, would have honoured the policy notwithstanding the p.p.i. clause, the plaintiffs were not entitled to recover nominal damages, since a contract to procure a contract "void as against public interest" could not give rise to such a claim. The plaintiffs were not entitled to substantial or nominal damages. The plaintiffs appealed.

Held, by the Court of Appeal, that sect. 4 of the Marine Insurance Act 1906 rendered void as against public policy a policy of insurance containing a p.p.i. clause even though the insured might have a legal insurable interest, and that although the clause appeared on a detachable slip, in accordance with a commercial practice, it must nevertheless be taken to form part of the contract.

Decision of McCardie, J. affirmed.

Semble, *that apart from statutory enactments a policy containing a p.p.i. clause may be bad on grounds of public policy generally.*

Semble, *also, if the contract had been to procure a void, and not illegal, contract the plaintiff might have been entitled to some damages.*

APPEAL by the plaintiffs from a considered judgment of McCardie, J., sitting without a jury, at Liverpool. The facts appear sufficiently from the judgments.

MCCARDIE, J.—The plaintiffs in this action are warehousemen at Liverpool, Birkenhead, and Newport. The defendants are insurance brokers. The plaintiffs claim damages against the defendants for breach of a contract made by the defendants to effect an adequate policy of insurance for the plaintiffs.

It is just to the defendants to state that the negligence complained of was not their personal negligence, but that of their London agents. It will be unnecessary to state the full details of the case, because they have already been reviewed by Bailhache, J., and also by the Court of Appeal in the action of *Cheshire* v. *Thompson* (1919, 24 Com. Cas. 114, 198).

The essential facts are as follows: From the year 1916 the export of nitrate of soda from South America was wholly in the hands of the British Government; they owned the cargoes sent from that country and the shipping was under their complete control. The cargoes were carried under time charters. The business in connection with these cargoes of nitrate was in the hands of Messrs. Antony Gibbs and Sons, who were acting as agents for the British Government, and by an arrangement which was made between Messrs. Gibbs and Sons and the plaintiffs, the plaintiffs were to act as warehousemen of the nitrate when it arrived at the ports which I have mentioned. The nature of the arrangement between Messrs. Gibbs and Sons and the plaintiffs is indicated in the letters which have been put in, and which I need merely refer to by date; they are the letters of the 4th Aug. 1915, the 13th Aug. 1915, the 19th Aug. 1915, the 26th Feb. 1916, and the 16th June 1916.

The plaintiffs' warehouses are large. They incurred, moreover, substantial expense in erecting particular accommodation, mainly of a fireproof character, for the reception of cargoes of nitrate and similar goods which they expected to receive in connection with their arrangement made with Messrs. Gibbs and Sons. In order to meet this capital outlay of the plaintiffs and to secure a return on the sums which they had previously expended in connection with their buildings, it was obviously essential that they should fill, as far as possible, their warehouses. If they knew that a cargo was coming, then, in pursuance of their duty to Messrs. Gibbs and Sons and the Crown, they were bound to reserve space for that cargo. Obviously they could not let the necessary space to others, and, therefore, if the cargo which was anticipated after advice received did not arrive, the result would be a loss by rent or otherwise to the plaintiffs by reason of the non-arrival of that anticipated cargo.

There were three main sets of risks which the plaintiffs desired to insure: First (*a*), the ordinary marine risks; secondly (*b*), war risks; and thirdly (*c*), there were the set of risks which arose from the diversion of the nitrate cargoes destined for the plaintiffs and so announced to them by Messrs. Gibbs and Sons for the Government, such diversion being due to the act of the Government in meeting the needs of the Allies, as, for example, Italy or France; that is, for some economic or political reason wholly disconnected with the risks to which I have referred under heads (*a*) and (*b*).

It is plain that equally serious loss might arise to the plaintiffs through either (*a*) or (*b*) or (*c*), and hence the plaintiffs desired to procure policies which would cover all three heads. They saw the defendants, they informed them clearly and fully of the facts which I have already narrated, and they made plain to them the risks which they desired to insure. Having received that information, and knowing the wishes and instructions of the plaintiffs, the defendants undertook to obtain policies which would cover the risks mentioned, and to secure in these policies an adequate and inclusive wording for the covering of all those risks.

The duties of the defendants were thereupon obvious. They instructed their London agents to do the necessary work; that firm saw the underwriters—Mr. Thompson was the principal underwriter—but they wholly failed to disclose the risks under head (*c*) which the plaintiffs were anxious to cover, and they left the underwriters in ignorance of these particular risks and the circumstances connected therewith. The slip which was handed by the agents to the underwriters in connection with the *Glenaffric* cargo, which is the vessel here in question, announced, so far as is material, that the profit which the plaintiffs desired to insure was 1300*l.* on the nitrate of soda, and it stated as follows: "To pay a total loss if the vessel does not reach destination named in the policy through any cause that may arise." The remainder of the slip is not material to the point here at issue.

Pursuant to that slip a policy was in fact issued, and that policy embodied the words of the slip and provided (so far as it is material to read it) that the underwriters would pay a total loss if the vessel did not reach the destination named in the policy through any cause that might arise. That was the policy in regard to which this action arises.

The *Glenaffric* loaded in South America in Dec. 1917, at the port of Iquique, under a bill of lading which was dated the 26th Dec. She was to go, after taking in her cargo, to a bunkering port in order to receive instructions as to her port of destination. Messrs. Gibbs wished and intended that the *Glenaffric* should go to Birkenhead, and that her cargo of nitrate should be there discharged

and put into the warehouse of the plaintiffs. On the 29th Dec. they wrote a letter to the plaintiffs in which they said: "*Glenaffric*—6000 tons to Birkenhead—she sailed this week," and upon the same date Messrs. Gibbs wrote to the Ministry of Shipping the following letter: "Please note that the *Glenaffric* sailed yesterday with 6000 tons; kindly order her to Birkenhead, Messrs. Cheshire."

But the *Glenaffric* never reached Birkenhead. The Government for purely economic reasons, and in order to assist the Italian Government, diverted her from Birkenhead, to which Messrs. Gibbs had intended her to go, and in fact she unloaded at Savona, in Italy, in Feb. 1918. Her diversion was absolutely disconnected with any question of war risks or marine risks; it was of a purely financial or ecomomic character.

The plaintiffs, who had anticipated the arrival of this vessel at Birkenhead, suffered a loss by reason of the diversion. They therefore claimed upon the policy, but the underwriters refused payment, and a writ was issued by Messrs. Cheshire, the plaintiffs, against Mr. Thompson, one of the underwriters. Mr. Thompson denied liability, and, apart from the other points raised in the defence, he disputed legal responsibility upon the ground that in substance the plaintiffs had not disclosed the necessary circumstances, had not made known to him the actual risk which they desired to insure, and had not effected the disclosure required by the rules of marine insurance. The matter came for trial, and it was heard in Dec. 1918 by Bailhache, J., who held that adequate disclosure had not been made to the underwriters, and that the words of the policy were not apt to enable the plaintiffs to recover. He stated in the course of his judgment a rule of law which has been read to me, and which, in substance, I think, subject to details of language, was adopted afterwards by the Court of Appeal. The plaintiffs' appeal was dismissed on the 13th March 1919, and the grounds upon which the Judge in the first instance decided against the plaintiffs were upheld.

The judgment of Bankes, L.J. pointed out that the plaintiffs desired to cover an insurance of a special kind of risk; he further pointed out that the plaintiffs had explained the fact to their brokers, Messrs. Vaughan, and that the brokers had failed to disclose such facts to the underwriters. Bankes, L.J. said this: "It may be that Mr. Thompson did know that the whole of this nitrate of soda trade was in the hands of the Government; it may be that he knew that the Government did not insure; it may be that Mr. Reeder pointed out to him that under these very general words was included the unusual risk of the Government changing the vessel's destination in the event of some accident occurring to the ship. But the mere fact that he indicated that risk seems to me conclusive that the non-disclosure of what was a much more serious risk, namely, the risk of the Government's changing its mind for some reason which was sufficient justification from their point of view, was in my mind a non-disclosure on which the insurer was entitled to say a policy obtained under those circumstances could not be enforced."

In the above circumstances the plaintiffs bring this action. I accept in substance the evidence given on behalf of the plaintiffs, and on that evidence I am satisfied that the defendants must be held guilty of negligence and breach of duty in not disclosing to the underwriters the actual risks which the plaintiffs desired to insure, and the circumstances connected therewith, and in not procuring a policy worded with the appropriate breadth. *Primâ facie*, therefore, judgment would be given by me against the defendants for such negligence and for the appropriate damages.

Two serious points, however, are raised against the claim of the plaintiffs. First, I take par. 5 of the defence, which submits that the policy which the defendants were requested to obtain was a "p.p.i." policy and was therefore void under sect. 4 of the Marine Insurance Act 1906 (6 Edw. 7, c. 41), and that the plaintiffs could not therefore have recovered thereunder against the underwriters and cannot now recover against the defendants for negligence. The second point the defendants submitted was that plaintiffs had no insurable interest in the cargo or profits of the *Glenaffric*. These points are of grave and general importance.

First, as to the "p.p.i." policy point. It is clear upon the evidence that the plaintiffs requested the defendants to procure a "p.p.i." policy, and it is equally clear that pursuant to these instructions the policy which was actually obtained on the *Glenaffric* cargo was in fact a "p.p.i." policy.

I might incidentally mention that in one respect I cannot accept the testimony proffered by the plaintiffs, for I can entertain no real doubt upon that which appeared before me that the plaintiffs did know the nature and effect of a "p.p.i." policy, and, indeed, even if they had not possessed actual knowledge of that, I should feel bound to impute such knowledge to them, in view of the fact that sect. 4 of the Act of 1906 was a clause dealing clearly with a public and well-known matter.

The defendants say, therefore, that by reason of sect. 4 of the Marine Insurance Act 1906 the policy taken out by the plaintiffs was void in any event quite apart from the other matters raised by Mr. Thompson. This position of the defendants raises a question upon sect. 4 of the Act of 1906, and I must express my surprise at the circumstance that the effect of this section has not already received judicial consideration and interpretation.

It provides by the first sub-clause that every contract of marine insurance by way of gaming or wagering is void. The sub-section constitutes an emphatic condemnation by the Legislature of any gaming contract with respect to marine insurance. It must be remembered that this sub-clause rests upon no mere technicality, it is based upon public policy, and it was passed in order to prevent if possible what was deemed to be a grave public mischief. So early as 1745 the Legislature had perceived the evils of gaming contracts of this description, and had provided a measure of legislation to deal with them. Sub-clause 2 is as follows: "A contract of marine insurance is deemed to be a gaming or wagering contract (*a*) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest." That is a distinct sub-section; and then the sub-section uses the word "or" and proceeds in the clearest possible manner to the alternative set of contracts which are to be deemed to be gaming or wagering contracts, and says "or (*b*) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself' or 'without benefit of

salvage to the insurer' or subject to any other like term."

In my view, the effect of sect. 4 is first of all to cover contracts which are gaming or wagering contracts upon the evidence of fact, and secondly to state that policies which bear upon their face certain words which tend to indicate gaming and wagering are also to be deemed gaming and wagering contracts. I can see no other interpretation of the section which gives effect to the word "or."

The able argument of Mr. Kennedy involved the submission that the words *prima facie* should be inserted before the word "deemed." As I pointed out in the course of discussion, and as I repeat now, it is clear that such words cannot be satisfactorily inserted at that place without destroying, not merely the grammar, but the sense of the section. And I further point this out, that the argument of Mr. Kennedy would involve that I should read at the end of clause (*b*) further words to this effect, namely, "unless an insurable interest is actually proved to exist." If the Legislature meant to provide that, nothing would have been easier than to insert such words. It seems to me that the whole scope and intent of the section is to provide a statutory condemnation both of contracts in which there is no insurable interest and of contracts which use words which might well suggest that no insurable interest existed.

I come to the view that instead of the words *primâ facie* being inserted before the word "deemed" a more appropriate word would be the word "conclusively."

The result is therefore that the plaintiffs instructed the defendants to procure a contract which would be contrary to the provision of the Act of 1906 and which would be, in my view, utterly void by reason of sect. 4 of that Act, which is based, not upon a mere technicality, but upon a clear rule of public policy.

The question is therefore raised as to whether or not the plaintiffs can recover the 1300*l.* insured by them in respect of the *Glenaffric* policy from the defendants as damages for breach of duty in not getting a policy of insurance which in law would have been void upon the ground which I have mentioned. Now I conceive that on principle it would be right to say that the plaintiffs could not recover, for I should deem the true rule of law to be that a contract by one person to procure for another a contract which would be void as against public interest should itself be void. In this connection I refer to the case of *Cohen* v. *Kittell* (60 L. T. Rep. 932; 22 Q. B. Div. 680). There the plaintiff employed the defendant to bet on commission, and the defendant failed to make the bet in pursuance of the plaintiff's instructions. The plaintiff sued the defendant for breach of contract and claimed as damages the excess of gains over losses that should have been received by the defendant had the bets in question been made. It was held by Huddleston, B. and Manisty, J. that as by the Act of 1845 a bet would not have been recoverable at law, the plaintiff could not maintain the action. The judgments are concise. Huddleston, B. stated this: "The contract of agency therefore for the breach of which the plaintiff sues the defendant is one by which the plaintiff employed the defendant to enter into contracts which, if made, would have been null and void, and the performance of which could not have been enforced by any legal proceeding taken by the defendant for the benefit of the plaintiff. The breach of such a contract by the agent can give no right of action to the principal. I see no difference between the case and the employment of an agent to do an illegal act. The section of Story on Agency which has been cited shows that the right of the plaintiff to have recovered in respect of the contract to have been made by the agent on his behalf is an 'essential ingredient' in the case against the agent for negligence in not contracting. In this case 'essential ingredient' is wanting, and *Webster* v. *De Tastet* (1797, 7 Term Rep. 157) shows that, this being so, the consideration urged on behalf of the plaintiff, that the losers of the bets to the defendant would probably have paid them as debts of honour, is wholly immaterial." Manisty, J. gives judgment to the same effect. He referred incidentally to Tattersall's, and says: "The custom of Tattersall's is again invoked, this time to make the agent responsible. It is clear, however, that the action cannot be maintained."

These judgments seem to me to be wholly agreeable to the cited case of *Webster* v. *De Tastet* (*sup.*). I think it follows from these decisions that the plaintiffs cannot recover the damages claimed in this action, and I follow the views expressed by the judges whose names I have mentioned in holding that the fact that Mr. Thompson did not and would not have raised the "p.p.i." point is not material.

I abstain from discussing the question raised before me as to whether it is the duty of a judge, be it in the Commercial Court or any other court, to observe the existence of the "p.p.i." clause. Great jurists have been mentioned in the argument before me, and I deem it undesirable that I should say anything as to the soundness of the course which has been taken by several of those whose names loom largely in the development of British commercial law. Nor do I propose to consider either *Gedge* v. *Royal Exchange Assurance Company* (82 L. T. Rep. 463; (1900) 2 Q. B. 214) or *Luckett* v. *Wood* (24 Times L. Rep. 617), which were cited by Mr. Greaves Lord in his vigorous argument, or the other cases which are mentioned in the Annual Practice under the notes to Order XIX., r. 15. In substance, therefore, the action fails. Mr. Kennedy, however, raised a further point. Undismayed by the decision in *Cohen* v. *Kittell* (*sup.*) he submitted that although he could not recover the 1300*l.* as loss of profits mentioned, yet he was entitled to claim from the defendants in any event nominal damages upon the ground that they had undoubtedly committed a breach of duty, and were, therefore, technically responsible in some damages to the plaintiff.

At first I was inclined to think that there might be substance in this point (though it would have but little bearing on my view as to costs), for undoubtedly the usual rule of law is reasonably clear upon the matter. It is nowhere better stated than in Leake on Contracts, 3rd edit., p. 908, where it is said: "In an action for breach of contract, if the plaintiff proves the breach but fails to prove any appreciable damage in fact, he is entitled to judgment for damages in law, which, as they exist only in name and not in amount, are called nominal, but are *primâ facie* sufficient to carry the costs of the suit." Much authority is set out in support of the statement, but to my mind that general rule has no application to a case where the contract is to effect another contract which would be void in

law, either because it is void by statute or because it is otherwise against public policy. I conceive that the facts of this case are outside the general rule of law that I have mentioned, and I accept and follow the view in Mayne on Damages, 8th edit., p. 645, which, to my mind, sets forth the true principle applicable to the present case. After dealing with the question of nominal damages in a manner which I need not further discuss, he says this: "But when the agent can show that under no circumstances could any benefit to the principal have followed from obedience to his orders, and, therefore, that disobedience to them has produced no real injury, the action will fail. Therefore, if an agent is ordered to procure a policy of insurance for his principal and neglects to do it, and yet the policy, if procured, would not have entitled the principal, in the events which have happened, to recover the loss or damage, the agent may avail himself of that as a complete defence. *A fortiori*, where the principal would have sustained a loss or damage if his orders had been complied with. Accordingly, if the ship to be insured had deviated from her voyage, or the voyage or the insurance is illegal, or the principal has no insurable interest, or the voyage as described in the order would not have covered the risk, in all such cases the agent, though he has fulfilled his orders, will not be responsible."

And I conceive that that is the true view. There is no case here, I think, for the grant of nominal damages, and it is to be observed that neither in *Webster* v. *De Tastet* (*sup.*) nor in *Cohen* v. *Kittell* (*sup.*), where the point might well have been presented (if sound), was it suggested that nominal damages should be recoverable.

I hold, therefore, that the plaintiffs cannot recover either the 1300*l.* or nominal damages.

I was invited by Mr. Kennedy to decide that the plaintiffs possessed an insurable interest within the Marine Insurance Act. In the view I have taken of sect. 4 it is not necessary to decide this important, far-reaching, and uncertain point. Upon consideration I have come to the view that for several reasons it is undesirable to offer an opinion upon the matter, or to in any way deal with the Marine Insurance (Gambling) Policies Act 1909. The facts and documents in this case are clear, and the point of law can, if it becomes necessary, be determined by an appellate tribunal.

For the reasons I have given there must be judgment for the defendants.

The plaintiffs appealed.

A. R. Kennedy, K.C., *R. A. Wright*, K.C., and *R. K. Chappell* for the plaintiffs.

Greaves Lord, K.C. and *Singleton*, for the defendants, were not called upon.

Bankes, L.J.—This is an appeal from a considered judgment of McCardie, J., who held that the plaintiff under somewhat peculiar circumstances was not entitled to recover any damages against the defendant. The learned judge has set out fully the facts of the case, and, therefore, it is not necessary to go through them in detail. What happened was this: The plaintiffs alleged that they had employed the defendants to take out a policy of insurance for them which covered certain risks, and their complaint was that owing to the defendants' negligence, or the negligence of the person for whom they were responsible, a policy had been taken out which did not cover one of the risks which they had instructed them to cover, and as a result of that they not only failed to recover the policy moneys but they were put to very considerable expense in the matter of costs in endeavouring to establish that the policy which had been taken out covered the particular loss. The defendants raised this defence. They said: "You instructed us to take out a 'p.p.i.' policy, and under those circumstances you are not entitled to recover anything," and that was the question which the learned judge had to decide, and which he decided in favour of the defendants. That defence rests upon sect. 4 of the recent Marine Insurance Act, which provides that every contract of marine insurance by way of gaming or wagering is void. Then sub-sect. 2 is, "a contract of marine insurance is deemed to be a gaming or wagering contract—(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or (*b*) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any other like term." It was said for the defendants that "Inasmuch as your instructions to us were to take out a policy which by the statute is declared to be a gaming and wagering contract and a void contract, you are not entitled in law to recover anything."

Mr. Kennedy, in his very full and careful argument to us, has divided his argument under three heads. He cannot dispute upon the evidence that the instructions which his clients gave were to take out a "p.p.i." policy. The learned judge has so found. Mr. Kennedy was not prepared to admit the correctness of the finding, but, when we were referred to the evidence, it was obvious that the learned judge was quite justified in coming to the conclusion at which he arrived on that point. So assuming those instructions to have been the instructions which were given, Mr. Kennedy's first point was that the "p.p.i." clause ought not to be considered as part of the contract of marine insurance at all. It was an intimation, if I may use the expression, that the underwriter reserved to himself an option of requiring proof of interest or not as he thought fit. But it was not a term of the contract, or intended to be a term of the contract by either party. I do not intend to express any opinion in reference to that point. I conceive that, if it were at any time established, it might remove the very considerable difficulties that sometimes learned judges have felt in reference to this question of dealing with "p.p.i." policies from which the slip has been previously removed, and I need say nothing further on that point, because it seems to me that Mr. Kennedy's second point failed.

The second point was this. He said this particular policy is not within the section at all. The section speaks of contracts of marine insurance being deemed to be gaming or wagering contracts where the policy is made interest or no interest, and he says: "Assuming that I am right in my first point, then it follows that this particular policy was not made in the form which is necessary to satisfy the requirements of the statute." Now it seems to me that the language of the section does not permit of that construction. It seems to me that the language is pointed and directed to exclude the question upon which this part of Mr. Kennedy's argument rested, namely, that his clients having in fact an insurable interest in this

risk the section did not apply to their case, because it seems to me, having regard to the language of the statute, the section is drawn for the purpose of excluding consideration of any inquiry into the question of whether interest existed or not. And this sub-sect. (*b*) is directed to the form of the instrument, and if it is directed to the form of the instrument it must include everything which forms part of the instrument whether it is pasted on or whether it is pinned on. In my opinion the section where it deals with the contract of marine insurance and says it is to be deemed to be a gaming or wagering contract where the policy is made in such and such a form is making void a contract where the instrument in which it is expressed contains any one of these objectionable clauses.

That brings me to Mr. Kennedy's third point. He says that the learned judge was wrong in holding that the contract as between his clients and the defendants was tainted because of the fact that as between his clients and the underwriters the contract of insurance was a gaming or wagering contract and void, and he seeks to establish that contention by a reference to *Bridger* v. *Savage* (53 L. T. Rep. 129; 15 Q. B. Div. 363) and *Read* v. *Anderson* (51 L. T. Rep. 55; 13 Q. B Div. 779) and other cases which might have been referred to where under certain circumstances a person who has been employed on behalf of a principal to enter into a gaming or wagering contract has been held entitled to say that a particular instance of that contract as made by him with his principal was capable of being enforced in the courts even though the ultimate employment, if I may use that expression, was to make a gaming and wagering contract for this principal. Now *Bridger* v. *Savage* (*sup.*) was a case where an agent, having received money paid for a bet, was sued by his principal for the money as money had and received to the use of his principal. It is common knowledge that that form of action rested upon equitable grounds, and I think that Manisty, J. in *Cohen* v. *Kittell* (*sup.*) is referring to that fact in the passage in his judgment on p. 683, where he says: "Doubtless where the gambling transaction is a thing of the past, the bet having been won or lost and the money having been received or paid, as the case may be, by the agent, it would be unjust that he should not in the one case account to and in the other case be recouped by his principal." And I think that *Bridger* v. *Savage* (*sup.*) is a case which depends upon that view of the law. *Read* v. *Anderson* (*sup.*) was a case of a different character. That is a case where the agent asserted that his principal had no right to withdraw his authority to pay a bet which he had been instructed to make for his principal and which had been lost, and there, as it seems to me, on a somewhat similar view of the law, the court held that it would be unjust to the agent, who had acted upon the instructions of his principal, that he should not be allowed to claim the benefit of so much of his contract as involved an indemnity by his principal in case he was called upon to pay the bet.

Those cases, it seems to me, are distinguishable from the present case. Here the agent has suffered no loss from acting upon the instructions of the principal at all. It is not a case in which he is calling upon his principal to make good any injury which he has suffered or will be certain to suffer as a consequence of acting upon his instructions. It is a case where the principal says to the agent: "You are responsible to me in damages because you did not carry out my instructions to make this gaming and wagering contract in accordance with my instructions." McCardie, J. has held that this case is really covered by the authority of *Cohen* v. *Kittel* (*sup.*) and *Webster* v. *De Tastet* (*sup.*), and I agree with that view, although there is a passage in Huddleston, B.'s judgment in *Cohen* v. *Kittell* where it seems to me the learned judge made a slight slip. There the action was brought by the plaintiff claiming damages because the defendant had not made bets for him which he had been instructed to make, and the court, consisting of Huddleston, B. and Manisty, J., had *Bridger* v. *Savage* (*sup.*), *Read* v. *Anderson* (*sup.*), and *Webster* v. *De Tastet* (*sup.*) cited to them, and they came to the conclusion that the action was not maintainable. Huddleston, B. reads the section of the Gaming Act of 1745, which provides that all contracts or agreements whether by parol or writing by way of gaming or wagering shall be null and void, and then he goes on: "The contract of agency therefore for the breach of which the plaintiff sues the defendant is one by which the plaintiff employed the defendant to enter into contracts which if made would have been null and void and the performance of which could not have been enforced by any legal proceeding taken by the defendant for the benefit of the plaintiff. The breach of such contract by the agent can give no right of action to the principal." I agree with that statement, and with the conclusion. But it is not necessary to agree with the sentence which immediately follows and the reasoning of the learned judge where he says that he sees no difference between that case and the employment of an agent to do any illegal act. Now t ere obviously is a distinction, and in many cases a very material distinction, between instruction to do an illegal act and instruction to do an act which the Legislature merely makes void. But in this particular case I do not think it is necessary to consider what the instructions are. The other case which McCardie, J. relied upon—*Webster* v. *de Tastet* (*sup.*)—I am not sure may not turn upon considerations of a rather different character from those which underlie the judgment in *Cohen* v. *Kittell* (*sup.*). I am prepared to agree with McCardie, J.'s judgment upon the ground that the employment by the principal of an agent to do an act which is by law declared to be a void act is one which gives the principal no right of action.

I think that there may be another ground upon which the view of the learned judge could be supported, although it is not one upon which it is necessary to express a definite opinion. It may well be that in spite of the change introduced by the Marine Insurance Act 1906 the making of a p.p.i. policy is against public policy, in spite of the change that has been introduced by the repeal of the statute of 1745, which declared that such contracts should be illegal, and the substitution of sect. 4 of the Act of 1906, which speaks of them as being void as gaming and wagering contracts, because the mischief which it is intended that the first Act should deal with and which is recited in the Preamble was just as great an evil at the time of the passing of the 1906 Act as it was in 1745. It may have to some extent changed its form or its forms, but the evil is the same evil, and the mere alteration of the language of the statute which from some points

of view may render the remedy more easily available under the later statute than it was under the other cannot, I think, be readily accepted as indicating an alteration in the view of the Legislature in reference to such a contract. If the law be that the true view of a p.p.i. policy is that it is against public policy and that these statutes and the present statute are merely the result of their being against public policy, then a contract to enter into a contract which is against public policy must, it seems to me, itself be against public policy. But, as I say, that is perhaps a more difficult question requiring more consideration possibly than one has been able to give to it, and, therefore, I do not desire to express any decided or definite opinion upon that, but I prefer to rest my judgment on the ground indicated by Huddleston, B.

Scrutton, L.J.—Mr. Kennedy's very careful and candid argument, to which I have listened with great attention, has not persuaded me that McCardie, J.'s judgment in this case is erroneous. As the point is one of considerable commercial and general importance, and as it is quite possible to think in this case that it is working an injustice to the parties concerned, I desire to express my reasons in my own words. Some Liverpool warehousemen had a contract by which a quantity of nitrate was coming to their warehouse from South American ports. The trade at that time was under the control of the Government so that ships which started at a particular port might be diverted to other ports in other countries, and the warehousemen were anxious to ensure that they should make the profits which they expected from the nitrate coming to their warehouse by insuring, amongst other things, against the non-arrival of the ship by reason of the Government diverting her to other countries. They accordingly gave a Liverpool firm of brokers instructions to effect policies which would cover, amongst other things, that particular source of loss. It is quite clear to my mind that, in view of the fact that it might be difficult to prove the actual loss, because when you knew the ship was not coming you not unnaturally would fill up your warehouse with other goods if you could get them, and there might be a somewhat complicated question as to how much you really had lost, they intended that their policies should have on them what is known in business as the p.p.i. clause, the effect of which would be that the mere production of the policy is evidence of interest to the full amount mentioned in the policy.

For a hundred years at least there has been an unfortunate conflict between the statute law and the practice of business men. It has been extremely common to place in policies a p.p.i. clause, providing that there shall be no necessity to prove the amount of loss, although all the time there was a statute which said that such a clause was either illegal or null and void. It is unfortunate that that practice has prevailed, because while, on the one hand, there are undoubtedly cases where there is a real loss, but it is difficult to prove its exact amount, and it is convenient in a business sense to have it assessed beforehand; on the other hand, there is no doubt most of the cases of deliberate attempts to get insurance money, and cases of over-valuation on the chance of a loss, are all rendered possible by the continued insertion of a "p.p.i." clause. Apart from the fact that the clause facilitates fraud, as it does in many cases, a practice has arisen with regard to it which places judges in a very great difficulty. It is clearly the duty of the judges if they know that a policy has that clause on it to treat it as null and void under the Act, and a practice has grown up of deceiving the court by parties tearing off the policy the clause which they have put on it in the hope that the court will not know that there is such a clause and will give effect to the policy. The court does not know generally, but having had some commercial experience suspects what those two pinholes mean in the margin of the policy, and suspects still more when it sees a bit of paper which has had something torn off it. Judges are placed in a very difficult position, at least, speaking for myself personally, when they strongly suspect that they are being asked to enforce a null and void contract, but have no evidence beyond the kind of indications that are on the policy. However that may be, that is the practice, and the only thing that can be said to business men who carry on business in that way is, that if they persistently run contrary to a statute, if they persistently enter into contracts and policies which are null and void under the statutes, they must not complain if the courts obey the statutes rather than their commercial practice.

In this case, the warehousemen desired to have the "p.p.i." clauses on the policies, and they were put on. The clauses were pinned on in the orthodox way. But it turned out that the Liverpool brokers who were instructed to effect the policy through their London agents did not convey to the London underwriters the exact nature of the risk that they were being asked to insure. They used general words which would cover the risk, but they did not convey to the minds of the underwriters that what their clients desired to cover was a particular special form of risk, namely, the diversion of the ship by Government orders to other ports or countries. In consequence, when a particular ship, the *Glenaffric*, was diverted to Italy and a claim was made under the policy the underwriters replied: "You had not told us this was the special risk you were desiring to insure and your general words do not cover it." It may be put as concealment; but it may also be put that the language under the circumstances did not cover the loss. Bailhache, J. has held, and the Court of Appeal has affirmed the view (*Thomas Cheshire and Co.* v. *W. A. Thompson*, *sup.*), that the London underwriters were not liable under those circumstances. The slip had been torn off the policy. So neither court thought that the transaction they were being asked to deal with was one that was null and void under the statute.

Then came the next stage, which is the present one. The Liverpool warehousemen, not being able to recover on their policy and finding that they did not recover, because of the action taken by their brokers, or the lack of action, brought an action for negligence against their brokers, to which the answer which the brokers have thought it right to make—and I am only here to enforce the law and not to express any opinion on their commercial conduct—was: "You cannot recover any damage, because you instructed us to make a 'p.p.i" policy which is a null and void transaction, and from a null and void transaction no damages can flow." And McCardie, J. has held that that is right.

Mr. Kennedy takes three points against the decision. He says, first, this clause is not really

part of the policy. It is a sort of informal polite intimation that in the proceedings in connection with the policy a certain course may be taken by the underwriters, but it is not part of the policy. Now I am afraid I am not able to accept the position that slips on a policy are not part of the policy. A contract of marine insurance must be expressed in a policy, and here is the policy with the slip attached to it; and I am afraid I do not see any ground for holding that slips on the policy are merely polite intimations for information of people as to what may happen to the policy, but are not part of the policy.

Then, secondly, Mr. Kennedy says, clause 4 of the Marine Insurance Act 1906 is not really so strict as it appears to be. It says: "Every contract of marine insurance by way of gaming or wagering is void. (2) A contract of marine insurance is deemed to be a gaming or wagering contract: (*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or (*b*) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself.'" That only means, if I understand Mr. Kennedy's argument, that it is *primâ facie* a gaming and wagering contract and you may defeat it if you can show you either had a real interest or a probability of obtaining it. That is, in effect, to read sub-sect. (*a*) of sect. 2 into sub-sect. (*b*). I see no ground for cutting down the section in that way. It seems to me Parliament has said: "If you put this clause in your policy without more we deem it to be a gaming and wagering policy, because the clause is a gaming and wagering clause." In my view, therefore, the second point fails.

Then comes Mr. Kennedy's third point, and the only point which has given me any trouble at all. It is said: "Even if this contract is null and void, yet if you have executed it negligently one may take into account the probabilities of the thing, and as the strong probability is that I should have been paid under this policy by the underwriter, if it had been properly executed, I may recover damages assessed in the way all damages have to be assessed on the probabilities of what would happen; and as I probably should have recovered under this policy if it had been properly effected, because probably the underwriter would not have taken the objection that the 'p.p.i.' clause was also on the policy, and we should have stopped the court from finding it out, I can recover damages." Now, my view of the principle on which this case should be decided is this, that a contract declared by the law null and void cannot be either directly or indirectly the basis of a legal claim. You have, first of all, contracts as to which there is no objection which are legally enforceable. You have then contracts under the Statute of Frauds which provides that certain legal relations do not make them illegal, do not make them null and void, but provides that they shall not be enforceable in law except by a certain procedure, namely, evidence in writing. In that class of case, which I call contracts of imperfect obligation, the illegal relation which cannot be enforced may yet have a number of legal consequences indirectly. I am not going through all the things that may happen under the Statute of Frauds. Anybody who is curious enough to look will find them in Sir Frederick Pollock's book on the Law of Contracts under "Imperfect Obligation." There the contract not being declared illegal and not being declared null and void is only unenforceable in a particular way; although it is unenforceable for lack of certain formalities, it yet may have legal consequences indirectly. When you get to the next class of case, which is where it is declared null and void, but not declared illegal, then, in my view, the court must give full effect to the nullity and invalidity which the statute declares and cannot consider as the basis of the legal obligation a set of relations which Parliament has declared to be null and void. For instance, a prominent class of null and void contracts are betting contracts. It seems to me quite clear that you cannot put forward as a claim for damages that your agent has not made a bet which he was employed to make. The bet that he would have made was a null and void transaction, and you cannot inquire into the cause of action on a null and void transaction and see what would have happened if he had made it, or what would have happened if, having made it, he had made it carelessly, made it with an insolvent bookmaker, made it for less than the amount at which he was instructed to make it. If you could go into a thing like that you would have treated as of some validity a transaction which Parliament has said shall be null and void. It seems to me, therefore, that the principle on which I should like to decide this part of the case is this: That you cannot try a transaction which Parliament has said to be null and void, the basis being illegal. The only exception, and I am not sure that it is an exception, is this, that when a man has received money for you it is no answer for him to say: "I received it in respect of a null and void transaction." He has received it and you cannot treat the receipt as null and void. *Bridger* v. *Savage* (*sup.*) appears to me to be a good example of that sort of case; and it rests upon the actual receipt of property. A good many people thought *Read* v. *Anderson* (*sup.*) was wrong. Parliament, at any rate, dealt with it very summarily by reversing it by statute within a year or two afterward, but it may be that *Read* v. *Anderson* (*sup.*) may be brought under the same principle. There is one thing further I wish to say about the money. It is quite possible to put it in the way in which Lord Ellenborough put it in *Griffith* v. *Young* (1810, 12 East, 513, at p. 514): "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely illegal or immoral, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other." That may be the same kind of principle which may justify proceedings in respect of receipt of money under a null and void contract which would not apply to any other form of utilising that transaction as the basis of a legal obligation. I prefer to rest my answer to the third point taken by Mr. Kennedy on that principle; but I am not at all sure, and I should like to reserve it for further consideration, whether you cannot raise the objection to this action and to actions of a similar character in respect of bets on the ground that the transactions which are being investigated are contrary to public policy. I am not at all sure that the legislation against these "p.p.i." clauses and the legislation against betting may not be rested on the fact that the transactions are contrary to public policy.

But, as I have said, I should like a fuller consideration of that aspect of the case before deciding it on that ground. I am content to leave it on the decision that you cannot make a null and void transaction, a transaction declared null and void by statute, the basis directly or indirectly of an action.

For these reasons, although I quite conceive that the plaintiff feels it strongly, I think that the judgment of the learned judge below was right and that this appeal fails.

Atkin, L.J.—I agree, but I should rather like to add a few words out of regard, if I may say so, to the admirable argument which has been addressed to us by Mr. Kennedy. His first point was that the slip was not part of the contract of insurance—by "the slip" I mean the attached slip. I do not think that can be supported. I think the test that one might apply would be this. Supposing there were perfectly valid terms expressed in such a slip attached to the policy, could it be said that those terms were not a part of the contract of insurance? Neither party suggests that for a moment. I think the intention of the parties was, and must be taken to have been in view of the fact that they attached it to the written document and signed the document with that slip attached, that they intended to include in the contract the terms contained in that slip.

The next point was that the contract was not within sect. 4 of the Act, because the assured had in fact, an insurable interest, and that the voidance of the contract which, according to the Act of Parliament, sect. 4, is made "'interest or no interest' or 'without further proof of interest than the policy itself' or 'without benefit of salvage to the insurer' or subject to any other like term," is only a provision that under those circumstances it is *primâ facie* deemed to be a gaming or wagering contract. I think that the words are inconsistent with that view, and it appears to me quite plain, when you consider the history of the clause and remember the section of the Act of 1745 which is repealed, that that was not the intention of the Legislature. I think that this contract was subject to a like term, the term used, and must be deemed to be a gaming or wagering contract.

The third point that was raised is this. It was said that the employment, at any rate, of the broker was a perfectly legal contract and that it was broken, and that in assessing the damages you were entitled to take into account the probability that the contract which the agent was employed to make, though void, would have resulted in an advantage to the plaintiff and the invalid contract gives rise to damages. To my mind, Mr. Kennedy substantiated the first part of that argument. I see nothing in the provisions of the Act to indicate as being merely a gaming and wagering contract a contract of insurance, nothing to make the employment of the insurance broker an illegal contract, and nothing to make it a void contract. If you once assume that the contract of insurance was a gaming or wagering contract you put it upon the same footing as a bet on a horse race, and it appears to me it has been decided by an authority which is binding upon this court, namely, the case of *Read* v. *Anderson* (*sup.*), that the employment of an agent to make a bet on horse races does give rise to a valid contract as between the principal and the agent, a contract on which the agent can sue the principal for an indemnity, and can sue him for an indemnity because that is an implied term of the contract of employment. In *Read* v. *Anderson* (*sup.*) it appears to me that the decision of the majority of the Court of Appeal is inexplicable except upon the footing that they did consider the contract of employment to be a valid contract. They said that it was; and I think that it was further stated to be valid in the case of *Bridger* v. *Savage* (*sup.*). Therefore, to my mind the contract of employment was a valid contract.

But that still gives rise to the further question what damages can be recovered by the principal if the agent breaks it. I think that under those circumstances where the employment is to make a contract which is null and void as opposed to being illegal, if the agent breaks that contract his principal has no right of damages against him, whether for nominal damages or substantial damages, if the only breach alleged by the agent is an omission to make a void contract at all, or default in making it with reasonable care; and I think *Cohen* v. *Kittell* (*sup.*) is an authority for that proposition. I think it is based upon sound reason except for the one sentence of Huddleston, B., where he says he sees no difference between that and an employment to make an illegal contract. It appears to me there is very considerable distinction, and it follows, I think, that I do not agree with the sentence in McCardie, J.'s judgment, where he said this: "Now I conceive that on principle it would not be right to say that the plaintiffs could not recover, for I should deem the true rule of law to be that a contract by one person to procure for another a contract which would be void as against public interest should itself be void." For that he cites the case of *Cohen* v. *Kittell* (*sup.*). If the learned judge by "void as against public policy" means "illegal," I think the proposition would be sound. It would not refer to the matter before us, but it would be applicable to the case of *Cohen* v. *Kittell* (*sup.*). *Webster* v. *De Tastet* (*sup.*) is a different matter, because there the contract was something which was treated as illegal in the sense that it was considered to be against public policy to insure wages.

For these reasons I think that the judgment of the learned judge below should stand. But I desire, as the other members of the court have done, to reserve the question as to whether or not this contract to make a "p.p.i." policy is an illegal contract. I do not want to further discuss it except to say that when it comes up to be considered it will probably be necessary to consider what the law was before the Act of 1745, as to which, curiously enough, there is quite an extensive discussion in the exchequer chamber in the case of *Cousins* v. *Nantes* (1811, 3 Taunt. 513), and I think it will further be necessary probably to consider what the law is after the passing of the Act of 1906, taking into serious account the provisions made by the Legislature in the Marine Insurance Act 1909, which dealt, to a limited extent, with these policies. I also wish to say for myself that in this particular case it has been assumed by everybody that if in fact the sub-agent, the insurance broker in London, was negligent that the defendants here, the country insurance brokers, were responsible for that negligence. I express no opinion upon that matter at all. I daresay it is perfectly true. I can imagine circumstances in which an agent in the country employed under such circumstances, as he necessarily must be, if he is contemplating the employment of an agent in London may not

be responsible for the negligence of that sub-agent if, in fact, he himself has used reasonable care in the selection of the agent. But that is a matter which does not arise now, and I only mention it. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard, Englefield,* and *Co.*, for *Simpson, North, Harley,* and *Co.*, Liverpool.

Solicitors for the defendants, *Finch, Jennings,* and *Tree,* for *Weightman, Pedder,* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 4, 5, 8, *and* 31, 1920.

(Before Rowlatt, J.)

Elliott Steam Tug Company Limited *v.* John Payne and Co. (*a*)

Charter-party—Termination of hire—Implied rights—Breach of charter-party—Requisition—Termination—"Restraint of princes"—Measure of damages.

A charter-party provided, inter alia, *for the hire of a chartered vessel for one calendar month from the date at which it was placed at the disposal of the charterers, and that thereafter hire was to continue at the same rate of payment until determined by fourteen days' notice given by the charterers. Some months later the shipowners withdrew the vessel from the service of the charterers, claiming an implied right to terminate the charter-party by reasonable notice, which they said that they had given.*

The tug was then requisitioned by the Government, and the shipowners contended further that the charter-party, if it was in existence at the time, was put an end to by the requisition; if it was not put an end to by the requisition, they relied upon the exception of "restraint of princes" in respect of the period under requisition. The charterers replied that the charter was still in existence, but that the ship was deviating when the requisition took place; her owners were not, therefore, entitled to rely upon the exceptions.

Held, that the charter-party was to continue in existence until terminated by the charterers, and that the shipowners had no implied right to put an end to it by notice or otherwise. Nor was it ended by the Government requisition, but, as the requisition was wholly unconnected with the wrongful act of the shipowners, the question of the application of the exceptions contained in the charter did not arise. On general grounds damages were not awarded for the period during which the vessel was under requisition.

Davis *v.* Garrett (1830, 6 *Bing.* 716) *distinguished. Dictum of Tindal, C.J., at p.* 724, *held not to apply.*

Action in the Commercial List tried by Rowlatt, J.

The plaintiffs claimed a declaration that a charter-party dated the 18th Aug. 1914 was still in force; an injunction to restrain the defendants from using a tug otherwise than in accordance with the charter-party; and damages for breach of the charter-party.

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

The plaintiffs, the Elliott Steam Tug Company Limited, carried on business in London as owners of steam tugs. The defendants, John Payne and Co., were the owners of the steam tug *John Payne,* of the port of Bristol.

By a charter-party dated the 18th Aug. 1914 the defendants agreed, as owners, to let to the plaintiffs, as charterers, the steam tug, the *John Payne,* "for the term of one calendar month, commencing from the 18th day of August 1914, at which date she is to be placed at the disposal of the charterers at Bristol." The defendants were to appoint the master and crew, and were to maintain the tug, which was to be employed between such safe ports in the United Kingdom, with the option of towing between the United Kingdom and continental ports and in the Channel, as charterers or their agents should direct. The charterers were to pay for the use and hire of the tug at the rate of 220*l.* per calendar month. The charter-party contained an exception of the restraint of princes; and there was also a type-written clause as follows: "The hire to continue at the same rate of payment until charterers determine same by fourteen days' notice."

The tug began work under the charter-party on the 22nd Aug. 1914, and the owners accepted hire, monthly in advance, until April 1915. Disputes arose between the parties at the end of 1914 and the beginning of 1915.

By letters dated the 4th and 16th Dec. 1914 the defendants gave notice to the plaintiffs purporting to terminate the charter-party.

The plaintiffs complained that the defendants' tug-master was disobeying orders which the charterers were entitled to give under the charter-party. They also alleged that on the 19th Feb. 1915 the tug was, for the time being, practically withdrawn from the service of the plaintiffs in consequence of the crew refusing to proceed outside of the Thames estuary owing to the presence of German submarines.

On the 3rd May 1915, when the tug was working in the neighbourhood of Dover, the defendants withdrew her from the charterers' service; and they ordered her to Bristol to undergo alleged necessary overhaul and repairs. When the tug arrived at Bristol the defendants, on the 21st May 1915, wrote to the plaintiffs, notifying them that they had sent the tug to Bristol for repairs, and that they would not redeliver her to the plaintiffs. The defendants claimed the right, and purported to terminate the charter-party by giving a fortnight's notice, which the plaintiffs refused to accept. The defendants did not restore the tug to the plaintiffs.

On the 10th June 1915 the plaintiffs issued a writ against the defendants claiming (1) a declaration that they were entitled to the use of the vessel under the charter-party until they should determine it by fourteen days' notice, and that the defendants had not the option to terminate the charter-party by notice; (2) an injunction to restrain the defendants from using the tug otherwise than in accordance with the charter-party; and (3) damages.

The plaintiffs alleged in their points of claim (*inter alia*) that they (the plaintiffs) had not given any notice to determine the hiring of the tug under the charter-party; that the defendants had been for some time desirous of terminating the charter-party, and not having the power themselves to do so, had sought to force the plaintiffs to exercise

their option to determine it, and for that purpose the defendants, in breach of the charter-party, had not given the plaintiffs the use of the tug, and had not at all times kept her at the disposal of the plaintiffs or in every way fit for the service nor provided the necessary equipment.

They alleged, further, that the defendants had not provided a suitable master and crew; that the master, with the approval of the defendants, had not followed the instructions of the plaintiffs, had not used all dispatch in prosecuting voyages, and had not rendered all customary assistance with the crew; and that the defendants, though advised by the plaintiffs of their dissatisfaction with the master and crew, had not investigated the matter and had not made any change in the appointments; and that the defendants had withdrawn the tug from the plaintiffs, and, notwithstanding the protests of the plaintiffs, had continued to withdraw the tug from the plaintiffs.

The defendants alleged that the plaintiffs had so misused the tug as to amount to repudiation of the charter-party. The defendants delivered their points of defence and counter-claim on the 7th July 1915. They did not admit that the charter-party still continued. They alleged that it was an implied term of the charter-party that the defendants should have the right to terminate the hiring of the tug by reasonable notice to the plaintiffs; that a reasonable notice was a fourteen days' notice; and that such notice was duly given to the plaintiffs by letter from the defendants, dated the 21st May 1915, and that the hiring accordingly terminated on the expiration of that notice; that all the allegations in the points of claim and particulars of breaches of charter-party by the defendants were denied with certain admissions and explanations. The defendants pleaded, alternatively, that they were entitled to terminate the hiring of the tug by reason of various matters—*e.g.*, by alleged continuous and unreasonable overwork of the tug by the plaintiffs, which, they alleged, made it impossible for them, the defendants, to attend reasonably to the upkeep of the tug; by alleged continuous overworking of the master and crew, and alleged putting of the tug in danger on several occasions. The defendants counter-claimed (*inter alia*) for a declaration that the hiring of the tug terminated fourteen days after the 21st May 1915 and for damages.

The plaintiffs by their reply delivered on the 13th July 1915 joined issue, and paid into court certain sums in respect of the counter-claim, at the same time denying liability.

On the 16th July 1915 the tug was requisitioned by the Government, and the tug continued under requisition until the 31st March 1920, and the defendants were thereby prevented from restoring the tug to the plaintiffs, even if they had desired to do so. The proceedings in the action were stayed during the period of the requisition.

On the 6th Feb. 1920 amended points of defence and counter-claim were delivered by the defendants. They added an alternative plea that the hiring of the tug had terminated on the 16th July 1915, the date of the requisition of the tug by the British Government, and they claimed a declaration to that effect.

The plaintiffs, in reply, said that if the tug was requisitioned by the British Government on the 16th July 1915 she was requisitioned at the instigation or wish of the defendants, that the defendants never alleged, until the amended defence was delivered, that the charter-party was terminated by the requisitioning, and the parties had, since July 1915, acted on the footing that the charter-party was not thereby terminated; and that in the circumstances the defendants were estopped from alleging that the charter-party was terminated by the alleged requisitioning.

Dunlop, K.C. and *F. van den Berg* for the plaintiffs.—On the true construction of the charter-party the tug was hired for one month at a certain rate, and thereafter the hiring was to continue indefinitely until the plaintiffs determined it by fourteen days' notice. The charter-party has not been so determined. The defendants had no power to determine the hiring, and the notices by which they purported to do so are void. The requisitioning of the tug by the British Government on the 16th July did not determine the hiring. See

Elliott Steam Tug Company v. *Duncan and Sons*, 34 Times L. Rep. 583.

The defendants had committed breaches of the charter-party, particularly in detaining the tug from the plaintiffs in and after May 1915 for alleged repairs. The repairs were not necessary and the plaintiffs are entitled to damages. The plaintiffs are also entitled to damages for the period during which the tug was under requisition, because in the absence of proof to the contrary, the requisition of the tug should be regarded as having arisen out of its wrongful detention by the defendants. The defendants are not entitled to rely on the exception of restraint of princes because they were committing breaches of the charter-party. See

Davis v. *Garrett*, 1830, 6 Bing. 716, per Tindal, C.J., at p. 724;
Lilley v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510;
Morrison and Co. v. *Shaw, Savill, and Albion Company*, 13 Asp. Mar. Law Cas. 400, 504 115 L. T. Rep. 508; (1916) 2 K. B. 783, 795;
Shaw and Co. v. *Symmons and Sons*, 117 L. T. Rep. 91; (1917) 1 K. B. 799.

MacKinnon, K.C. and *W. N. Raeburn*, K.C. for the defendants.—On the true construction of the charter-party a term is implied that the defendants were to be entitled to terminate the hire by giving the plaintiffs a reasonable notice. A fourteen-days' notice is a reasonable notice, and such a reasonable notice had been given by the defendants to the plaintiffs. Therefore the charter-party was determined before any of the alleged breaches by the defendants took place.

Alternatively, if the charter-party was not determined by notice, it was determined by the requisitioning of the tug by the British Government on the 16th July 1915.

The dictum of Tindal, C.J. in *Davis* v. *Garrett* (6 Bing. 716, at p. 724) does not apply here, because the requisitioning of the tug did not arise out of its alleged detention by the defendants. Therefore, the plaintiffs are not entitled to damages in respect of the period during which the tug was under requisition by the Government. Moreover, this case is entirely distinguishable from the case of *Morrison and Co.* v. *Shaw, Savill, and Albion Company* (*sup.*), and the defendants are entitled to rely on the exception of the restraint of princes. The plaintiffs have failed to prove that the defendants have committed any breaches of the charter-party.

Cur. adv. vult.

March 8.—Rowlatt, J. delivered an interim judgment.—His Lordship said: I will now deliver judgment on all the points that arise in this action, except one point, on which I propose to reserve my decision to another day.

The first question is, what, on the true construction of the charter-party, is the duration of the period for which the tug was hired by the plaintiffs? The charter-party contains a clause providing that the tug is to be hired for one calendar month at a certain sum for that term, and it contains also the following typewritten clause: "The hire to continue at the same rate of payment until charterers determine same by fourteen days' notice."

In my opinion, these provisions can only mean that the hiring of the tug at the specified rate is to continue indefinitely, as long as the tug remains in existence, subject to the condition that the plaintiffs may put an end to it by giving the stipulated notice. It is an extraordinary arrangement, but if the document be construed according to its plain meaning, there can be no doubt that it is the arrangement into which the parties have entered.

It follows, therefore, that the defendants had no power to terminate the hiring of the tug, and that the notices by which they purported to do so in Dec. 1914 and May 1915 were void and inoperative. Nor can it be said that the defendants were entitled to treat the hiring as having been terminated by any act of the plaintiffs. The defendants allege that the conduct of the plaintiffs was in many respects unreasonable and harassing, but I am unable to find that it amounted, in any instance, to such a breach of the charter-party as enabled the defendants to say that it constituted a repudiation of the contract. Nor are the defendants justified in their contention that the hiring was terminated by the requisitioning of the tug on the 16th July 1915. In my opinion, as I have already said, this charter-party was to continue in force for an indefinite time, and in this case, as in the previous case of *Elliott Steam Tug Company* v. *Duncan and Sons* (34 Times L. Rep. 583), I must come to the conclusion that the requisitioning of the vessel did not put an end to the charter-party. I am of opinion, therefore, that the charter-party was not terminated by any of the causes relied on by the defendants, and that it still remains in force.

That being so, if at any time after the date of the charter-party the defendants have, without lawful excuse, failed to place the tug at the disposal of the plaintiffs, they have committed a breach of the charter-party, for which the plaintiffs are entitled to relief. I think, however, that the case is one in which the relief, if any, should take the form, not of an injunction, but of damages.

On the 19th Feb. 1915 the tug was practically withdrawn from the service of the plaintiffs in consequence of the refusal of the crew to leave the estuary of the Thames, being afraid of attack by German submarines. The tug was at work in the Thames, but the plaintiffs wanted her to go elsewhere, and the crew refused to comply with their instructions. The defendants were bound to procure a crew who would carry out the instructions of the plaintiffs, and their failure to do so, in this instance, constituted a breach of contract in respect of which the plaintiffs are entitled to an inquiry as to damages.

Further, on the 3rd May 1915 the defendants withdrew the tug from the plaintiffs and sent her to Bristol, where the defendants' works were, for repairs, and kept her there until she was requisitioned. I do not say that the removal of the vessel by the defendants was unjustifiable, but I think that they kept her there longer than was necessary.

I find that the repairs could have been effected by the 1st June 1915, and that as from that date the defendants withheld the tug from the plaintiffs in breach of the charter-party. I, therefore, hold that the plaintiffs are entitled to damages for the period between that date, on which the tug should have been returned to them, and the 10th June 1915, the date of the writ in the action.

There remains the important question whether or not the damages which the plaintiffs are entitled to recover in respect of the defendants' breaches of the charter-party should include damages for the loss of the tug to the plaintiffs during the period she was under requisition.

That is a question of some difficulty, and I will consider it further before giving my decision on it.

March 31.—Rowlatt, J. read the following judgment:—In this case I disposed, at the hearing, of all questions except one. The point that I reserved arises in this way. The defendants, so I have held, in breach of the charter-party, withdrew the ship from the service of the charterers, claiming to determine the hearing. The charterers did not accept the repudiation, but continued to insist on the ship being restored. While matters were in this position the vessel was requisitioned by the Government, and the owners were thereafter prevented from restoring her to the service of the charterers if they wished to do so. In these circumstances, it was said for the plaintiffs that the ship, when requisitioned, was to be treated as a vessel which was deviating from a voyage contracted for, and that the owners were liable for damages calculated over the whole period of the requisition.

I do not think that the point turns on the exception of restraint of princes, because it seems to me that when the owner is prevented by the law of the land from using his vessel in the service of the charterer, the result must be, independently of any exception, that the same law cannot make him liable in damages. Surely I cannot call upon him to do two inconsistent things at the same time.

But a passage in the judgment of Tindal, C.J. in *Davis* v. *Garrett* (6 Bing. 716) was referred to, at p. 724, which is as follows: "We think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act has not been done." It is to be observed that the learned judge is there dealing with damages that did arise from the breach, and the decision was that it was none the less recoverable because it was not shown that it would not have happened if there had been no breach. I do not read the principle laid down to be that all damage which occurs during the period of a breach is to be treated as connected with it unless the contrary is shown, but that

damages flowing from the act which constituted the breach, in that case navigating the vessel where and when she met with disaster, could not be excluded merely because they might have flowed from navigating her on the course contracted for.

If the larger rule indicated above is to be applied, it would seem to follow, and indeed I think it follows from the plaintiffs' argument here, that if a tenant of a house wrongfully held over for a day after the expiration of his term and on that day the house was requisitioned he would be responsible in damages for the requisitioning. This is, I think, out of the question. In my view the requisitioning, whether in the case of the vessel material to this action or in the case of a house, is not to be regarded, unless it is proved to be so in fact, as arising out of the use of the vessel or house at the time, but as due to a liability incident to its mere existence, and that the rule in *Davis* v. *Garrett* (*sup.*) has no application.

In the circumstances, therefore, I decide the point reserved in favour of the defendants.

Judgment accordingly.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*
Solicitors for the defendants, *Holman, Fenwick,* and *Willan.*

House of Lords.

Thursday, July 1, 1920.

(Before the LORD CHANCELLOR (Lord Birkenhead) Lords FINLAY, SHAW, MOULTON, and SUMNER.)

PAGE AND OTHERS *v.* ADMIRALTY COMMISSIONERS; ELLIOTT STEAM TUG COMPANY *v.* SAME. (*a*)

Salvage—Tug requisitioned by Admiralty—Demise of tug to Crown—"Ship belonging to His Majesty"—Right of Admiralty to salvage remuneration—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping* (*Salvage*) *Act* 1916 (6 *&* 7 *Geo.* 5, *c.* 41), *s.* 1.

Where a tug is requisitioned by the Admiralty upon terms which amount to a demise of the tug to the Admiralty, the latter and not the owners of the tug are entitled to salvage remuneration subsequently earned by the tug.

By sect. 557, *sub-sect.* 1, *of the Merchant Shipping Act* 1894, "*Where salvage services are rendered by any ship belonging to His 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 any other expense or loss sustained by His Majesty by reason of that service. . . .*"

By sect. 1 *of the Merchant Shipping* (*Salvage*) *Act* 1916, "*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.*"

A tug belonging to the appellants was requisitioned by the Admiralty upon terms which amounted to a demise of the tug to the Admiralty, the tug rendered salvage services to another vessel, and the Admiralty Commissioners claimed a declaration that they were entitled to the remuneration so earned.

Held, that the tug was a "ship belonging to His Majesty" within the meaning of sect. 1 *of the Merchant Shipping* (*Salvage*) *Act* 1916, *and therefore the Admiralty Commissioners and not the owners of the tug were entitled to claim the salvage moneys.*

Decision of the Court of Appeal (*reported* 14 *Asp. Mar. Law Cas.* 394; 120 *L. T. Rep.* 137; (1919) 1 *K. B.* 299) *affirmed.*

CONSOLIDATED appeals from orders of the Court of Appeal (reported 14 Asp. Mar. Law Cas. 394; 120 L. T. Rep. 137; (1919) 1 K. B. 299) by the owners of two tugs which, while under requisition by the Admiralty earned respectively 4500*l.* and 350*l.* as remuneration for salvage services to two ships.

The Court of Appeal in the first, affirming Bailhache, J. (14 Asp. Mar. Law Cas. 360; 119 L. T. Rep. 338), held that the tug in each case was a vessel "belonging to His Majesty" within the meaning of sect. 1 of the Merchant Shipping (Salvage) Act 1916; and therefore the Admiralty Commissioners were entitled to the amount awarded for the salvage services rendered by the vessel, the owners having no claim to any part of the salvage money.

In the second case which raised the same point, Hill, J. had given judgment for the Admiralty Commissioners, and the appeal from his decision was dismissed by the Court of Appeal.

Stewart Bevan, K.C. and *Van den Berg* for the appellants.

Sir *Gordon Hewart* (A.-G.), *MacKinnon,* K.C., and *Dunlop,* K.C., for the respondents, were not called on.

The LORD CHANCELLOR (Lord Birkenhead).—This is an appeal from two orders of the Court of Appeal dated the 3rd Dec. 1918, which confirmed a judgment of Bailhache, J. that was delivered on the 30th May 1918, in favour of the respondents, and a judgment of Hill, J. on the 29th July 1918, also in favour of the respondents. The actions were consolidated and the issues raised in the two cases are identical. The questions involved in the appeal are whether the appellants as against the respondents are entitled to be paid the sums respectively of 4500*l.* and 350*l.*, and these questions depend upon the rights as between the appellants and the respondents to the benefit of salvage services rendered by the tug *Conqueror* to the steamship *Sussex* in Jan. 1917, and by the tug *Warrior* to the steamship *Messina* in Feb. 1917.

With the outbreak of war it became necessary for the Admiralty to requisition a number of tugs for the service of the armed forces of the Crown and amongst others the tug *Conqueror* and the tugs *Warrior* were requisitioned in the early days of the war, the *Warrior* on the 7th Aug. 1914 and the *Conqueror* on the 4th Oct. 1914. No charter-party was ever executed between the owners of these tugs and the Admiralty, but it was agreed between the parties that the tugs should be taken upon the basis of the charter-party sometimes known as the Expeditionary Force charter-party and sometimes as T. 99. The charter-party in question contained a clause 11, which is in the

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

following terms: "The owners shall provide and pay for all wages, provisions, and all other expenses in connection with the captain, officers, engineers, and crew, for the insurance of the steamer, for all deck and engine room stores, water for all purposes, for the proper ventilation of the cargo, for boats, for ballast necessary to enable the vessel to proceed with safety without cargo, and for the maintenance of the steamer in a thoroughly efficient state in hull and machinery during the service." The clause which I have just read has been described in the correspondence and in the judgments in the courts below as the "gross clause"; the term is not perhaps particularly expressive, but for the sake of convenience it may be retained. Another clause of the charter-party should be specifically referred to, clause 29, which is as follows: "The steamer has liberty to assist vessels in distress, and to deviate for the purpose of saving life. All salvage to be for owners' benefit, but ship to be deemed off pay during the time occupied in salvage operations."

Now, the effect of this charter-party in relation to the point I am now dealing with may be shortly stated, the arrangement being that the owners should provide and pay wages and provisions and all other expenses—a very reasonable stipulation is contained in the latter clause to which I have called attention—and that all moneys that may be recoverable under the head of salvage should equally accrue to the owners' benefit. The arrangement which was made, and to which I have referred, was at a later date varied. In Sept. 1916, an agreement was made between the parties by which the *Conqueror* passed from what I may term the gross basis to a net basis, and a similar arrangement was made in Jan. 1917 in the case of the *Warrior*. The causes which led to the modification of the original arrangement do not, it seems to me, very greatly concern us. The change was in fact made, and the correspondence between the parties is the only record of what the parties intended at the time when this modification was made. The Admiralty proposed that the change should be made, and it is very important to consider what is the attitude at that time assumed by the appellants. It is perhaps equally important that the extent and importance of the change should be clearly grasped. The change was of this kind: the *Conqueror* and the *Warrior* at the time of the respective salvage services were commissioned as His Majesty's ships; the masters and crews were the servants of His Majesty, the masters held commissions as lieutenants in the Royal Naval Volunteer Reserve, and the other members of the crews received from the Admiralty and wore uniforms according to their rank; they were naval ratings, and the wages and victualling allowances were paid by the Admiralty. The tugs were in the possession and control of the Admiralty; all the running expenses of the tugs and employment were payable and paid by the Admiralty and not by the owners. The tugs were employed at the sole risk of the Admiralty as regards all risks, except fair wear and tear. Such was the nature of the change which was proposed by the Admiralty to the owners, and it must be assumed that the owners realised at once what the nature of the proposal was and what the inevitable consequences of such a proposal must be upon the salvage clause of the earlier agreement. They knew or must be taken to have known that the charter had become a charter of demise. The appellants, although they received a proposal involving necessarily a modification so profound in the agreement between themselves and the respondents, made no observation or reservation of any kind; in other words, they are informed that the change is to be made in the arrangement between themselves and the Admiralty of such a character as to render it highly irrational and unusual that they should thereafter attempt to establish any claim to salvage. They acquiesce without protest in the making of this change and they do not suggest any stipulation on their behalf in relation to salvage.

It was attempted by counsel for the appellants to argue that because in an earlier case, where a tug belonging to the appellants had been requisitioned by the Admiralty upon the net basis and a change of arrangement had been made by the appellants, the Admiralty had acquiesced in a salvage award being made in favour of the appellants, it must be taken that the Admiralty intended when they placed the tugs in question on the net basis that any salvage payment should in this case too inure to the benefit of the appellants. I am not able to accept this contention. At the period in question the Merchant Shipping (Salvage) Act 1916 (6 & 7 Geo. 5, c. 41) had not become law, and I entirely decline to draw any inferences from an omission on the part of the Admiralty to intervene in the earlier salvage case—an omission which took place at a moment when they had no legal title or claim on which they were concerned to insist.

It only remains that I should state my view quite shortly upon the position, which was the subject of argument by both learned counsel who addressed you. Their contention has been throughout of this kind. They say that originally the appellants were entitled to salvage. For its own purpose the Admiralty proposed a modification of the original agreement. It would have been possible to effect that modification without in any way altering the right to salvage which under the earlier agreement belonged to the appellants. The respondents did not in any way attempt to expressly modify that provision, and it must, therefore be taken to have survived. The answer to this contention is that the later agreement by its substance destroyed those circumstances in the earlier contract which, and which alone, rendered either usual or proper the payment of salvage to the appellants. Under those circumstances, and in the absence of any stipulation to the contrary, it must be assumed that the right to salvage on the part of the owners disappeared when the earlier agreement was modified.

In my judgment this is a very clear case. The appeal fails, and I move your Lordships that it be dismissed with costs.

LORD FINLAY.—I entirely agree that the appeal in this case fails. The whole question is what was the effect of the transfer of these two tugs from what has been called the gross basis to the net basis. So long as the tugs were employed upon the gross basis the vessel was run by the owner, and he received a sum estimated on a footing that he was to incur all the expenses connected with the running of the vessel. When the basis was changed to the net basis that was entirely done away with. The expense of running the vessel was after that with the Admiralty, and the

sum that was paid was, in effect, a sum only for the demise of the ship to the Admiralty. Now this change from the gross to the net basis took place in Sept. 1916 and in Jan. 1917, so that both vessels by Jan. 1917 were upon the net basis. Now what was the effect of that? The effect was that the crew were no longer in the service of the owner. It therefore became quite impossible that salvage services should be rendered on behalf of the owner, so that the owner would be entitled to receive payment for such salvage services. We had, if I may say so, a very interesting and admirable argument from Mr. Van den Berg upon this point, but I confess I remain entirely unconvinced. It seems to me that it really does not matter that the owners of these tugs did not think of what effect the change would have upon salvage. They agreed to the change being made, and the question is what in law is the result of that change, and it is utterly immaterial that it never occurred to the owners to think of what its effect would be upon any salvage that might be earned.

It was very much pressed upon us that the idea with regard to the *Conqueror* came from the owner of the *Conqueror* himself. In the case of the *Conqueror*, indeed, it was suggested by the master of the tug, and he wrote a letter addressed to his employers, the Elliott Steam Tug Company, saying that it was very desirable for the protection of the master and crew of the tug that they should wear the King's uniform. The phrase he used was that they might be shot as pirates if they were not in uniform and were caught doing the work they were doing. Of course if they were to wear the King's uniform then they must enter into the King's service. That letter of the 3rd Aug. was considered, with the result that, by the letters which passed in September, the master and crew were taken into the service of the Crown, the master receiving a temporary commission, and the basis of hire was altered from gross to net. The change was complete, and it matters not in the slightest degree that the reason which suggested the change was the desire, and the very proper desire, of the master and crew for the more complete protection which the King's uniform would give them. They could not wear the King's uniform without becoming the King's servants, and that really ends the matter.

In the case of the *Warrior* the proposal, I think, came from the Admiralty on the ground that the discipline of the men of the *Warrior* left something to be desired, and that it was necessary, in order that discipline should be completely established, that they should become the servants or become the crew of the Crown, and the men accordingly signed articles under the Admiralty I am not going to refer again to the letters which have just been read; it is perfectly clear that from that time they became the servants of the Crown. There again you have it perfectly clear that all possibility of the earning of salvage for the owners after that was cut away.

Then what remains of the case? It is simply this: The suggestion that although all that had taken place, you could spell out an agreement between the Admiralty and the owners of these tugs that any salvage after that earned by the Crown's servants in charge of these tugs should be handed over to the owners of the tugs. Well, I have listened attentively to all that has been said upon this point, and I really cannot find any trace of any such agreement. The truth is that when the change was completed and the parties agreed to the change, the owners of the tugs, and I daresay the Admiralty, never thought about its effect upon salvage; but the change was made, and the only question now is, in the absence of any extraordinary agreement such as that suggested to vary the rights of the parties, what in law is the effect of the transfer of the crews from the service of the owners of the tugs to the service of the Crown? I entirely agree that the appeal fails.

Lord SHAW.—I agree.

In the course of the argument I put to the learned counsel for the appellants this question: Was it or was it not admitted that at the time when these salvage services were rendered the tugs rendering these services were the subject of demise to the Admiralty? The learned counsel, after consideration, admitted, as was natural and necessary, that there was such a demise. The demise was effected by the change of the transaction between the Crown and the owners having been made from gross to net. That has two consequences. When a change takes place from gross to net the result of that transaction is a complete supersession of the gross agreement. It must necessarily be so, because under the net agreement, as has been admitted, a demise to the Crown takes place; the servants become the servants of the Crown, the salvage is rendered by the Crown through its servants, and not through the servants of the owners. The result in law accordingly is, first, supersession of the gross agreement; and, secondly—the consequence of the net agreement being what I have stated—a legal demise. The proposition in law which arises finally brings us to very familiar ground, but it is well stated in the judgment of Bailhache, J., which I thus quote: "The legal effect of a charter-party which is 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 such services, the money when an award is made for such services goes not to the owners but to the charterers, who have the vessel upon time charter." Hill, J., in the case of the *Warrior*, assented to that being a proper statement of the law; it was also assented to by the Court of Appeal, and I entirely agree with it.

Lord MOULTON.—I agree.

Lord SUMNER.—I agree, and I only desire to put it on record that as the point, which was elaborately discussed in the Court of Appeal, upon the true construction of the Merchant Shipping Act 1894 and the Merchant Shipping (Salvage) Act 1916 has not been raised in your Lordships' House it has been unnecessary for your Lordships either to express or to form any opinions as to its correctness.

Appeal dismissed.

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

Solicitor for the respondents, *Treasury Solicitor.*

Judicial Committee of the Privy Council.

June 18, 21, *and July* 29, 1920.

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

THE DUSSELDORF. (*a*)

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

Prize Court—Territorial waters of neutral country—Rights of neutral State—Expenses of removal of vessel improperly seized—Restitutio in integrum.

The German steamship D. *was captured, through an error of judgment in computing the three-mile limit, by a British man-of-war, in Norwegian territorial waters, and proceedings were taken in the Prize Court for her condemnation. The vessel was released by the Prize Court, but the Norwegian Government claimed from the British Government, in addition to the delivery up of the ship and her cargo or its proceeds, all costs, fees, and expenses incidental to her removal and restitution, and an account of the profits made during the period of her requisition.*

The Prize Court rejected the demand on the ground that the violation of neutral waters was unintentional and the result merely of an error of judgment.

The Norwegian Government appealed from so much of the order of the President as rejected their claim to costs and damages.

Held, that the claimants were entitled to such expenses of removing the vessel from British to other waters as might fall or would ultimately fall on them, but they were not entitled to the costs and fees payable to the Marshal of the Prize Court or to any sum for the requisition of the ship.

Decision of Lord Sterndale (14 *Asp. Mar. Law Cas.* 478; 122 *L. T. Rep.* 237; (1919) *P.* 245) *varied.*

APPEAL from a decree of Lord Sterndale, sitting as President of the Prize Court (reported 14 Asp. Mar. Law Cas. 478; 122 L. T. Rep. 237; (1919) P. 245), on a claim by the Norwegian Government for damages and expenses incident to the capture of the German steamship *Dusseldorf* by H.M.S. *Tay and Tyne* in Norway's territorial waters and to her subsequent release.

The *Dusseldorf* was captured in Feb. 1918, and proceedings were taken in the Prize Court for her condemnation.

The Norwegian Government entered a claim that the vessel should be released and her cargo, together with damages and costs, on the ground that the capture took place within Norwegian territorial waters.

Lord Sterndale, P. on the 12th May 1919 ordered on the above ground that the ship and the appraised value of her cargo be released to the claimants' solicitors on their behalf; he, however, held that, as there was no intention to violate territorial waters, the claim to damages and costs should be rejected.

By an order made on the 30th June 1919 the President rejected a motion by the claimants that the Crown be directed (1) to account to the claimants for the profits received in respect of the use of the ship; (2) to reimburse the claimants in respect of the expenses in taking delivery of the ship and taking her to Norway; (3) to pay the expenses incurred by the Marshal in connection with the detention, care, and custody of the ship.

The Norwegian Government entered this appeal from so much of the order of the 12th May 1919 as rejected their claim to costs and damages and from the dismissal of the subsequent motion.

Sir *Erle Richards*, K.C. and *Balloch* for the appellants.

Sir *Gordon Hewart* (A.-G.), *Butler Aspinall*, K.C., and *Raeburn*, K.C., for the Crown.

The considered judgment of their Lordships was delivered by

Lord SUMNER.—In this case the *Dusseldorf*, a German ship, was making her way from Narvik, with a cargo of iron ore, down the Norwegian coast towards the entrance to the Baltic, and so to Emden. Her object was to keep within Norwegian territorial waters, so as to baffle capture by British men-of-war. She was taken by H.M.S *Tay and Tyne*, at a point off Buholmen and Grisholmen, which was, as it turned out, a little (say 200 yards) within the territorial limits. The learned President, Lord Sterndale, found that the commander of the *Tay and Tyne* had no intention of violating Norwegian neutrality, but that, by an error of judgment, which their Lordships consider to have been very pardonable, he conceived that the three-mile line should be drawn a little further to the east than its true position. It is plain that the German shipowners had a narrow and somewhat lucky escape, and that the sovereignty of Norway suffered the minimum of prejudice from this unintentional violation.

The present claim is made on behalf of His Majesty the King of Norway by the appellant, Mr. Waldemar Eckell, the Royal Norwegian Consul-General in London. His claim was, first, for delivery up of the *Dusseldorf* and her cargo or its proceeds; secondly, for the cost of removing her to Norway; thirdly, for costs and fees payable to the Marshal of the Prize Court or otherwise upon her delivery; and, fourthly, the vessel having been regularly requisitioned by His Majesty's Government pending the hearing before the Prize Court, for an account of profits made by the Crown from the use of the ship, or, alternatively, for payment of a reasonable sum for her use.

It may be well to consider in the first instance how this matter stands, apart from authority. In the vessel herself and her cargo, on their own account, the Norwegian Government have neither right, title, nor interest, nor had they ever even possession. The German owners have all the right and interest, and, in the absence of any treaty or convention dealing with the case, they can neither come before the court directly as claimants nor can they be allowed to do indirectly what is directly incompetent. Indeed, as against them, the capture is good, being the capture of enemy property; and the "claim of territory," as it is called, is one which is available to the territorial Sovereign only, and not to the private shipowner. These considerations, apart from the validity and effect of orders, regularly made, permitting the Admiralty to requisition the vessel, at once dispose of the fourth claim, namely, that for profits or freight or hire in respect of the benefit which the British Government obtained from requisitioning the vessel

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

under the Prize Rules. If the appellant recovered any such sum, it would be held simply in the interest of the enemy owners. No claim has been made, nor has any evidence been given, on the footing that the Norwegian Government have come under any pecuniary liability to the owners of the *Dusseldorf*, nor is there any suggestion that the seizure involved them in any outlay or pecuniary disadvantage outside of these proceedings. No one would wish to make light of a violation of territorial sovereignty, but in itself this is a matter arising between Sovereigns and, apart from the peculiar position of captors who are bound to bring their alleged prize before the court, it would in itself be non-justiciable, for in effect the Prize Court would be called on to pronounce a decree, founded on the conduct of his officers, against the Sovereign in virtue of whose commission it is authorised to act, and to evaluate imponderable wrongs, which lie outside the category of those with which it is wont to deal.

A Court of Prize is not, as such, a disciplinary tribunal for officers in His Majesty's Navy, charged with the correction of errors committed by them while discharging their duties. Any complaint against such officers which the Government of Norway might have, and any claim for amends for an invasion of the territorial sovereignty of Norway, would fitly be preferred through diplomatic channels to His Majesty's Government for examination and redress.

The facts that the court found itself regularly in possession of the *Dusseldorf*, and subsequently made a regular order giving leave to requisition her, are at once the foundaion of the jurisdiction and the occasion of the Norwegian Government's appearance. It is a fortunate circumstance that the ancient practice, by which Courts of Prize entertain litigious claims of this kind made on behalf of neutral Powers, led long ago to the submission of one class of international questions, at any rate, to a judicial determination instead of to the arbitrament of arms, and so provided for a solution of vexed questions at once peaceful, honourable, and friendly. It may therefore well be that the rules, which apply to capture on the high seas, are by no means closely applicable to capture in neutral territorial waters. On the high seas, if there is reasonable ground for detention, the risk of it is one which even a neutral must run, and the appropriate remedy is the release of the ship in this country. In neutral waters, on the other hand, no capture should be made at all, and rules applicable to the high seas are not *in pari materiâ*. Simple release of the ship in this country to the claimant Sovereign may be an inadequate redress. The fact that the court has duly received into its charge and jurisdiction a ship, which ought not to have been seized at all, leads to the conclusion that the true claim of the appellant is for a *restitutio in integrum*, so far as the Government of Norway are concerned; but that, naturally as their Lordships would incline to a treatment of it as liberal and ungrudging as possible, they are still bound to act judicially and to follow legal principles and the decisions already given in Prize cases.

The authorities prior in date to the recent war are few in number and are somewhat indeterminate. In cases between captors and private owners the jurisdiction to award damages and costs against the former on the ground of their misconduct, or to refuse to give them in favour of the latter, where their conduct had been suspicious or irregular, was long ago well recognised, but the language used in stating the grounds of it was not uniform. Sometimes Sir William Scott spoke of such decrees as giving compensation to the suffering owners, whether the misconduct of the captors was intentional or not; sometimes they were made avowedly as a punishment to deter others, generally privateers, from the repetition of offences. In *The Ostsee* (9 Moore, P. C. 150) the Privy Council laid it down that the former is the better view, though, if so, it is not easy to appreciate the relevancy of inquiring whether the captors acted under a reasonable mistake. From such a jurisdiction little guidance is to be obtained in the present case. Of actual "claims of territory" but few are reported. There are three decisions of Sir William Scott—*The Twee Gebroeders* (3 C. Rob. 162), *The Vrow Anna Catharina* (5 C. Rob. 15), and *The Anna* (5 C. Rob. 373)—and during the present war, in addition to the present case, there have been *The Lokken* (26th July 1918), *The Valeria* (122 L. T. Rep. 751; (1920) P. 81), and *The Pellworm* (14 Asp. Mar. Law Cas. 490; 123 L. T. Rep. 685; (1920) P. 347). No point has been argued in the present case as to the effect of the provisions of the Treaty of Versailles, such as was discussed in the *Pellworm*.

In the *Vrow Anna Catharina* Sir William Scott observes: "The sanctity of a claim of territory is undoubtedly very high. . . . When the fact is established it overrules every other consideration. The capture is done away, the property must be restored notwithstanding that it may actually belong to the enemy, and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to further punishment."

In the *Twee Gebroeders* the same great authority condemned the conduct of the captors as having been in violation of a neutral Sovereign's rights; but held that, as they had not intended to commit any wrong, and as it was not easy for them to have ascertained where the neutral boundary ran, they ought not to be held liable in damages and costs. On the other hand, in the *Anna*, which was the case of a privateer and not of a regular King's ship, there had been deliberate abuse of the territorial waters of the United States, and in a claim of territory restitution of the captured vessel was accompanied with a decree for payment of damages and costs. It does not appear what the measure of these damages was, or whether the Government of the United States had been put to actual expense by the conduct of the privateer.

In the present case there can be no doubt that the appellant was entitled to have the *Dusseldorf* (and the proceeds of the cargo) released to him on behalf of His Majesty the King of Norway. Had the naval officer's error been brought to the notice of the British Government forthwith, before the *Dusseldorf* was brought before the Prize Court, her prompt return to Norway on behalf of the Crown, with suitable expressions of regret and regard, would, it can hardly be doubted, have been an ample satisfaction to the King of Norway for the unintentional wrong done. In the event, which has happened, of the ship's being placed in the Prize Court, the question now is what further relief, if any, should be accorded to the claimant.

The learned President, Lord Sterndale, before whom this question was hardly sufficiently argued,

decided, on the authority of the *Twee Gebroeders*, that there was no ground for decreeing such costs and damages to the claimant as it has been the practice to grant where the violation of neutrality has been high-handed, negligent or designed. If this were the sole ground on which the matter could be put, there can be no doubt that his decision ought to be affirmed.

It is, however, now on fuller argument contended that, as the right of the Norwegian Government is at least for restoration, this involves either the physical redelivery of the *Dusseldorf* in Norwegian waters, which is not really asked for, or the payment of the costs of her return voyage. The ground is that, if this be not so, the Norwegian Government must either pay this expense, and so suffer pecuniarily for the error of a British officer, or leave the German owners to navigate the vessel for themselves. In any case as between the Norwegian Government and persons whose property at the time of the seizure was within the territorial jurisdiction of the King of Norway and *sub protectione regis*, this would place his Government in the invidious position of leaving them without any redress at all for a seizure, which occurred notwithstanding their claim to the protection of the Norwegian Crown. There is a further matter for consideration, which is this. If the hearing had been completed and the release had been decreed, *flagrante bello*, as might have been the case, and if the Norwegian Government, to avoid expense and responsibility for which they would receive no recompense, had forthwith handed the *Dusseldorf* over to her owners before she had reached the security of neutral waters, she might have been captured again. In that case the Government of His Majesty the King of Norway might have been exposed to the observation that their proceedings resulted merely in the vindication of the public sovereignty of the kingdom of Norway without advantage or redress to the private rights, which had suffered interference while within the limits of that realm.

Their Lordships think that this argument is well founded, and that, alike from the necessity of performing and paying for the voyage to Norway at their own expense, and from the possibility of being exposed to any such reflection, the Norwegian Government ought to be protected. They are, therefore, entitled to costs of the voyage to Norway paid and borne by them. The claim for repayment of the marshal's fees and other similar sums rests on a different footing. Here the important points are that the ship came regularly into the custody of the officers of the court and, but for the requisitioning, which also was a regular proceeding, would have remained throughout in its charge, and so would have had the benefit of care and protection which would enure to enhance the vessel's value or avert depreciation. Even in the hands of the Admiralty, she has necessarily had the benefit of a certain amount of upkeep in the ordinary course of user, and there is no suggestion of ill-usage, neglect or wilful deterioration. Although, as now appears, the captors had no legal right to possession, they were in fact in possession in all good faith, and, in placing the ship and cargo in the custody of the Marshal, they acted in discharge of an obligation of a very binding character, from the observance of which it would be most inexpedient to deter persons in their position in any way. Further, in a matter of costs it is particularly necessary to observe settled rules of practice, for costs are always somewhat artificial matters and dependent on the practice of the court. It has been laid down in *The Franciska* (10 Moore, P. C. 73) by their Lordships' board that such costs as those now in question are properly charges on the property itself, because it is for the benefit of whom it may concern that the ship and cargo should be placed in the care and custody of the Marshal of the court. This decision is, of course, binding upon their Lordships, and they therefore think that these charges form a proper charge against the ship and fall to be discharged by those to whom she is delivered up, nor is it necessary or appropriate to inquire under what form or by what process, if any, they may be recovered over from the German owners.

It is possible that some part or the whole of the costs of transferring the *Dusseldorf* to neutral waters has been paid, or contracted to be paid, by her owners, and so has not fallen, or, if they perform their contract, will not ultimately fall, on the Government of Norway. In such a case the appellant will not recover them in these proceedings. In the result the appeal will be allowed with costs, and the decree of the President will be varied by directing that the appellant is entitled to be paid such expenses of removing the *Dusseldorf* from British waters to Norwegian or other neutral waters as may have fallen, or will ultimately fall, on the Government of Norway, but otherwise the decision of the President will be affirmed. The case will be remitted to the Prize Court to make the necessary formal decree and to direct a reference to the registrar. Their Lordships will humbly advise His Majesty to this effect.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 6, 1920.

(Before BANKES, WARRINGTON, and SCRUTTON, L.JJ.)

SPRINGER *v.* GREAT WESTERN RAILWAY COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carrier—Perishable goods—Delay in transit—Strike of railway employees—Sale by necessity—Duty of carrier to communicate with owner of goods.

In Sept. 1918 *the defendants contracted with the plaintiff to carry a consignment of tomatoes from Jersey to Covent Garden Market, London. There was no fixed period for delivery. The tomatoes were duly loaded on board the steamship* C. *at St. Helier, but the vessel was weatherbound there for about three days. By the time she arrived at Weymouth a strike had broken out among the defendants' employees, in consequence of which considerable delay occurred in unloading the vessel, and it became impossible to dispatch the goods to London by rail for an indefinite time. The cargo was*

(*a*) Reported by T. W. MORGAN and W. C. SANDFORD, Esqrs., Barristers-at-Law.

already in bad condition. No attempt was made by the defendants to communicate with the owners and inform them of the state of things at Weymouth and of the condition of the cargo. The defendants decided that the best thing to do in the circumstances was to endeavour to sell the cargo as a whole forthwith, and that was done. Salter, J. (following Sims *v.* Midland Railway Company, 107 *L. T. Rep.* 700; (1913) 1 *K. B.* 103) *held that the sale of the plaintiff's goods was a breach of contract to carry the goods unless the defendants could satisfy the court that it was commercially impracticable to communicate with the plaintiff and that the sale of the plaintiff's goods was really necessary. Whether communication with the owner is commercially practicable or not must depend on the facts of each case, but if communication is physically possible without disproportionate expense, and if there is reason to expect that instructions can be obtained before a final decision is made; then the carrier must at least attempt to obtain such instructions before he deals with the goods otherwise than under the express terms of the contract of carriage. He held on the facts that the sale of the plaintiff's goods was a breach of the contract of carriage and a wrongful conversion of the goods.*

Held, on appeal, that the judgment of Salter, J. (infrà) *was right.*

ACTION in the non-jury list tried by Salter, J.

The plaintiff's claim was for 172*l.* 10*s.* damages for breach of duty in and about the carriage and delivery of goods by railway.

The plaintiff alleged that on or about the 19th Sept. 1918, the defendants agreed with the plaintiffs to carry for the plaintiff certain goods, namely, 198 half sieves of tomatoes from Jersey to Covent Garden Market, and there deliver them to the plaintiff for reward to the defendants. The defendants received the said 198 half sieves of tomatoes for the purpose and on the terms aforesaid, but the defendants did not carry them from Jersey to Covent Garden Market or deliver them there to the plaintiff.

The defendants admitted that on or about the 19th Sept. 1918 they agreed with the plaintiff by and on the terms of a consignment note dated the said 19th Sept. 1918, and signed by Marks and Proctor Limited, his agents, to carry for the plaintiff from Jersey to Covent Garden Market, and there deliver to the plaintiff for reward to the defendants 198 half sieves of tomatoes which were on or about the said 19th Sept. 1918 delivered to the defendants by Marks and Proctor Limited.

The defendants said that it was provided by the consignment note that in respect to any goods booked through by the defendants or their agents for conveyance, partly by railway and partly by sea, the defendants should be exempted from liability for any loss, damage, or delay which might arise during the carriage of such goods by sea from any or every danger or accident of the seas, rivers or navigation of whatever nature or kind soever in the same manner as if the defendants had signed and delivered to the consignors a bill of lading containing conditions to that effect.

By the agreement it became and was the duty of the defendants (subject to the terms thereof) to exercise all reasonable care and to take all reasonable steps to procure that the tomatoes should be safely carried to their destination aforesaid within a reasonable time, but the defendants were not by the agreement laid under any further or higher duty. The defendants admitted that the tomatoes had not in fact been carried to their destination, but by reason of certain matters alleged the defendants said that they had fulfilled their duty in that they had exercised all reasonable care and taken all reasonable steps, and had not been guilty of any delay, and that they were not liable to the plaintiff.

The defendants alleged that in the exercise of powers had by them under the Defence of the Realm Acts or otherwise, the Lords Commissioners of the Admiralty directed and compelled the defendants to load and carry all goods delivered to the defendants for carriage from the Channel Islands to England in certain vessels which were not the property of nor in any way under the control or in the possession of the defendants, and further directed and compelled such vessels to sail from the Channel Islands by first proceeding to Cherbourg and then sailing thence under convoy to Weymouth.

In pursuance of such direction and compulsion the defendants loaded the tomatoes so delivered to them as aforesaid on the steamship *Croham* on the 20th Sept. 1918. On the 20th, 21st, 22nd, and part of the 23rd Sept. 1918 there was a westerly gale in the Channel, and the master of the *Croham* could not, or would not, sail until the evening of the 23rd Sept. 1918.

On the evening of the 23rd Sept. 1918 the *Croham* sailed from Jersey and proceeded with due dispatch thence to Cherbourg in pursuance of the directions and compulsion aforesaid, and was thence convoyed to Weymouth, arriving there at or about 12.45 p.m. on the 24th Sept. 1918.

By reason of a strike of the defendants' railway servants at Weymouth and elsewhere it was difficult (and impossible without substantial delay) to discharge the cargo of the *Croham* and impossible to forward the same or any part thereof by rail or in any other way to its destination. The cargo (including the tomatoes) was unloaded by hand on to the quay at Weymouth on or about the 26th Sept. 1918, and it then appeared that part of the cargo, which consisted wholly of tomatoes, was already unfit for human consumption, and that the remainder would shortly become so unless it were promptly consumed. In the circumstances, the best course to be adopted by the defendants in the interests of the owners of the cargo and the only course which would avoid the cargo becoming wholly useless and valueless was to sell it immediately in the locality for what it would fetch, and in the circumstances it was practically impossible to communicate with the consignors or consignees of the cargo (including the plaintiff) and ask for instructions before selling the cargo without the same becoming meanwhile wholly unsaleable.

The defendants on the 26th Sept. 1918 sold the cargo in the locality for what it would fetch.

Further, in the alternative the defendants in the circumstances claimed that they were excused from further fulfilment of the agreement, the damage and delay being due to the damages of the seas or navigation.

The defendants counter-claimed for freight.

The plaintiff admitted that in respect of the delay of the *Croham* in arriving at Weymouth—she was three days overdue, owing to having been weatherbound—the defendants were protected by the conditions of the consignment note.

The plaintiff stated in his evidence that if the defendants had communicated with him he could have sent a motor lorry to Weymouth to carry his tomatoes to London. Part of the cargo, including the plaintiff's tomatoes was sent by the purchaser to London by train on the 27th and was sold in Covent Garden Market on the 28th.

Colam, K.C. and *F. O. Robinson* for the plaintiff.

Barrington-Ward, K.C. and *Wilfrid Lewis* for the defendants.—It is the duty of a common carrier to carry the goods safely and to deliver them. There is the further obligation to deliver within a reasonable time, looking at all the circumstances of the case, and he is not responsible for delay arising from causes beyond his control. See

Taylor v. *Great Northern Railway*, 14 L. T. Rep. 363; L. Rep. 1 C. P. 385.

An excuse for failure to deliver is afforded by act of God, King's enemies, and inherent vice:

Anson on Contracts, 14th edit., p. 337;
Lister v. *Lancashire and Yorkshire Railway Company*, 88 L. T. Rep. 561; (1903) 1 K. B. 878.

A further duty arises that all reasonable steps shall be taken to preserve the goods in existence, and if not to obtain their value:

Sims v. *Midland Railway Company*, 107 L. T. Rep. 700; (1903) 1 K. B. 103;
Great Northern Railway Company v. *Swaffield*, 30 L. T. Rep. 562; L. Rep. 9 Ex. 132.

So long as the goods are *in esse*, it is the duty of the carrier to keep them in that state and he can recover expense incurred in so doing. The conditions governing a sale by necessity are correctly stated by Scrutton, L.J. in *Sims* v. *Midland Railway Company* viz. (1) that a real necessity must exist for the sale; and (2) that it must be practically impossible to get the owners' instructions in time. In this case, it is clear on the facts that the carrier could not obtain instructions from the consignee before the sale. It was not possible from a business point of view to communicate with the consignee. Communication with the owner is not an absolute requirement, but only if it is reasonable. See

Carver on Carriage of Goods by Sea, ss. 297, 298.

In this case communication would have been useless. "Practicable" in this connection means likely to be productive of beneficial results. Tomatoes are affected with inherent vice in the sense that they were in danger of immediate perishing. With whom were the defendants to communicate, the senders or the consignees? [Salter, J.—Would it not be the person with whom the contract of carriage was made?] A different standard must be applied when dealing with perishable goods:

Atlantic Mutual Insurance Company v. *Huth*, 4 Asp. Mar. Law Cas. 369; 44 L. T. Rep. 67; 16 Ch. Div. 474, at p. 483.

Colam, K.C. in reply.—The general principle is laid down in *Australasian Steam Navigation Company* v. *Morse* (1 Asp. Mar. Law Cas. 407; 27 L. T. Rep. 357; L. Rep. 4 P. C. 222, at p. 228). The defendants were under an obligation to communicate with someone. It was wrong to say that if it was impossible to communicate with all, they might sell without communicating with any. Whether the goods are perishable or not, there is no right to sell without communicating with the owner, if possible to do so:

Acatos v. *Burns*, 47 L. J. 566, Ex.; 3 Ex. Div. 282.

It is not sufficient to prove that the master thought he was doing his best for all concerned, or even that the course which was adopted was the best. Nothing but necessity can authorise the master to do anything other than carry the goods to their destination. The defendants cannot justify selling, unless they have communicated with the plaintiff, or it was impossible to do so. But there was no necessity to sell the goods. They were not bad. The difficulty of sorting good from bad was not a reason for selling the good and the bad. But in fact on the quay the good were separated from the bad and defendants could have communicated with the owners. The sale was a tort unless it can be justified.

Cur. adv. vult.

Salter, J.—In this case, the plaintiff claims damages for breach of a contract of carriage. On the 19th Sept. 1918, the defendants contracted with the plaintiff to carry 198 half sieves of tomatoes, the property of the plaintiff, from St. Helier to Covent Garden. There was no fixed period for delivery. On that day the goods were picked and taken to the wharf at St. Helier, and on the following day, Friday, the 20th, they were put on board the steamship *Croham*, forming part of a cargo of of 1780 tons odd. The *Croham* was weatherbound at St. Helier from Friday, the 20th, to Monday, the 23rd Sept. She sailed on the evening of that day and arrived at Weymouth at 12.45 p.m. on Tuesday, the 24th. That morning a strike had broken out at Weymouth, involving certain classes of the defendant's employees. The strike affected large areas of the defendant's system, and was of an extensive and serious character. There is no evidence that it was due to any fault of the defendants, or that it could have been foreseen or prevented by them. One result of this strike was that no further dispatch of goods by rail from Weymouth could be made for an indefinite time. Another result was to greatly retard the unloading of goods in the harbour, and the third result was that it became commercially impracticable to sort out the goods of the different owners of the cargo so as to deal separately with each consignment.

There were three classes of labour then available at the quay; first, the crane men and other servants of the defendants; then a force of 150 soldiers from a labour battalion; and lastly a small body of casual civilian labourers. On the 24th Sept. a vessel called the *Lady Tennant* was being unloaded. When that job was finished on the evening of that day the railwaymen ceased work, leaving only unskilled labour and no tackle.

Next in turn was the *Ibex*, which had to be unloaded and reloaded. This would take all day on the 25th, so that the cargo of the *Croham* could not be unloaded till Thursday, the 26th, and then could not be forwarded unless the strike was at an end.

This was the state of things when the *Croham* arrived shortly after mid-day on Tuesday, the 24th. She was three days overdue, and was a bad boat. Mr. Boyle, the defendants' traffic agent at Weymouth, was anxious as to the condition of this cargo. He said: "I expected trouble from the

moment the strike began on Tuesday morning, and from the cargo having been so long on board." He sent his head clerk, Gill, on board at once. Gill examined the cargo and reported unfavourably.

The position, therefore, was that the cargo was already in bad condition; that it could not be touched till the Thursday; and the further transport was impossible for an indefinite time. In these circumstances it was, in my opinion, the duty of the defendants under the contract of carriage, to endeavour to communicate with the owners of the cargo without delay. No attempt to do this was ever made. The hatches were removed and wind sails erected, but nothing was done, and nothing could be done, to remove the cargo till Thursday, the 26th.

On that day the unloading of the *Croham* began at 6 a.m. and was finished at 10 p.m. The goods were unloaded by hand on to the quay and stacked in three classes: (1) Those fit to be forwarded, (2) those which could be forwarded after the baskets had been repaired, and (3) those unfit to be forwarded. The condition of the cargo varied a good deal; on the whole it was bad.

About ten o'clock Mr. Boyle came to the quay, and after examining the goods decided that in the circumstances it would be best to endeavour to sell the cargo as a whole forthwith. He communicated with Mr. Drake and Mr. Digby, local fruit merchants of good position, and after negotiation he sold 13,730 parcels to Mr. Drake and 3179 to Mr. Digby. The remaining 900 were either unsaleable or were sold to casual local buyers. Drake and Digby bought at 2*s.* per parcel, all over. I gather from the evidence of Digby and Albert Nash that much the larger part of this cargo consisted of 12lb. parcels; so that the price obtained by Mr. Boyle was much more than 2*s.* per half sieve—probably nearer 4*s.*

At two o'clock in the afternoon of the day the strike ended as suddenly as it had begun. There was no evidence that this event could have been foreseen by Mr. Boyle or his superior. On the contrary, I am satisfied that when he sold the cargo that morning he had good reason to assume that further transit by rail would be impossible.

When the *Croham* arrived on the 24th Mr. Boyle was in possession of documents which would have enabled him to communicate directly and forthwith by telegraph and telephone with the Covent Garden consignees, among whom was the plaintiff. He could not communicate directly with the other consignees, but through St. Helier certainly, and through Paddington probably, he could have communicated promptly with most of the consignees, probably with all of them. He could have received their instructions by telegraph and telephone in the course of the 24th and 25th, and by the morning of the 26th he could have been in receipt of written instructions.

The sale of the plaintiff's goods is a breach of the contract to carry them to London, unless the defendants can satisfy me (1) that it was commercially impracticable to communicate with the plaintiff, and (2) that the sale of the plaintiff's goods was really necessary: (*Sims and Co.* v. *Midland Railway Company* (*sup.*). Whether communication with the owner is commercially practicable or not must depend on the facts of each case, but I think it is safe to say that if communication is physically possible without disproportionate expense, and if there is reason to expect that instructions can be obtained before a final decision must be made, then the carrier must at least attempt to obtain such instructions before he deals with the goods otherwise than under the express terms of the contract of carriage.

It was contended that if Mr. Boyle had communicated with the owners he would have received conflicting instructions, and that his difficulty would not have been removed and might have been increased. To my mind this is no answer. It is true that the defendants could not deal separately with each consignment, but in many cases the owners could. The plaintiff, if informed, would certainly have sent a lorry with men, who would have picked out his goods when taken from the ship, and brought them to London. There is no doubt that many other owners would have taken a similar course. But apart from this, I cannot accept the contention that it is for the carrier to judge whether a useful purpose would be served by communicating with the owner. A bailee cannot claim to be an agent of necessity if his principal is commercially accessible and the bailee makes no attempt to get instructions.

For these reasons I think that the sale of the plaintiff's goods was a breach of the contract of carriage and a wrongful conversion of the goods. As the plaintiff has not, in fact, received any part of the proceeds of the sale, he is entitled to obtain as damages the sum his goods would have realised if there had been no breach of contract. To ascertain this sum, I must assume that the plaintiff would have received information on the 24th or 25th. He owns motor lorries, and stated that he would have sent one to fetch the goods. I do not doubt that he would. Owing to the strike, the London market was insufficiently supplied, and tomatoes were realising good prices. I think that the goods would have reached Covent Garden at the latest in time for the early market on the 28th. To help me to determine what they would then have realised I have the following evidence. Mr. Drake sent 4578 parcels, part of his purchase, to Covent Garden on the evening of the 27th, consigned to his agent, Mr. Bradenham. The goods travelled in trucks attached to a passenger train, at three times the ordinary goods rates, and at his own risk. These parcels were not selected. They realised slightly more than 3*s.* 6*d.* per parcel net. The cargo of the *Croham* seems to have been mainly 12lb. parcels; so that the half sieves in this consignment probably realised nearly 7*s.* net. The evidence as to this consignment was that some of it was in awful condition. There was about 5 per cent. unsaleable. The plaintiff's goods were not quite sound, but better than the average, and the whole would have been worthless by Monday. About 11 a.m. that day, Saturday, the 28th, a lot of 239 half sieves, part of the 4578 parcels, was delivered by the defendants to Mr. Bradenham, and immediately sold by him. Of this lot about 150 or 160 were the plaintiff's goods. This lot realised an average of 8*s.*

I have carefully considered all the evidence as to the prices realised at Covent Garden by Jersey tomatoes on the 27th and 28th Sept. I have come to the conclusion that the plaintiff's goods, if brought to London by motor and carefully sold at the early market on the 28th would have realised at the most an average of 10*s.* the half sieve net, including the sixteen half sieves of second quality, that is 99*l.* From this must be deducted the cost of the journey by motor, which the plaintiff put at

about 2*s.* a mile each way, that is 28*l.* That leaves 71*l.* I allow 2*l.* 8*s.* on the sixteen half sieves missing, and 2*l.* 10*s.* for the lids, making altogether 75*l.* 18*s.* due to the plaintiff.

The counter-claim fails, as the freight was not earned. There will be judgment for the plaintiff on the claim and counter-claim for 75*l.* 18*s.* with costs, and an order that the money in court be paid out to the plaintiff or his solicitors in part discharge.

Judgment for the plaintiff.

The defendants appealed.

Barrington-Ward, K.C. and *Wilfred Lewis* for the appellants.

Colam, K.C. and *F. O. Robinson* for the respondent.

BANKES, L.J.—This is an appeal from the judgment of Salter, J. and no complaint is made that the learned judge misconceived the law applicable to the case. But what is said is that the facts did not justify his application of them.

The short facts were these, that the plaintiff, who apparently carried on business in Covent Garden, was the consignee of a considerable quantity of tomatoes which were packed in baskets bearing his name and consigned from Jersey in a vessel called the *Croham*. The defendants had undertaken the carriage of those goods. The vessel was unfortunately detained by weather for a considerable time in the harbour in Jersey. She made a slow passage and arrived at Weymouth on the 24th Sept., three days after the goods had been put on board. Unfortunately when she arrived a strike broke out amongst the railway employees, and, as there were two other vessels to be discharged at the berth before her turn came, it was not possible to start discharging her until Thursday, the 28th Sept., by which time a very considerable quantity of these tomatoes were in an unmerchantable condition. The defendants sold the whole cargo locally without communicating with any of the consignees before they did so, and the plaintiff's case was: "You ought to have communicated with me at the earliest possible moment when you realised that it would probably be impossible to complete the carriage of these goods by delivery at Covent Garden, and given me the opportunity of deciding for myself whether you should sell them locally, or whether I should try myself either to take them away or sell them myself locally; and because you did not do that you have committed a breach of your duty as carrier and are responsible to me in damages." It is admitted that the law is laid down correctly in *Sims* v. *Midland Railway Company* (107 L. T. Rep. 700; (1913), 1 K. B. 113) in the judgment of Scrutton, J., and he, referring to a passage in Mr. Carver's book on Carriage by Sea, says "that the conditions necessary in order to make a sale by the carrier without notice valid are, first, a real necessity must exist for the sale, and, secondly, that it must be practically impossible to get the owner's instructions in time as to what should be done."

The whole cargo was sold on the 26th Sept., and if the defendants were entitled to treat the whole cargo of tomatoes as one indivisible lot, there is no doubt that the sale was justified. But there is a very serious question as to whether they were so entitled. There is a preliminary question as to whether or not, under the circumstances, it was practically impossible to get the owner's instructions before the 26th Sept. as to what should be done. With regard to that, one has to consider what opportunity the defendants' representatives had of forming a judgment as to what the condition of these tomatoes was upon the arrival of the vessel, or soon after, and forming a judgment as to whether it would be at all likely that it would be possible to send these goods on in merchantable state, and whether it was not obvious that, under the circumstances prevailing, a sale would have to take place. The position is this: The vessel arrived about 12.45 p.m. on Tuesday, the 24th Sept., and Mr. Boyle, who is in charge for the defendants company at Weymouth, when the vessel arrived, sent his representative, Mr. Gill, a clerk, on board, and Mr. Gill states in his evidence what he found the condition of things to be. He said: "The top tiers were very badly heated and overripe. Almost made me sick. The tomatoes were half-cooked." That he must have reported to his superior officer, and the superior officer's condition of mind before he received that report was, as he expresses it in his own evidence, "I expected trouble the moment the strike began, Tuesday morning, and from the cargo having been on board so long." Under those circumstances one asks oneself what conclusion must this experienced gentleman have come to? He was faced with this condition of things: a vessel arriving long overdue with a cargo of tomatoes—a perishable cargo—with a strike just broken out, the continuance of which no one could foretell. It had apparently begun in South Wales and spread to Weymouth, but whether it was going to last a day, or two days, or a fortnight, or a month, apparently no one at that time could tell. There were two vessels at the berth which had to be dealt with before this vessel could commence her discharge. I cannot conceive it possible that that gentleman should have come to any other conclusion than that a sale of these goods was inevitable, if they were to be disposed of at all in anything like a merchantable condition. If that is so, it seems to me that the duty of the railway company was to communicate immediately with the consignee. That they did not do, and for that Salter, J. has held them responsible, and in that view I entirely concur.

It appears now from the evidence that Mr. Boyle has, I think, misconceived what the purpose and object of communicating with the consignee is. It is to enable him to give the railway company instructions as to whether they shall sell if they consider necessary or whether they shall refrain from selling. But Mr. Boyle's reason for not communicating with the consignee is something different. He says: "I did not consider whether to notify the consignee or not, the reason being that I could not tell him the condition of his lot." It was quite true he could not tell him the condition of the lot, but what he could tell him was that he had formed the conclusion that it would be absolutely necessary in all human probability to dispose of these goods locally if they were to be saved at all, and to ask the consignee if he wished him to do that which he found to be necessary, or did he wish to deal with them himself. That sort of communication would have met the situation and relieved the defendants from liability.

As I have said, I entirely agree with the view which the learned judge took. It now turns out, from a telephone communication which has been discovered by my brother Scrutton, which was apparently not brought to the attention of the

judge, that that is the view this gentleman himself entertained and communicated to his employers at Paddington.

In my opinion this appeal fails and must be dismissed with costs.

Warrington, L.J.—I agree.

Scrutton, L.J.—I agree. The railway company in this case have sold somebody else's goods, and they have not the right to sell other people's goods unless they can establish certain conditions. They are agents to carry the goods, and not to sell them. To sell them, circumstances must exist which put them in the position of agents of necessity for the owners, to take the action which is necessary in the interests of the owners. Those conditions do not arise if the railway company can communicate with the owners and get their instructions. If the railway company can ask the owner what is to be done in the circumstances with any reasonable chance of getting an answer, they have no business to take upon themselves the sale of the property. They must give the owner a chance of deciding the way in which he will deal with the property, and very often he knows very much better than the railway company what is the best thing to do. The railway company, from the nature of things, cannot be experienced in dealing with every class of property which they carry, whereas the owner in the trade does know the best way of disposing of the particular kind of goods which it is his business to deal in. The first thing which the railway company must show to justify their selling the goods is that it was impossible commercially to communicate with the owner and receive instructions from him. If they show that, they must then justify the sale by showing that it was the only reasonable business course to take in the circumstances. In this case, on the 24th Sept., when the goods came into Weymouth in a ship three days late, with a strike on, it was fairly obvious that there was a serious risk of the goods not getting to London in a condition which would justify their being sent on. Under those circumstances, in my view it was the duty of the railway company to ask the consignee for instructions if there was any commercial possibility of their getting through. They were not entitled to take it upon themselves to settle what should be done with the goods if they could with any reasonable commercial probability obtain instructions from the owner. That there was such a probability of loss on the 24th is, I think, obvious from the document which we have found in the documents handed up to us—the telephone communication of the 24th. It shows that on the 24th Sept. it had been determined to sell the goods locally, pointing to the fact that on that day it was thought extremely probable that the duration of the strike, combined with the probability of sea damage through the prolonged voyage, might render it desirable to dispose of the tomatoes in some way other than by carriage. Was it commercially impossible on the 24th Sept. to communicate with the consignee at Covent Garden? The question answers itself. Of course, it was not commercially impossible. The reason why Mr. Boyle seems to have not communicated is that he did not then know the exact state of the tomatoes, and consequently could not give the fullest information to the consignee. That was not a reason which justified him in not communicating. He should, in my view, have communicated with the consignee, stating the probable delay, anything he knew about the condition of the goods, and asking for instructions as to what he should do. It is quite obvious that the consignee would then have had the opportunity of deciding: Shall I leave it to the man on the spot who knows more about the conditions locally, or shall I send down a motor lorry to get my goods and bring them up? In fact, it appears that this particular lot of goods in good packages was in a fairly good condition, and I think the second mistake that Mr. Boyle made is to think that he can sell goods in good condition because it is to the best interest of goods in bad condition. Of course, if you have an all-over price, good, bad and indifferent, it is a very good thing for the indifferent goods that you put into the sale, and it is a very bad thing for the good goods that you put into the sale—they will fetch less than they otherwise would have fetched, and the indifferent goods will fetch more than they otherwise would have fetched. Mr. Boyle seems to me to have been under the mistaken impression that some sort of law of general average applies to goods when they come out of a ship, and that you can treat them as a sort of general adventure and sacrifice the good goods for the benefit of the bad goods.

As to the law, I hope I correctly stated it in *Sims* v. *Midland Railway Company* (*sup.*), which seems to me to be accurate. I do not gather that it is disputed in this case. What is disputed is the application of it, and on the facts of this case it seems to me that if one is to consider, as I said one has, whether there was a reasonable business necessity for the sale, with a view to the probable duration of the strike, and the nature of the goods, and whether it was possible to communicate with the consignees and obtain their instructions as to the sale it was doubtful, even on the 24th Sept., as to what was the best thing to do—whether to get motor traffic to take away the consignments or to sell them there. But there was time to communicate with the consignee, and it was commercially possible to communicate with the consignee and to ask him what he wished done with the goods. That being so, the railway company were bound to communicate with the consignee, and were not entitled to take upon themselves the burden of deciding the question which the consignee ought to be the person to decide.

For these reasons I agree with the judgment which has been given by my Lord.

Appeal dismissed.

Solicitor for the appellants, *A. G. Hubbard.*
Solicitor for the respondent, *C. J. Parker.*

Thursday, July 15, 1920.

(Before Bankes and Scrutton, L.JJ. and Eve, J.)

Fisher, Reeves, and Co. Limited *v.* Armour and Co. Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Sale of goods—Sale—Goods in lighters—"Ex store"—"Ex warehouse."

The defendants agreed to sell and the plaintiffs to buy certain cases of tinned meat "ex-store Rotterdam." The goods had arrived in Rotterdam some months

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

earlier and had been landed on the quay, but, owing to great congestion at the port, they could not be put into a warehouse, but were stored in lighters, where they were at the date of the contract and afterwards.

Held, that the goods being in lighters could not properly be described as "ex store," and that the buyers were entitled to repudiate the contract.

Judgment of Bailhache, J. (1920) 2 *K. B.* 329) *reversed.*

Appeal by the plaintiffs from the judgment of Bailhache, J.

The defendants were a company registered in the United Kingdom and carrying on business in London. They were a branch of Armour and Co., of Chicago, packers and exporters of meat. Another branch of the same undertaking was incorporated under the Dutch law in Rotterdam. The branches acted occasionally as agents for one another.

In July 1919 the defendants had in their possession 7573 cases of boiled beef which they had bought in South America and consigned on board the steamship *Sheridan* to the Rotterdam branch. During the latter half of the year 1919 the port of Rotterdam was much congested. Great quantities of goods had been consigned to the port in expectation of demands from Germany. This expectation was not fulfilled, and consequently there was more merchandise in the port than the warehouses could accommodate. There were lying in the port lighters of very large capacity used for the transport of goods on the Rhine, and much of the merchandise in the port of Rotterdam was stored in these lighters for want of room elsewhere. The goods in question had arrived at Rotterdam on board the *Sheridan* in July and had been landed on to a quay, but were afterwards stored in lighters, as the Rotterdam branch could find no space for them in any of the warehouses.

On the 4th Nov. the plaintiffs, a firm of merchants in London, wished to buy 500 cases of boiled beef. Their manager, Mr. W. J. Woodward, applied to the defendants' manager, Mr. S. Herbert, who agreed to sell subject to confirmation 500 cases out of the stock at Rotterdam. Correspondence subsequently passed between the parties with reference to the contract.

On the 10th Feb. 1920 the plaintiffs issued a writ against the defendants claiming 2500*l.* and other sums for insurance and damages. In their statement of claim they alleged: (Par. 1) That by a verbal contract made on the 4th Nov. 1919 between one W. J. Woodward as agent for the plaintiffs and one S. Herbert as agent for the defendants, the defendants agreed to sell to the plaintiffs 500 cases of South American boiled beef lying in store at Rotterdam at $22.25 per case, and that the contract was confirmed by letters from the defendants, the first dated the 12th Nov., inclosing an invoice dated the 8th Nov., and the other dated the 14th Nov. 1919; (par. 2) that it was a condition of the contract, and that the defendants by their agent warranted that the goods were then lying in a store or warehouse at Rotterdam; (par. 3) that relying on that condition and on the warranty of the defendants given by their agent Herbert, the plaintiffs paid 2500*l.* and received a delivery order for the goods; (par. 5) that on or about the 12th Dec. 1919 it came to the plaintiffs' knowledge through their agent, W. J. Woodward, who was then in Rotterdam, that the goods were not in store but were in lighters; and (par. 6) that by reason of the premises the plaintiffs became and were entitled to repudiate the contract, which they did by letter dated the 16th Dec. 1919 to the defendants.

The defendants admitted that a contract was made on the 4th Nov. between W. J. Woodward on behalf of the plaintiffs and S. Herbert on behalf of the defendants, but said that by that contract the defendants agreed to sell and the plaintiffs agreed to buy 500 cases of South American boiled beef spot Rotterdam, and not "lying in store," as alleged by the plaintiffs. They said that this contract was confirmed by a letter of the plaintiffs of the 4th Nov., and they admitted and referred to letters of the 12th Nov. and 14th and to an invoice of the 8th Nov. They counter-claimed 179*l.* 2*s.* 2*d.*, the balance of the contract price.

It appeared from the evidence that the general prevailing condition of the port of Rotterdam was known to the plaintiffs at the date of the contract. A witness called for the plaintiffs stated that goods in a lighter or a ship could not be described as "ex store," and that "store" meant a public or private warehouse.

Bailhache, J. found as a fact that the plaintiffs' agent, W. J. Woodward, had tried to sell the goods and had asked the defendants' agent at Rotterdam to sell them for him after he had learnt that they were not in a store but in lighters. The learned judge held that the words "ex store" applied to goods stored in lighters, and gave judgment for the defendants (1920) 2 K. B. 329).

The plaintiffs appealed.

Patrick Hastings, K.C. and *W. A. Jowitt* for the appellants.—The judgment of Bailhache, J. was wrong. "Ex store" has reference to goods on land and not to goods afloat in lighters. "Ex warehouse" and "ex store" mean much the same thing. As "ex store" in common parlance refers to goods on land, if the defendants contend that the expression was used here in another sense, they must show that the plaintiffs understood it was being used in that other sense. The plaintiffs did not know that goods were being stored at Rotterdam in lighters and sold as "ex store." The decision of Bailhache, J. came as a surprise to the commercial world.

Stuart Bevan, K.C. and *Claughton Scott* for the respondents.—The judgment of Bailhache, J. has been misunderstood. The learned judge never meant to lay down that in general "ex store" includes "ex lighter." All he meant to hold was that, in the particular circumstances of this case the goods answered the conditions of the contract. The plaintiffs knew that there was great congestion at Rotterdam. "Ex store" in the contract only meant that the goods were not sold ex ship. [Scrutton, L.J.—Would an insurance of goods in store, a land risk, cover goods in a lighter, a marine risk?] That depends on the nature of the goods and the nature of the store—*e.g.*, explosives are frequently stored in hulks. The meaning of "ex store" is different in different ports. Secondly, "ex store" was not a term of the contract; thirdly, the plaintiffs attempted to resell the goods after learning that they were stored in lighters and have waived any right to repudiate the contract.

No reply was called for.

Bankes, L.J.—The judgment of Bailhache, J. has been taken as defining generally the meaning of the expression "ex store" as applied to goods the subject of a sale, and we are informed that merchants view the judgment as disturbing the course of business, as not being in accordance with the generally accepted meaning of those words. The judgment was not, I think, so intended, and Mr. Bevan does not uphold it as a judgment of general application; but he says that in the particular circumstances of this case Bailhache, J. came to the right conclusion.

Two points were raised on this appeal; first, whether the contract was one for the sale of goods "ex store"; secondly, assuming that it was, what is the meaning of that expression in this particular contract? The appellants, in their pleading, alleged a verbal contract made on the 4th Nov. 1919; the respondents admitted a verbal contract; and both parties pleaded that the contract was confirmed by letters which passed between them. In truth, the correspondence does not confirm the verbal contract alleged by the appellants, but it is common ground that the contract was made verbally between Mr. Woodward as agent for the appellants and Mr. Herbert as agent for the respondents, and its terms have therefore to be gathered from the evidence of those two persons, both of whom were called as witnesses and each of whom had an opportunity of stating what the contract was. Mr. Woodward says it was a contract for the purchase and sale of a quantity of boiled beef "ex store Rotterdam." Mr. Herbert does not dispute this; in his letter of the 14th Nov. he spontaneously describes the contract as a purchase by the plaintiffs "ex store Rotterdam." Upon this question Bailhache, J. does not express a very clear opinion; in the view he took it was not necessary to decide the question, and he was content to take the contract as one for the purchase of goods "ex store Rotterdam." I have no hesitation in saying that the contract was for the purchase of goods "ex store Rotterdam."

Then what is the meaning of "ex store" apart from special circumstances? It is easier to say what is not "ex store" than to give a complete definition of what is "ex store." I should say most decidedly that goods ex lighter or goods ex wharf are not goods "ex store." That seems to be also the defendants' view. Their sales manager said: "We always offer our goods ex quay and/or warehouse and/or lighter," for the reason, surely, that each was to be distinguished from the others. Mr. Bevan contended that the judgment of Bailhache, J. was not to be treated as one of general application, but as having reference to the particular facts of this case and that under the conditions prevailing in the port of Rotterdam these goods might properly be described as "ex store." I could understand the view of the learned judge if the appellants knew that goods of this kind were being stored in all sorts of places which could not ordinarily be described as stores, and if they entered into this contract to buy goods "ex store" knowing that the goods might be in a lighter or in a ship or under a shed; but there is no evidence that the appellants knew this, and I do not read the judgment as based upon any inference that they did. If a person sells foods to another and uses an expression well known to have a special meaning among business men, he will be bound by that meaning unless he gives evidence that he told his purchasers, or that they knew without his telling them, that the expression was being used in a special sense. There is nothing in this case to suggest that the words were being used with any but their ordinary meaning and they must be read in their generally accepted sense. A witness having special knowledge was called to say what that sense was; he said that goods in a lighter or in a ship could not properly be described as "ex store," and went on to say "a store is a public or private warehouse." The learned judge differed with this definition. I think, myself, it is unwise to attempt a definition of a store; stores must vary greatly in size, capacity, and description according to the place where they are situate and the goods they are intended to hold; and therefore I am content to accept the other part of the witness's evidence, which accords with my own experience, where he said "goods in a lighter or ship cannot be described as 'ex store.'"

For these reasons I think the appellants are right in saying that these goods, which at the time of the sale were in lighters, could not properly be described as sold "ex store," and that they were justified in repudiating the bargain and insisting on repayment of the purchase price which they had paid. The appeal must be allowed; judgment must be entered for the appellants, and the counterclaim will be dismissed.

Scrutton, L.J.—I agree. The first question is whether the contract between the parties included a contractual description of the goods as "ex store." It seems plain to me on the evidence that this was the agreement. It was a verbal agreement. If it had been necessary to consider whether there was a memorandum in writing of that agreement to satisfy sect. 17 of the Statute of Frauds or sect. 4 of the Sale of Goods Act 1893 the letter of the 14th Nov. signed by the respondents would have been sufficient, inasmuch as it contained the description "ex store" and a reference to "the 500 cases . . . boiled beef which you recently bought from us," which would have let in parol evidence of the other terms of the contract. That letter signed by the respondents coupled with the telegram they sent on the 15th Dec. strongly confirms my view. I begin therefore with a contract for the sale of goods "ex store."

The second question is whether generally, which Mr. Bevan does not assert, or in the special circumstances of the port of Rotterdam at this time, goods lying afloat in a lighter could be described as "ex store." I am not quite clear whether the learned judge meant to decide this question in view of the special circumstances of the port or on the general meaning of the word "store." If he founded his decision on this latter ground, I should both on the evidence and from my own experience disagree with the opinion that "ex store" could cover "ex lighter" or "ex quay." When goods in a lighter are insured the risk is a marine risk. If they are in a store the risk is, in my view, a land risk. I do not propose a definition of the word "store" which will cover all its meanings whatever be the trade or the port in question. The meaning varies with the subject-matter and its surroundings. Personally I have no doubt that, applied to frozen meat, "ex store" means ex refrigerating store and that a vendor who having sold frozen meat ex store tendered meat off the quay would be quickly brought to his senses by the purchaser or anyone else in the trade to whom he tendered it. "Store" in various ports may have different meanings; but

one thing is clear, that in general "ex store" indicates storage on land. Mr. Bevan indeed did not argue that as a general proposition "ex store" would indicate a marine risk in a lighter afloat; he has argued that it was generally known that there was congestion in the port of Rotterdam and that anybody purchasing "ex store" must be taken to know that in a time of congestion goods may be stored in all sorts of odd places, and that any of these places may be a store. I asked whether the same wide meaning might be given to the word "warehouse" in time of congestion, and whether goods in any of these odd places might be described as sold "ex warehouse." Mr. Bevan thought that would be carrying the doctrine of congestion a little too far in its effect upon the meaning of the English language. I think the same strain is put upon the language when the word "store" is made to include any place where goods may happen to be in time of congestion. The evidence of the appellants' knowledge of the actual facts only amounts to this, that they knew the port was congested, but knew nothing about lighters being employed for storing the goods. When a seller in describing the goods to be sold uses an ordinary commercial term in a sense outside its ordinary meaning he must make it plain to the buyer that he is selling him something other than that which the term used would ordinarily indicate. In my view, therefore, whether the word "store" can only be read in its ordinary sense, or whether some peculiar meaning may be given to it in view of the congested state of the port of Rotterdam at the time, the goods were not "ex store" within the meaning of this contract, and the appellants were entitled to reject them, the description being a condition precedent of great commercial importance.

Thirdly, it was contended, though not pleaded, that the appellants had lost the right to reject, because with knowledge of the facts they took action inconsistent with that right. When one party to a contract becomes aware of a breach of a condition precedent by the other he is entitled to a reasonable time to consider what he will do, and failure to reject at once does not prejudice his right to reject if he exercises the right within a reasonable time. In my opinion, he is also entitled during that reasonable time to make inquiries as to the commercial possibilities in order to decide what to do on learning for the first time of the breach of condition which would entitle him to reject. I cannot see that the appellants did anything beyond making inquiries in order to decide what they should do. Therefore, if this matter had been pleaded, it would not have afforded a defence. For these reasons I think the appeal should be allowed.

Eve, J.—I am of the same opinion. I think the contract was plainly a contract to sell "ex store" at Rotterdam, which, in my view, in the absence of special circumstances affecting the conclusion of the contract, is synonymous with "ex warehouse." The primary meaning of each expression seems to me to be a place for the storage of goods or wares. In this case I see no special circumstances to warrant us in attributing to the expression "ex store" the meaning for which the respondents contend.

The further point, that the right to reject had been lost, not having been raised on the pleadings, ought not, in my opinion, to have been entertained; but even if entertained it does not afford a defence.

Appeal allowed.

Solicitors for the appellants, *Cosmo Cran* and *Co.*
Solicitors for the respondents, *W. A. Crump* and *Son.*

Thursday, July 29, 1920.

(Before Lord Sterndale, M.R. and Warrington and Younger, L.JJ.)

London General Insurance Company Limited *v.* General Marine Underwriters' Association Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Cargo—Lloyd's notify casualty—Notice ignored by insurers—Reinsurance policy effected after loss—Non-disclosure of material facts—Insurers deemed to have known of the loss—Loss not known to reinsurers—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 6, *s b-s.* 1; *s.* 18, *sub-ss.* 1, 3; *s.* 19.

Where the plaintiffs, who had insured a cargo (lost or not lost) effected through their brokers a reinsurance of the same cargo some hours after both parties had received from Lloyd's the usual casualty slips notifying them that the cargo had sustained damage by a peril insured against, which slips both parties had overlooked, it was decided by Bailhache, J. that the fire in the steamship was a circumstance which the plaintiffs ought to have disclosed to the defendants if they had known it, and, if the casualty slip had been duly attended to as it ought to have been, the plaintiffs must be deemed to have known of the fire in time to have communicated the information to their brokers and to the defendants before the latter wrote the risk; and that therefore the action failed.

The plaintiffs appealed.

Held, that the decision of Bailhache, J. was right and must be affirmed.

Appeal by the plaintiffs from the decision of Bailhache, J. in an action tried in commercial court.

The facts of the case as found by Bailhache, J. are fully stated in the following written judgment of the learned judge which was delivered by his Lordship in May 1920.

Bailhache, J.—This is a claim on a reinsurance policy on cargo in the steamship *Vigo* on a voyage from Italy to the United Kingdom. The defence is concealment of a material fact, namely, that part of the cargo had been destroyed by fire.

The decision depends upon the application of sect. 18 and 19 of the Marine Insurance Act 1906 to the facts of this case. By those sections it is the duty of the assured to disclose to the underwriters every material circumstance known to the assured, who is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him, and when, as in this case, the insurance is effected by an agent, the agent must similarly disclose every material circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him, and every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

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

To that duty there is one exception material to this case, namely, the assured is not bound to disclose any circumstance known or presumed to be known to the underwriter, who is presumed to know matters of common notoriety or know circumstances which an underwriter, in the ordinary course of his business as such, ought to know.

The facts are these: The fire on the *Vigo* was known at Lloyd's late on the night of the 24th Sept. 1918. It was posted on the casualty board on the morning of the 25th by ten o'clock. A casualty slip containing that and other information was sent by Lloyd's to their subscribing underwriters, including the plaintiffs, at or about the same time. These slips are made and sent out as occasion requires during the day. A daily register or index of information is published and issued by Lloyd's, but only contains information received not later than eight o'clock on the previous evening. At or about ten o'clock on the 25th the plaintiffs' brokers were instructed to effect a reinsurance policy at Lloyd's. They did it at about four o'clock that same afternoon. The plaintiffs, although they had the casualty slip, did not read it, and did not, in fact, know of the casualty until some two days later. The defendants, when they wrote the risk, were in the same state of ignorance.

There can be no doubt that the fire was a circumstance which the plaintiffs ought to have disclosed had they known it; indeed, they frankly admit that they should and would have done so. It is impossible, in my view, to contend successfully that such a circumstance need not have been disclosed by the assured, because the underwriter might have found it out for himself by looking at the casualty board or at the casualty slips. The duty is the same if the fire is a circumstance which the plaintiffs must be deemed to know.

The remaining questions, then, are: Must the plaintiffs be deemed to have known it, and if so, in time to communicate it to their broker, who, by the way, was as ignorant of the fact as were the plaintiffs and defendants. Brokers do not receive the casualty slips, and do not, as a rule, consult the casualty board before showing a risk in the room.

In order to solve the two questions left, and to appreciate the plaintiffs' contentions upon them, it is necessary to state the plaintiffs' method of business. Their head office and their marine insurance office are in separate buildings. The marine insurance office sends daily *borderaux*, as they are called, to the head office, showing the results of the day's work. These are examined, and if they show that the plaintiffs have a heavier line upon a risk than they care to carry, the insurance office is instructed to re-insure.

The plaintiffs have, I understand, a limit of 1000*l.* on any one line. They have several of the well-known automatic reinsurance treaties with other companies, and if any of them is available they simply reinsure under one or more of those treaties. If none is available, as was the case here, they reinsure, as was done here, in the ordinary way through brokers at Lloyd's.

The marine insurance office has three departments —for underwriting, for claims, and for reinsurance respectively. Instructions to reinsure are given direct by the head office to the reinsurance department, which was, at the time, under the charge of a Miss Stephens, acting when necessary under a Mr. Diaz, who was the brother and deputy of the plaintiffs' underwriter. The casualty slips were delivered to underwriters' room. There was great pressure of business. The underwriters seldom or never looked at them. They were put in a drawer and from time to time during the day taken to the Claims Department. What they did with them does not appear.

I was told by Mr. Hogg for the plaintiffs that the primary object of the slips is to give underwriters the latest available information in advance about risks that might be disclosed to them during the day. If so, the plaintiffs do not seem to have used them for that purpose as is shown by their being carried off to the Claims Department, which is not concerned with new business, but with losses on existing policies.

I am not, I think, concerned with the particular method in which the plaintiffs carried on their business. The question I must ask myself is: Was the casualty slip notice to the plaintiffs of the fire on the *Vigo*, and I think it was. If it were not so, the magnitude of the business of an assured, or the extent of his personal attention to it, or even the pressure of a busy time, would always have to be considered in applying sect. 18 of the Marine Insurance Act 1906, and the same means of knowledge would have different results according to the way an assured chooses to carry on his business, and might even depend upon whether he was busy or slack, or whether his clerks were efficient or inefficient.

The argument for the plaintiffs is that because their Reinsurance Department did not see the casualty slip and did not know its contents, therefore the plaintiffs did not know and cannot be deemed to have known of the fire. That argument does not appear to me to be sound. The question is not what ought the plaintiffs' reinsurance clerk to have known, but what the plaintiffs must be deemed to have known.

The very object of the casualty slip is to give the latest possible information to the recipients, thus supplementing the daily index whose information does not go beyond the previous day. These slips are obviously useless unless they are read as and when they come in, if not they might as well cease to be supplied. An assured neglects the information given him in these slips at his peril. If the slip had been duly attended to, there were at least four and probably five hours in which the information as to the fire might have been communicated to the brokers, and in my opinion, this was ample time for the purpose. The case called for prompt action.

In my opinion, therefore, the defence is made out and there will be judgment for the defendants with costs.

From that decision the plaintiffs now appealed.

Douglas Hogg, K.C. and *Jowitt* for the appellants.

Stuart Bevan, K.C. and *Claughton Scott* for the respondents.

Lord Sterndale, M.R.—This is an appeal from the decision of Bailhache, J. who gave judgment for the defendants in an action on a policy of insurance on the ground that there was a fact, a material fact, which must be deemed to have been known to the insurers affecting the re-insurance within the meaning of sect. 18 (1) of the Marine Insurance Act 1906. In the ordinary course of business it ought to have been known to them and, therefore, must be deemed to have been known. The learned judge

held also that it did not come within the subsequent sub-section of that Act which provides—sub-sect. 3—that a circumstance need not be disclosed "which is known or presumed to be known to the insurer." Then the sub-section goes on to add: "The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know."

The plaintiffs had a line upon the cargo of a vessel called the *Vigo*, and on the 24th Sept. 1918, they wished to effect reinsurance to a certain extent because they had a bigger line than they considered right upon that vessel. The *Vigo*, in fact, suffered casualty in some of her cargo which got on fire on the evening of that day. I do not know at what time the casualty began. At any rate the information came to Lloyd's late at night—at eleven o'clock on the 24th Sept. 1918—and on the morning of the 25th Lloyd's sent out information of the fire in what are called casualty slips to their subscribers, amongst whom were the plaintiffs.

The plaintiffs were among a number of companies who apparently employed one Maurice Diaz as their underwriter, and he carried on his business at the office of a company called the National Benefit Insurance Company Limited. There he as underwriter acted for the plaintiffs and for a number of other companies, and I think he must be considered for the purposes of this case as the underwriter of the plaintiffs carrying on their business at that place. The plaintiffs' head office was some little distance away.

In the place where Mr. Diaz was there was a Marine Department, a Claims Department, and a Reinsurance Department, and they were all underwriters and all part of the underwriting department. A lady of the name of Stevens was in charge of the Re-insurance Department apparently, under—it was distinctly said under—Mr. Diaz, and his assistant, who was his brother, Mr. Leon Diaz. She was not in the same room, the underwriting room; her room was upstairs on the fourth floor. But it was all one underwriting department divided into sections.

The way the business was carried on was thus: When the plaintiffs found they had a bigger line than they thought advisable on any risk, they communicated or it was communicated to a gentleman who was in their employment not where the head office was, but they went to Cornhill and informed the underwriting department there. I do not think, as far as I can see, from the evidence that it went straight up to Miss Stevens in her fourth-floor room, but he instructed the department at Cornhill, and then it was handed to Miss Stevens who, if she could, placed the reinsurance with some associated companies with which they had treaties of reinsurance, and if she could not, she sent out instructions to the broker to effect it at Lloyd's from outside.

On the 24th Sept. 1919, Miss Stevens received instructions to reinsure a portion of the line on the *Vigo*. She drafted some instructions and dated them the 25th because they were too late to be put in operation on the evening of the 24th. On the morning of the 25th, somewhere between ten and eleven o'clock, she handed these to the broker's clerk who went round to see if there was any business. The broker received the instructions, but was not able to effect the reinsurance until somewhere about four o'clock in the afternoon. It is not quite clear at what time the casualty slips came from Lloyd's to the office. It was somewhere about ten or half-past ten; I should think somewhere nearly about the same time as the instructions were handed to the broker's clerk.

When the casualty slips were received nobody took any notice of them at all. There was a great press of business and nobody apparently looked at the casualty slips. They were handed in to the underwriting department and the underwriter or his clerk picked them up and put them into a drawer, possibly he read them, possibly he did not, and at the end of the day they went up to the Claims Department, and according to Mr. Diaz's evidence the Claims Department should have given information to the Reinsurance Department as to any casualties. It seems to me quite clear from the evidence that nothing of the kind was done. Once they got into some spot there they stayed, and nobody was sent from the Claims Department to see what was done with them; therefore, really they were entirely neglected; it may have been caused to a certain extent by press of business.

The evidence of the defendants is that what was done with the casualty slips in their case was that they were looked through by a lady clerk, and if there was anything in them which concerned the risk upon which the defendants were engaged that was brought to the attention of someone in authority. It was not always done early in the morning; it was very often late in the day that something was done, and I think it must be taken that the defendants were not upon the risk in the *Vigo*. I think there is no positive evidence of that. I think the drift of the evidence is that they were not. The defendants also said that in effecting an insurance they would investigate either the casualty slips or any other information including what was called the daily list, which was a list of casualties the day before compiled by Lloyd's and sent out, but that in proposing reinsurances they did not look at any of these materials.

Those are the circumstances under which the question arises, Ought the plaintiffs in the course of business to have known of this casualty, and to have known of this casualty at a time when they could have recalled their instructions to their brokers to effect reinsurance free of casualties? Bailhache, J. has found that they ought, and he has found that they ought on this ground, that they had no right to neglect the casualty slips from Lloyd's, which they admitted to be sent for the purpose of giving information entirely, and certainly they ought not to neglect them in a case where they were on a risk as they were on the *Vigo*. Their evidence went to this, that they really did nothing to make use of the casualty slips at all. He held that that was not right, and that they ought as far as business would have permitted them to have availed themselves of the information that was given to them by Lloyd's, and I do not see my way to differ from him.

If it were a question here of the plaintiffs having done their best, so far as the press of business would allow, to make themselves acquainted with the casualty slips, and their not being able to do so in time to stop the broker's instructions, I think it might have been difficult to deal with such a case, but there is no such case before us. They never did anything at all, and I do not see my way to differ from the learned judge in the court below when he comes to the conclusion that if they had taken steps to examine the casualty slips they

might and would have found out this casualty in time to communicate with their brokers before four o'clock, when the reinsurance was effected.

There remains another point, and that is this: It is said that if that is true of the plaintiffs it is equally true of the defendants, and as they ought to have known in the course of their business the contents of the casualty slips it was a circumstance which the plaintiffs were not bound to communicate to them. The learned judge has taken the view—again I do not see my way to differ from it—that the defendants were not upon the risk in the *Vigo*. I think that is right, and he has then taken this—that you could not expect the defendants, supposing they had looked at the casualty slips, to have present to their minds always the information about a vessel which at the time they got the information, if they did get it, would have had no interest to them at all.

In fact, the learned judge has dealt with it, I think, rather upon the same principle as the principle in the case of *Bates* v. *Hewitt* (L. Rep. 2 Q. B. 595); where the plaintiff had not informed the insurer that the *Georgia* had been a confederate cruiser and was, therefore, not insurable, and it was held he need not communicate that fact because the defendant had the same means of knowledge and had the same knowledge, and the defendant admitted that he had known that at one time the *Georgia* was a confederate cruiser, but it was not present to his mind when he took the risk, and the court held that an insurer was not to be expected to carry all sorts of miscellaneous information always in his mind—information which was not interesting at the time that he got it.

That principle seems to me to be the one on which the learned judge acted, and I do not see my way to interfere with his decision. As I have said, the defendants had nothing to do with the *Vigo* at all. The young lady clerk, Miss Stevens, would never have communicated the name of the *Vigo* to them at all, because they were not interested in the *Vigo* and, therefore, there was no reason really, in the ordinary course of business, why the defendants should have known this information about the *Vigo*.

For these reasons, although I was in doubt for a time about the case, I do not see my way to differ from the decision of Bailhache, J, and I think, therefore, that this appeal must be dismissed.

Warrington, L.J.—I am of the same opinion.

I just want to mention one point which particularly strikes me and has influenced me in the conclusion at which I have arrived, and that is with regard to these casualty slips which are intended to tell the persons concerned what casualties have happened. I think the one with regard to the *Vigo* must be taken to have arrived in the early morning at the office in which the plaintiffs' underwriting business is carried on. It was a casualty which happened overnight, and it appears, as I understand, very near the end of the list as a casualty in the casualty book for that day, and I think one may infer it arrived early in the morning.

We know from the evidence what is done. The matter is taken to the underwriting department—that is to say, the department which is concerned with this part of the business. The business is divided into sections, one of which is concerned particularly with reinsurance, and the matter goes into that department. The casualty slips are there, and the evidence is that it was the practice of the manager of the Underwriting Department, or some practical officer, to look at those slips whenever he had the opportunity of doing so. They do not go at once to the Claims Department.

I gather from the evidence that they would be sent up to the Claims Department in the evening unless it happened to be convenient at some time during the day to send up a batch that had already arrived. But there they were in the Underwriting Department ready to be inspected by the manager, and the manager says he did look at them from time to time, and the only reason, apparently, why they were not looked at on this day was that, owing to pressure of business, he had not got them.

It seems to me that is not enough. The ship was on the casualty slips; they were contemplating reinsuring it, and there was information material to the risk actually in their possession, and it is only because they were either too busy or too careless to look at it that they did not obtain material information.

It seems to me the circumstances are such that we cannot possibly differ from Bailhache, J. in holding that this was information which, under the Act of Parliament, must be taken to be a matter of which they ought to have had knowledge.

With regard to the other point, it seems to me the defendants were in a very independent position. It is true that the casualty slips went to their office also, but they were not interested in this risk and they had no reason for referring to the slips. I do not believe for a moment that if they had been already insurers of that risk they would have accepted the reinsurance without ascertaining that fact, and if they were not interested in it then even if they had looked at the casualty slips it would not necessarily have conveyed anything to their minds, the knowledge of which must continue, when at a late hour in the day the proposal for this reinsurance was put forward.

I think that Bailhache, J. on this point also was right and that the defendants cannot be presumed to have had knowledge of this casualty merely because they had the opportunity of ascertaining it, and not merely the opportunity of ascertaining it, but the opportunity of it being carried in the head of the man whose duty it was to know it.

I am, therefore, of opinion that the judgment of Bailhache, J. must be affirmed.

Younger, L.J.—I am of the same opinion, but I confess that I express the conclusion at which I have in fact arrived with some reluctance.

The ground on which I have ultimately arrived at this conclusion is this—that it appears to me that the manner in which the plaintiffs' Underwriting Department was conducted was such that information as to the contents of the casualty slips would never, except in the most exceptional circumstances—"timeously," as the Scotch say—come to the knowledge of the Reinsurance Department. And if this court were to differ from the conclusion at which the learned judge has arrived, I cannot but think that in a case less meritorious than this, it might not be possible for persons in the position of the plaintiffs to establish liability against their insurers by wilfully, one might almost say, though it could not be proved, closing their eyes to information which it was their duty to know.

With reference to the point which has been made, which is borne out by the evidence, that so far as

the defendants are concerned they, when they are accepting risk, are more careful, in the course of their business, in referring to the daily list than when they are offering themselves the distinction between the two cases, I think, is this: Neglect on the part of the defendants, when accepting risk, to refer to the daily list, is neglect to their own undoing, but neglect on the part of the defendants when they are offering risk for insurance to withhold or not to make some disclosure, is to the undoing of the insurer, and injures him. Therefore, I think that the two cases should be regarded from a different point of view, and, regarding them from a different point of view in relation to their duty to the other, then it seems to me that the duty of the defendants when accepting risk from the assured in relation to information with regard to this particular vessel or property with which they have had previously no concern is certainly not so intimate in the ordinary course of business as is the duty of the assured to themselves in the case of reinsurance of property already at risk.

For these reasons, therefore, I think that the learned judge in the court below came to a right conclusion, and I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Coburn* and *Co.*; for the respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, Jan. 16, 1920.

(Before HILL, J.)

THE CHARLOTTE. (*a*)

Practice—Limitation of liability—Right to limit—Amount of bail—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

In a collision action the defendants gave bail for the amount of their statutory liability under the Merchant Shipping Act 1894, *s.* 503, *and affirmed that the collision occurred without their actual fault or privity. The plaintiffs filed a counter affidavit alleging privity.*

Held, that the plaintiffs were entitled to bail to the full value of the defendants' vessel.

MOTION by plaintiffs in a collision action to set aside a *caveat* against arrest, and for leave to arrest the vessel of the defendants.

Defendants in a collision action had prepared bail for their vessel at 15*l.* per ton in accordance with sect. 503 of the Merchant Shipping Act 1894, together with an affidavit stating that the collision occurred without their actual fault or privity. Plaintiffs by a counter-affidavit alleged that the masthead and the green light of the *Charlotte* were defective, and that it was believed that the defects in these lights existed at the commencement of the voyage.

For the plaintiffs it was contended that it might be that the owners were responsible for the defective condition of the lights, in which event they would not be entitled to limit the liability under sect. 503 of the Merchant Shipping Act, because the collision would not have taken place "without their actual fault or privity," and in these circumstances they claimed that they were entitled to bail in the sum of 63,000*l.*, being the full value of the *Charlotte*. Their claim was for 80,000*l.*

R. H. Balloch for the plaintiffs.

Lewis Noad for the defendants.

HILL, J.—I think in this case I ought to grant the plaintiffs' application and set aside the *caveat* entered against arrest and give leave to arrest the *Charlotte*. With regard to the 13,000*l.* bail, I give leave to the defendants to apply if matters are not agreed, and I reserve all questions of costs of bail and of this application. In my view the practice is accurately stated in note (*p*), at pp. 291, 292, of Williams and Bruce's Admiralty Practice (3rd edit., 1902), which reads:

> If the amount for which a cause of damage is instituted exceeds the statutory limit, the defendant, on filing an affidavit with damage suit, stating the tonnage of his ship and that the collision happened without the actual fault or privity of any of the owners, will, if these facts are not denied by the plaintiff, be entitled to have the ship released on bail being given to an amount sufficient to cover the amount of the statutory limit and interest and costs. . . . Of course the plaintiff may dispute the facts on which the defendant's right to avail himself of the benefit of the provisions of the statute rests, and then bail must be given to the full value of the property.

The defendants allege that the facts will turn out to be such that they will be entitled to limit their liability, and the plaintiffs dispute that, and that issue is one which cannot be tried on the present application. That leaves the plaintiffs, who do not assent and have never assented to the bail being limited, with a right to demand bail to the full value of the ship; but, of course, they do it entirely at their own risk. If it turns out that they have made an exorbitant demand for bail, they will probably suffer for it hereafter.

Solicitors: *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff; *W. A. Crump* and *Son*, agents for *Gilbert Robertson* and *Co.*, Cardiff.

March 1 *and* 15, 1920.

(Before HILL, J.)

THE MARIE GARTZ. (*a*)

German claimants—Judgment entered before the war—Rights of claimants to proceed to reference after ratification of peace—Treaty of Peace between Allied, &c., Powers and Germany 1919, *arts.* 296-297—*Treaty of Peace Order* 1919, *s.* 1, *sub-ss.* 16 *and* 17.

Before the war the defendants, who were German shipowners, recovered judgment against the plaintiffs, who were British, condemning the plaintiffs in damages for collision and ordering a reference for assessment of the said damages. The defendants had not filed their claim before the outbreak of war. The claim and vouchers were ultimately filed a few days before the ratification of the Treaty of Peace, but it was agreed that they should be taken as filed on a subsequent date. The plaintiffs then took

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

out a summons to set aside the claim and vouchers on the ground that under the Treaty and the Order applying its provisions the parties were not entitled to litigate the claim, but must submit to settlement by the clearing houses.

Held, that the defendants' claim was not a debt under arts. 296 of the Treaty, but was a right under art. 297, which was to be "retained and liquidated in accordance with the law of the Allied State concerned." There was nothing in art. 297, nor in the Treaty of Peace Order, s. 1, sub-ss. 16 and 17, to prevent the defendants from proceeding to a reference, although they might not touch the proceeds, nor to prevent the plaintiffs from paying money into court.

SUMMONS to set aside the defendants' claim for a reference under a judgment.

The facts and contentions are fully set out in the judgment.

A. Bucknill for the plaintiffs.

C. R. Dunlop, K.C. and *G. P. Langton* for the defendants.

HILL, J.—The plaintiffs in this case are the owners of the British steamship *Karamea*, Messrs. Shaw, Savill, Albion and Co. Limited. The defendants are the German owners of the German steamship *Marie Gartz*. The defendants are the holders of a judgment in their favour made before Aug. 1914, whereby the plaintiffs and their bail were condemned in the defendants' damages arising out of a collision between the two steamships, and the defendants' damages were referred to the registrar and merchants to assess the amount thereof. The defendants had not filed their claim in the registry when war broke out. In Nov. 1919 the defendants' solicitors gave the plaintiffs' solicitors notice of their intention to proceed, and a few days before the 10th Jan. 1920 filed the defendants' claim and vouchers. The plaintiffs took out a summons for an order that the filing and service of the claim and vouchers of the defendants should be set aside, and that the defendants' claim should be removed from the file. The registrar refused to so order, and from that refusal the plaintiffs appeal.

Two points were taken before me on behalf of the plaintiffs. First of all, it was objected that the notice to proceed was given and the claim and vouchers were filed before the Treaty of Peace was ratified, that is before the 10th Jan. 1920. This is a technical but a sound objection. Until the Treaty of Peace was ratified the defendants were alien enemies and had no *locus standi* in the King's courts. The plaintiffs, however, were willing to waive this objection, and I see no objection to the claim and vouchers being treated as filed on Monday, the 12th Jan. 1920.

The second objection is of more importance, and is based on the Treaty of Peace Order 1919, made under the Treaty of Peace Act 1919. The plaintiffs contend that neither the defendants nor the plaintiffs have any right to litigate the defendants' claim in the ordinary way, and that they, the plaintiffs, cannot appear at the reference without committing an offence under the Order in Council. *Primâ facie* the defendants have a right to proceed upon their judgment and prove their damages and obtain a report. Is there anything in the Order in Council which deprives them of that right or makes it illegal for them or for the plaintiffs to attend at the reference or for the registrar and merchants to hear it and make a report? The argument was mainly based upon art. 296 of the Treaty of Peace, as made law by the Treaty of Peace Order in Council, but reference was also made to art. 297. These articles and others, which make up sects. 3 to 7 of Part 10 of the Treaty, are given the force of law by the Order in Council. The Treaty of Peace Act 1919, under which the order is made, gives power to his Majesty to "make such Orders in Council and do such things as appear to him to be necessary for carrying out the Treaty and for giving effect to any of the provisions of the Treaty." In pursuance of that, the Treaty of Peace Order was made, and it gives the effect of law to the articles I have mentioned, and makes various provisions for carrying out those articles.

In my opinion, art. 296 does not apply to the defendants' claim, but art. 297 does. Art. 296 deals with debts, and, so far as obligations of private persons are concerned, is careful to limit its application to that particular class of "pecuniary obligations." It contemplates that debts may be admitted or not admitted; but it deals only with debts. In terms it distinguishes between "debts" and the "proceeds of liquidation of enemy property, rights and interests." The Order in Council which makes the articles law, and which is made under powers for giving effect to the Treaty, cannot give a wider meaning to "debts." For the purposes of the order, the claim of the defendants is, in my opinion, not a "debt." It is, however, a "right." It is a right to have the defendants' damages ascertained and the judgment turned into a judgment for a liquidated sum. Being a right belonging to a German national within the territory of the King, it comes within art. 297, and is by 297 (*b*) subject to the "right to retain and liquidate" it in accordance with the Treaty, and comes within the provisions of sect. 1, sub-sect. 16, of the Order in Council, which charges "All property, rights, and interests within His Majesty's Dominions and Protectorates belonging to German nationals, and . . . the net proceeds of their sale, liquidation, or other dealings therewith."

It is, therefore, a right of a German national subject to the charge so created. But it is to be observed that it has not been vested in the custodian under sect. 1, sub-sect. 17 (*d*), of the Order in Council. What is the position of the German national entitled to such a right so charged and of the British national bound by it? Art. 297 (*b*) provides that: "The liquidation shall be carried out in accordance with the laws of the Allied or associated State concerned," viz., in this case England. There is nothing in that to prevent the reference being held. The Order in Council by sect. 1, sub-sect. 17, makes provisions "with a view to making effective and enforcing such charges as aforesaid," and it includes among those provisions the following: "(*a*) No person shall, without the consent of the custodian, transfer, part with, or otherwise deal in any . . . right . . . subject to the charge." This applies to the defendants. And: "(*e*) If any person called upon to pay any money or to transfer or otherwise to deal with any . . . rights . . . has reason to suspect that the same are subject to such charge as aforesaid, he shall, before paying, transferring or dealing with the same, report the matter to the custodian, and shall comply with any directions that the custodian may give with respect thereto." As to (*a*), I cannot think that by proving the claim in the reference and

obtaining a report the defendants will deal in the right, and certainly they will not transfer or part with it. As to (*e*), even if to attend the reference were a dealing with the right, which I think it is not, the plaintiffs have reported the matter to the custodian, and the custodian has not directed them to do or not to do anything.

I can find nothing in the Order in Council which deprives the defendants of their right to proceed to a reference and obtain a report, or which makes it illegal for the plaintiffs to take part in the reference. The defendants will not be able to handle the money, but, as under the Treaty Germany undertakes to compensate its nationals in respect of the retention of their rights (art. 297 (i.), it may be important for them to have the amount ascertained.

The plaintiffs objected that they would not be able to tender. I agree that they can offer no payment to the defendants, but I see nothing to prevent their paying money into court, with a notice that it is in satisfaction of the claim of a German national. The charge will prevent the money being paid out to the defendants, and the registrar will be able to deal with the question of costs, having regard to the payment in.

The plaintiffs also said that, having lost a ship by submarine attack, they had a special right of set off under art. 296, annex 14. I decide nothing about that. I decide nothing about the application of the damages when liquidated. Art. 297 provides for that, and it may or may not be that when art. 297 is applied to the proceeds of the liquidation of this right the plaintiffs will be able to apply to have the benefit of annex 14 of art. 296. I do not decide the point one way or the other. I am only deciding that there is nothing in the Order in Council which deprives the defendants of their legal right to prove their damages on a reference or which makes it illegal for the plaintiffs to take part in that reference.

I therefore dismiss the appeal, but, as the defendants can only put themselves right by getting their claim and vouchers treated as of the 12th Jan. 1920, the plaintiffs were technically right and ought to have the costs of the summons both here and before the registrar.

Solicitors: *Ince, Colt, Ince,* and *Roscoe; Stokes* and *Stokes.*

March 15 and 17, 1920.

(Before HILL, J.)

THE CEYLON. (*a*)

Collision in a river estuary—Collision Regulations and river rules both applicable—Whole duty of ship described in river rules—Conduct of ship governed by the river rules—Regulations for Preventing Collisions at Sea, preliminary note and arts. 16 *and* 30*—Tyne By-laws* 18 *and* 39.

"*Where there is a certain rule which deals with the whole scope of the subject, to add parts of the provisions of the sea rules would be to interfere with the operation of the river rules.*"

In a fog a steam vessel, when inside the piers at the Tyne entrance, heard a long blast right ahead. She did not stop her engines, but continued to navigate at a moderate speed; whilst doing so she came into collision.

Held, that the collision occurred at a place where both the Collision Regulations and the Tyne By-laws applied. But that by art. 30 *of the former the Collision Regulations were not to interfere with the operation of any local rules, and, as in this case the Tyne By-laws* 18 *and* 39 *prescribed the whole duty of a vessel navigating in fog, the Collision Regulations were entirely inapplicable.*

The Carlotta (8 *Asp. Mar. Law Cas.* 544; 80 *L. T. Rep.* 664; (1899) *P.* 223) *followed.*

ACTION for damage by collision.

Arts. 16 and 30 of the Regulations for Preventing Collisions at Sea provide:

Art. 16. Every vessel shall, in a fog . . . 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.

Art. 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland water.

The facts and contention appear from the judgment.

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

Laing, K.C. and *Lewis Noad* for the defendants.

HILL, J.—The collision in this case happened at about 9 a.m. on the 13th Feb. 1919 inside the piers at the Tyne entrance. . . . There is no doubt in my mind that from the time the *Ceylon* sighted the *Oscar Fredrik* the *Ceylon* did nothing wrong and neglected nothing that she ought to have done. . . . And I find, as a fact, that the collision happened well over on the south side of the channel in the *Ceylon's* water, and not in the *Oscar Fredrik's* water.

This leaves for consideration the charges against the *Ceylon* (1) of speed, and (2) of not stopping the engines. As to speed, I find that it was moderate. It may have been rather more than two or three knots, but it was not much more, and, in the circumstances, it was moderate. It is significant that she was preceded by the *Luga,* which she was not overhauling, and she was followed by the *Lake,* which was not overhauling her until the *Ceylon* stopped her way by dropping her anchor. They were all coming down at about the same speed, and, applying the best test I can, I find that they were not making more than four knots, and the Elder Brethren think that that was a moderate speed, and I agree.

As to not stopping the engines, the *Ceylon* heard a long blast, some of the witnesses think more than once, right ahead. The pilot, who was steering by objects on the south shore, and who knew the *Luga* was going down in front of him, concluded that it came from the *Luga.* He did not stop the engines. The plaintiffs say that this was a breach of art. 16 of the sea regulations. The defendants say, firstly, that the sea regulations did not apply; and secondly, that their not stopping was justified, for the position of the ship ahead was ascertained, for it was either the *Luga,* which was known to be outward bound, or, if it was an incoming ship, then a ship which was presumed to be coming up north of mid-channel; and in this connection the defendants

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

refer to the case of *The Hare* (9 Asp. Mar. Law Cas. 549; 90 L. T. Rep. 323; (1904) P. 331).

Whether the sea regulations apply is a difficult question. The sea regulations are *primâ facie* applicable to the waters in question, for they are "waters connected with the high seas, navigable by sea-going vessels" within the preliminary to the sea regulations. It is not disputed that the Tyne rules are applicable to the waters in question. The Tyne rules are made under proper local authority. By art. 30 of the sea regulations: "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river, or inland waters."

By art 16 of the sea regulations (by the addition made in 1897), if that article is applicable, the *Ceylon*, on hearing, apparently forward of her beam, the fog signal of a vessel the position of which was not ascertained, should, as far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision was over. And by the sea regulations this rule is applicable in narrow channels as elsewhere. The only difference, if the ships are in a narrow channel, is that that circumstance may affect the question whether "the circumstances of the case admit" and the question whether "the position of the vessel is ascertained" or not.

The Tyne rules provide with great detail for vessels keeping on their own side of the channel when in the channel. They also provide for the way in which the entrance to the Gateway between the piers is to be approached. Then, as to fog, they provide by rule 18 the fog signals which are to be sounded, and by rule 30 it is provided that "every vessel under way when overtaken by a fog shall be navigated at a very moderate speed, and shall, as soon as practicable, be moored or anchored out of the navigable channel. Vessels shall not, without the permission of the harbour master, be got under way during a fog."

In *The Carlotta* (*sup.*) a very similar question arose. The question in that case was whether a ship in the Thames being aground ought not only to make the whistle signal required by the Thames rules, but also ought to exhibit two black balls under art. 4 (*a*) of the sea regulations. It was held that art. 4 (*a*) of the sea regulations did not apply to a ship aground and therefore the other part of the judgment was in effect *obiter*; but Barnes, J. in a careful and considered judgment, which is relevant here, dealt with the question on the assumption that art. 4 (*a*) did apply to a ship aground, and on that assumption he held that the matter was governed by the Thames rule and not by the sea regulations. And his reasoning is summed up in the last words: "Where there is a certain rule which deals with the whole scope of the subject, to add parts of provisions of the sea rules would be to interfere with the operation of the river rules."

It will be noticed there that the subject was what signal should be given, either by sound or exhibition, by a vessel aground. The Thames rule provides for a whistle signal and the sea rule for the exhibition of two black balls. It might well be said that these were not inconsistent, but one supplementary to the other, and therefore both should apply; but Barnes, J. held that, inasmuch as the Thames rule dealt with the whole scope of the subject of ships aground, and provided the signal for it, the sea regulation which dealt with the same subject-matter was excluded.

Applying that to the present case, the Tyne River rules 18 and 39 seem to me to deal with the whole scope of the subject of the duties of ships in fog in the river, and to add to them the second provision of art. 16 of the sea regulations would, in my opinion, be as much to interfere with the river rules as in *The Carlotta* it was to add the sea regulation as to exhibiting black balls. I arrive at this conclusion with considerable hesitation, but that is the conclusion at which I arrive. Applying rule 39 of the Tyne rules, I find that the *Ceylon* was being navigated at a "very moderate speed," and nobody has suggested on either side that the circumstances were such that either of these ships ought to have been moored or anchored out of the main channel.

Having found, as I have, with regard to the rules, it is unnecessary to consider whether I ought to extend the decision in *The Hare* to cover a case where ships are in a natural channel of the width of the lower Tyne. The *Hare* was in collision in the Manchester Ship Canal, and I should hesitate—I should want to consider the matter much more carefully—before I could think it right to extend the reasoning which was applied to a collision in the Manchester Ship Canal to a collision in a narrow water as wide as the lower part of the Tyne. I do not express an opinion one way or the other upon it.

But I will only add this: If the matter is to be considered independently of rules altogether, I have asked the Elder Brethren whether, in their opinion, it was contrary to good seamanship or an unreasonable thing for the *Ceylon* to act as she did in not stopping, and they advise me that they cannot say that it was either contrary to good seamanship or an unreasonable thing in the circumstances of the case.

I therefore find that these allegations against the *Ceylon* are not made out. The matter stands or falls entirely on the question of the side of the channel, and on that I have decided in favour of the *Ceylon*.

I therefore pronounce the *Oscar Fredrik* alone to blame.

Solicitors: *Botterell* and *Roche*, agents for *Botterell*, *Roche*, and *Temperley*, Newcastle-on-Tyne; *Stokes* and *Stokes*, agents for *Bramwell*, *Clayton*, and *Clayton*, Newcastle-on-Tyne.

Wednesday, April 21, 1920.

(Before Sir HENRY DUKE, P.)

THE PELLWORM AND OTHER VESSELS. (*a*)

Prize Court — Enemy vessel — Capture in neutral territorial waters — Requisition by Admiralty — Claim for restitution by neutral Government — Prize Court Rules 1914, *Order XXIX.—Treaty of Peace with Germany, art.* 297, *and Annex* 3 *to Part* 8.

Two German merchant vessels were captured by British warships in July 1917 *after a chase which ended in Dutch territorial waters. Lord Sterndale held in subsequent proceedings* (The Pellworm, 14 *Asp. Mar. Law Cas.* 490; 121 *L. T. Rep.* 488) *in prize that there had been an unintentional violation of Dutch neutrality, and he therefore*

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

dismissed the claim of the Crown for condemnation and that of the Netherlands Government for damages and costs. Further consideration was adjourned, as the vessels had been requisitioned by the Admiralty under Prize Court Rules 1914, *Order XXIX., upon the usual undertaking for payment of appraised values. Two of the vessels were subsequently sunk by enemy submarines. The Netherlands Government claimed release of the vessels and compensation.*

Held, that the capture created no proprietary right in the Netherlands Government, and that the claim was a claim in the right of the disseised enemy owners; that the requisition by the Crown was effectual to vest the property in the vessels in the Crown; that the claim was therefore for restitution in value by the payment of the appraised values of the vessels to a neutral Sovereign for the use of German owners; that such sums were within art. 297 *of the Treaty of Peace with Germany, and must be retained to be dealt with pursuant to the Treaty. The claim of the Netherlands Government dismissed.*

ACTION for condemnation. Claim by Netherlands Government for restitution.

R. A. Wright, K.C. and *Bischop* for the Netherlands Government.

Sir *Gordon Hewart* (A.-G.), Sir *E. M. Pollock* (S.-G.), *Butler Aspinall*, K.C., and *Dunlop*, K.C. for the Crown.

The facts and argument are fully set out in his Lordship's judgment.

Sir HENRY DUKE, P.—This is a claim of the Netherlands Government, on behalf of her Majesty the Queen of the Netherlands, in respect of the seizure of four German steamships, the *Pellworm*, the *Marie Horn*, the *Heinz Blumberg*, and the *Breitzig*, with their cargoes of fuel, which was made by ships of his Majesty's Navy on the 17th July 1917. The ships were brought in forthwith for condemnation, and a cause of condemnation was duly commenced on the 25th July 1917. On the 31st July 1917, upon application by the Admiralty pursuant to Prize Court Rules, 1914, Order XXIX., leave was given to requisition the ships and their cargoes subject to appraisement and the usual undertakings and on the 11th Aug., after appraisement, the ships were released to the Admiralty upon the undertaking of the Procurator-General for payment of the appraised values as the court might direct. The cargoes were also delivered to the Admiralty.

In Dec. 1917, the Netherlands Government appeared in the several causes and made claims for release of the ships with costs, damages and expenses on the ground that the seizures had been made in the territorial waters of the Netherlands. There are claims to the cargoes by or on behalf of various claimants, but no evidence with regard to these were brought to my notice. Three of these claimants are neutrals.

In July last the claims in relation to the ships were heard by Lord Sterndale, who found that the seizure had, in each case, been made within the territorial waters of the Netherlands, but without any intention to violate the neutrality of Holland. Lord Sterndale made a declaration as to the locality of the seizures, rejected the claims for damages and costs, and reserved further consideration of the cause. Upon further consideration evidence was received as to certain material events subsequent to the seizure. As to the several ships, it was shown that the *Pellworm* and the *Marie Horn* were employed after delivery to the Admiralty as colliers plying between Wales and North France; the *Pellworm* until the 9th Oct. 1917, when she was sunk by an enemy submarine without warning and eighteen of the crew were drowned; the *Marie Horn* until the 8th May, 1918, when she was sunk by an enemy submarine without warning and two of her crew were drowned. The *Heinz Blumberg* and the *Breitzig*, after being employed by the Admiralty on various duties, were at the date of the hearing before me engaged in the British coasting trade.

Between the hearing before Lord Sterndale and the further consideration of the case the Treaty of Peace between the Allied and Associated Powers and Germany, which was signed at Versailles on the 28th June 1919, had been ratified, and Annex 3 to Part 8 and art. 297 thereof have a bearing upon the present claims. By Annex 3 to Part 8 Germany ceded to the Powers the property in all German-owned ships of 1600 tons and upwards, and in one-half, reckoned in tonnage, of all German-owned ships between 1000 and 1600 tons, and undertook within two months of the coming into force of the Treaty to deliver the ships so ceded. By art. 297 Germany ceded to the Powers respectively the right to retain and liquidate all property and interests within their territories belonging to German subjects at the date of the coming into force of the Treaty, leaving the expropriated owners to look to the German State for compensation in respect of such expropriation. An order of His Majesty in Council, dated the 11th Aug. 1919, made in pursuance of the Treaty of Peace Act, 1919, has provided official agencies in this country for dealing with the property and interests in the United Kingdom which pass under the Treaty.

Of the ships here in question, one, the *Heinz Blumberg*, was of 1600 tons gross measurement or more, but for reasons which will appear I do not find it necessary to deal separately with the cases of the several vessels.

The claimants delivered particulars of the relief claimed by them in consequence of the decision of Lord Sterndale. The claims include delivery up of the ships in like condition as at the time of capture; compensation for user of the ships since the requisition; compensation in value for the cargoes requisitioned; and the values of the ships lost. The answer made on the part of the Crown alleges in respect of the ships the release and delivery to the Admiralty under Orders of the court for requisition of all four and the sinking of the *Pellworm* and *Marie Horn* by enemy action, "in flagrant contradiction with the rules of International Law." It admits the delivery under requisition and the disposal and consumption of the requisitioned cargoes. As to ships and cargoes and all claims in respect of them, the answer further sets up Annex 3 to Part 8 and art. 297 of the Treaty of Versailles, and submits that in the events that have happened no order should be made for delivery or payment to the claimants.

Counsel for the claimants insisted before me on their right to delivery of the vessels remaining in the possession of the Crown under the rules laid down by Lord Stowell in the *Vrow Anna Catharina* (5 C. Rob. 15), which has been recently applied by this court in the cases of *The Dusseldorf* (*ante*,

p. 84; 122 L. T. Rep. 237; (1919) P. 245) and *The Valeria* (*ante*, p. 55; 122 L. T. Rep. 751; (1920) P. 81). As to the orders of the court giving leave for requisition and the release and delivery of ships and cargoes made thereunder it was argued that the right of requisition which is exercised under Order XXIX. is derived from municipal law only and does not bind foreign States and their subjects. As to the Treaty of Versailles, the case was made that the rights of the Sovereign of Holland in the ships and cargoes in question are independent of the rights of the German owners, and are not affected by a treaty to which Holland was not party, even though the rights of the German owners should be held to be so affected.

In respect of the ships sunk by enemy action, counsel for the claimants contended that the risk of loss by such means was accepted by the Crown upon obtaining delivery by process of requisition, and that the value of the ship in each case with a fair recompense for its user must be awarded against the Crown. Application was made for an opportunity of considering whether the appraisements made under the order of the court represented the true values; but to this application, for the first time made at the hearing more than two years after the appearance of the claimants, and without any apparent ground for challenging either the regularity or the correctness of the appraisements, I thought I ought not to accede.

As to the vessels in the possession of the Admiralty, as well as those sunk by enemy action, counsel for the Procurator-General relied on the orders of the court, under Order XXIX., as orders which vested the ships in the Crown for all purposes. The claim for payment on account of user they resisted as inconsistent with the order for requisition, and, in substance, a claim for damages. Counsel informed me that in the case of *The Dusseldorf* (*sup.*) a like claim was made, and was disallowed by Lord Sterndale. Apart from the Treaty of Versailles, it was contended on the part of the Crown that, at any rate as to the two ships still in its possession, the order, properly consequential upon Lord Sterndale's interlocutory decree, would be an order for payment out to the claimants, on behalf of the German owners, of the sums undertaken by the Procurator-General to be paid as a term of the requisitions. The wrongful destruction of the ships sunk by submarine was, however, alleged as an answer to any German claim in respect of these ships, and the Treaty was relied upon as an answer to any claim made in respect of German property or interest. Counsel maintained that a Neutral State claiming restitution of prize taken in its territorial waters claims only as a trustee for the owner of the property seized.

The case depends mainly, I think, upon the question whether a neutral State claiming a vessel captured in its territorial waters claims in respect of an interest of its own or solely in assertion of its sovereignty and of the right of the disseised owner. If the seizure creates a right in the ship on the part of the neutral Sovereign, that right must be safeguarded by the court. If the only proprietary right at the time of the claim is that of the owner, cesser of that right pending the suit prevents any decree of restitution for the use of the owner.

The only encroachment which was made upon the rights of the owner by the seizure here in question was the subtraction from them of an inchoate right of prize on the part of the captor. Nothing done then or later by captor or owner seems of itself to found a claim of interest in the neutral State whose territory was violated by the seizure. The case for the claimants was supported by reference to cases like *The Anne* (1818, 3 Wheaton's Reports U.S. 435), *The Bangor* (114 L. T. Rep. 1212; (1916) P. 181), and *The Dusseldorf* (*sup.*). The statement of Story, J., in giving judgment in *The Anne*, is in these words: "A capture made within neutral waters is as between enemies deemed to all intents and purposes rightful; it is only by the neutral Sovereign that its legal validity can be called in question; and as to him, and him only, it is to be considered void. The enemy has no rights whatsoever; and if the neutral Sovereign omits or declines to interpose a claim, the property is condemnable *jure belli* to the captors."

The argument for the claimants assumes that the right of the neutral State which is asserted by Story, J. is a right coupled with an interest. There is no decision to this effect, so far as I know. In the recent cases in this court the question did not directly arise, though on examining the decree in *The Dusseldorf* (*sup.*), where His Majesty the King of Norway was claimant, and restitution of a German-owned ship was ordered, I find the direction in the decree to be "that the said steamship be handed back by the Crown to the Marshal and forthwith released by him to Messrs. Waltons and Co. on behalf of the said claimant." The words are perhaps capable of a meaning consistent with the existence of a special interest in the claimant—an interest which it would be an act of grace on his part to yield up to the disseised owner. The proposition that there is such an interest can be tested by applying the rule of international law as it is stated by Lord Stowell in the often-cited case of *The Vrow Anna Catharina* (*sup.*): "When the fact [of capture in neutral waters] is established it overrules every other consideration; the capture is done away with; the property must be restored." "Do away with the capture" and you extinguish the right in prize of the captor. "Restore the property" and it reverts in its former owner. It cannot revest in the neutral claimant for it never was vested in him. This conclusion is supported by the forms of the entries, which I have seen, in the Assignation Book of the Admiralty of the decrees in some well-known cases. For example, in *The Twee Gebroeders* (3 C. Rob. 162), heard in 1800, the claimant on behalf of the King of Prussia, alleging a seizure of a Dutch ship in Prussian territorial waters, was Sebastian Friday 'intervening and claiming the said ship and cargo.' The Registrar's note of this decree is that 'the judge pronounced the ship to have been captured and seized in violation of the territory of His Majesty the King of Prussia . . . and decreed the same to be restored to the said claimant for the use of the owners and proprietors thereof.'

In the case of *The Anna* (5 C. Rob. 373) decided in 1805, the claimant was Mr. Lyman, acting on instructions of the United States Government, and the ship, cargo and specie were decreed to be restored to him for the use of the owners and proprietors thereof.

In point of principle I see no ground on which it can properly be supposed that the neutral

Sovereign in a case like the present asserts a right to property other than that of the enemy owner, and I think the authorities show that he does not. Because of his enemy character the enemy owner can maintain no claim, but when the neutral sovereign appears to demand restitution he demands it for the use of the enemy owner.

What is next to be determined is whether the orders of the court authorising the requisitions which were made by the Crown were effectual to charge the property in the ships and cargoes, that is to say to vest the same in the Crown. That depends upon two things; the intent of the rules under which the requisitions were made, and the validity of them in point of international law. Order XXIX. provides for permanent and for temporary requisitions; having regard to the definition in Order I., r. 2, it includes both ships and goods, and the process by which it is carried out is that of "release and delivery" to the agents of the Crown. Requisitioned goods are certainly delivered for consumption. Ships are delivered for purposes which involve certain distinctions in some cases, as, for example, sinking in waterways for defensive purposes, and great risk of destruction in most other cases. Looking at the order as a whole I think its intent is that ships and goods requisitioned shall become the property of the Crown, and, for all purposes of the jurisdiction in prize, shall thenceforward be represented by the appraised values. The judgment of the Privy Council in the case of *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77, 166) determines the conditions under which the power of requisition can be exercised so as to bind the rights of persons not subject to our municipal laws. Applying the rules there stated, I find that the vessels and goods here in question were urgently required for the defence of the realm; there was a real question to be tried in prize as between captor and claimants; and the determination of the court that the right of requisition was exercisable was a judicial determination. On the whole, therefore, I hold that the orders for requisition and the release and delivery made thereunder vested in the Crown the property in these ships and cargoes. Once it is held that the ships were vested in the Crown, the sinking of some of them by enemy action after requisition is, I think, an irrelevant matter. Neither the claimants nor the owners are barred by it, in respect of a claim upon the funds which result from the requisitions, and neither of them was an actor in the lawless transaction by which the ships were destroyed.

The demand of the claimants for payment by way of recompense for the use of the several ships since they were requisitioned is disposed of so far as this court is concerned by what I have already said. Not only had the claimants no property of their own in respect of which such a claim could arise; the property was in the Crown when the user in question occurred. I need not consider whether this claim was in reality a claim for damages transformed, as was said for the Crown, by something akin to waiver of tort into a money claim under an implied obligation. At any rate, no award can be made.

Apart from the Treaty of Versailles, the result as to these four ships of the conclusions I have stated would be a decree for restitution in value by payment over of the four appraised amounts to the claimants for the use of the respective owners. What is the effect of the Treaty? The distinction between ships of 1600 tons and upwards and ships of under 1600 tons becomes immaterial. The subjects of the claim now are four sums of money payable to a neutral Sovereign for the use of German owners. The Treaty purports to transfer to the Crown all property and interests in the United Kingdom belonging to German subjects at the date of the coming into force of the Treaty. The beneficial interest in the same is, I think, within the class of things transferred. I cannot doubt that a neutral assignee of one of the shipowners would have had as good right as his assignor to the beneficial interest of his assignor under the decree. There being no property or beneficial interest in the claimant, the Neutral Power, the fact that that Power is no party to the Treaty seems to me to be immaterial. The ratification of the Treaty by the sovereign authority of the signatories gives it binding effect as against their respective subjects, and none the less so because ratification was subsequent in date to the material events in the cause, including the interlocutory decree. The view which I take of this matter is, I think, based upon identical considerations with those which underlie the judgment of the United States Supreme Court in the case of *United States* v. *The Schooner Peggy* (1803, 1 Cranch's American Law Reports, 2nd edit., p. 103, at p. 108). Marshall, C.J. stated the governing principle in these words: "Where a treaty is the law of the land and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by this court as an act of Congress."

The treaty there in question operated to divert by certain of its general provisions rights of a captor which had been established in a court of first instance before the date at which the treaty took effect. In the present case effect must be given to the relevant articles of the Treaty of Versailles.

In the events that have happened the proceeds of the four ships must be retained to be dealt with pursuant to the Treaty.

Consideration of the claims relating to the cargoes must be reserved until the facts have been more fully ascertained.

Solicitors: *Ince, Colt, Ince* and *Roscoe; Treasury Solicitor.*

Monday, April 26, 1920

(Before HILL, J.)

THE LARGO LAW. (*a*)

Maritime Conventions Act 1911, *s.* 8—*Motion to set aside writ—Proceedings not commenced within two years — "Reasonable opportunity of arresting" defendant vessel.*

The plaintiffs obtained leave, on an ex parte *application, to issue a writ in March* 1920 *against the steamship* L. L. *claiming damages in respect of a collision which took place in Sept.* 1917. *At the time of the collision the* L. L. *was under requisition and no effective arrest could have been made. She ceased to be under requisition on the* 21*st March* 1919, *and from the* 25*th March* 1919 *until the* 4*th April* 1919 *she might have been arrested by the plaintiffs, but the plaintiffs could not have arrested*

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

her again until Feb. 1920, *when she came within the jurisdiction of the court. Hill, J., holding that the plaintiffs had had no reasonable opportunity to arrest before Feb.* 1920, *granted leave in accordance with sect.* 8 *of the Maritime Conventions Act* 1911. *The owners of the* L. L. *moved to set aside the writ. Held, that leave had been properly granted.*

MOTION to set aside a writ.

The facts in the case appear from his Lordship's judgment.

A. D. Bateson, K.C. and *Sinclair Johnston* for the plaintiffs.

R. H. Balloch for the defendants.

April 26.—HILL, J.—This motion arises upon an *ex parte* order made by me, extending the time under sect. 8 of the Maritime Conventions Act, and the defendants now say that the order ought not to have been made.

The collision in question happened in Sept. 1917. The defendants' ship, the *Largo Law*, remained under requisition until the 21st March 1919. During that time, though a writ could have been served upon her, she could not have been effectively arrested here, for if the marshal had made the arrest the Crown would have got the arrest set aside.

During 1918 she was within the jurisdiction, but she was still under requisition. In 1919, after the time at which she ceased to be under requisition, she was once within the three miles limit. She does not appear to have been in any port within the jurisdiction, but she arrived at Barry Roads on the 25th March 1919, and she sailed on the 4th April 1919. She had in fact been released from requisition on the 21st March. Therefore she was for ten days in Barry Roads, a period which began four days after she had ceased to be a requisitioned ship.

She was not within the jurisdiction again until Feb. 1920, when she was first at Greenock, then at Glasgow, and afterwards at Cardiff.

Mr. Bateson says that this case comes within the second and obligatory part of the proviso to sect. 8. He says that the evidence is such that the court ought to be satisfied "that there has not during such period [the limitation period of two years] been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business."

Mr. Balloch says that the court ought not to be satisfied of that at all because there was this period of ten days, and because for a long time, it is quite obvious on the affidavits, the plaintiffs were not thinking about arresting the vessel at all, but were thinking about the matter being arranged by the British Government, both vessels being under requisition.

Whatever the motives of the plaintiffs were for not taking action earlier, the matter I have to determine is whether, within the meaning of sect. 8, there was a reasonable opportunity of arresting the vessel within the jurisdiction of the court. The plaintiffs have satisfied me that there was not. On the facts as I have stated them I think there was not.

It would be quite idle to ask to have the warrant of arrest executed during the time the *Largo Law* was under requisition, and after she had come off requisition, a matter which was not known immediately to anybody except the owners of the ship. the only occasion on which she could have been arrested was for those ten days during which she was lying in Barry Roads, and I am not at all sure, without knowing all the circumstances, whether the marshal's men could have effectively arrested the ship when she was in Barry Roads.

But assuming that the marshal's men could have effectively arrested the ship while lying in Barry Roads, then I think the plaintiffs have still satisfied me that, notwithstanding that fact, there was no reasonable opportunity of arresting the vessel.

Therefore I think I was right when I granted the first application, and I adhere to that decision and dismiss the defendants' motion.

I should add that it is not irrelevant that the owners of the *Lord Dufferin* were in Canada and the managers in New York.

[The costs of the motion were made costs in the cause.]

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*.

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

Judicial Committee of the Privy Council.

July 15, 16, *and* 22, 1920.

(Present: The Right Hons. Lords HALDANE, CAVE, DUNEDIN, ATKINSON, and DUFF, J.)

PAQUET AND ANOTHER *v.* CORPORATION OF PILOTS FOR AND BELOW THE HARBOUR OF QUEBEC; ATTORNEY-GENERAL FOR CANADA, INTERVENER. (*a*)

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada—Quebec Harbour—Corporation of pilots—Legislative authority—British North America Act 1867 (30 & 31 *Vict. c.* 3), *ss.* 91-92 — *Canada Shipping Act* (*Revised Statutes of Canada* 1906, *s.* 123—4 & 5 *Geo.* 5, *c.* 48, *ss.* 1, 2, 3 (*Stat. of Can.*).

The respondent corporation, which consists of licensed pilots of the Harbour of Quebec and below, sued the first appellant, a pilot and a member of the corporation, to recover a sum earned by him for services of a pilot of the harbour during the season of navigation of 1917. *The defendant pleaded that under* 4 & 5 *Geo.* 5, *c.* 48 (*Stat. of Can.*), *he was entitled to retain for his own use and benefit the amount of his earnings over and above such sum as might be required for the pilots' pension fund.*

Held, that the power conferred on the corporation by 23 *Vict. c.* 123 (*Stat. of Can.*), *to demand pilot dues and to call on pilots to hand over their earnings as received was extinguished by* 4 & 5 *Geo.* 5, *c.* 48, *ss.* 1, 2, 3 (*Stat. of Can.*). *The Dominion Legislature had power under the British North America Act* 1867, *s.* 91, *Head* 10 (*Navigation and Shipping*), *to enact laws with regard to pilotage, although they trenched upon the property and civil rights in a province. On the question whether the corporation was still entitled to demand from a pilot a contribution to the pilots' pension fund their Lordships expressed no opinion.*

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

Judgment of the Court of King's Bench, reported Q. Rep. 27 K. B. 409, reversed.

APPEAL by special leave from a judgment of the King's Bench for Quebec dated the 3rd April 1918, reversing a judgment of the Superior Court dated the 2nd Nov. 1917.

The action was brought by the respondent corporation against the first appellant, since deceased, in the Superior Court to recover the amount earned by him for pilotage services during the season of navigation of 1917. The defendant pleaded that under the Dominion statute 4 & 5 Geo. 5, c. 48, he was entitled to retain for his own use and benefit the amount of his earnings over and above such sum as might be required for the pilots' pension fund.

The action was tried before Dorion, J., who gave judgment for the defendants. On appeal the Court of King's Bench (Archambeault, C.J., and Lavergne, Carroll, and Pelletier, JJ., Cross, J. dissenting) reversed the decision and gave judgment for the present respondents.

By the Order in Council granting special leave to appeal, the Attorney-General for Canada was given leave to intervene as the appeal raised questions in which the Dominion Government had a direct interest.

Newcombe, K.C., *Meredith*, K.C., and *Theobald Mathew* for the appellants and intervener.

Macmaster, K.C. and Hon. *S. O. Henn Collins* for the respondents.

The considered opinion of their Lordships was delivered by

Lord HALDANE.—In this case the Attorney-General for the Dominion of Canada has been made a co-appellant, as the appeal raises questions in which the Dominion Government has a direct interest.

In 1917 the respondent corporation brought the action out of which the appeal arises, in the Superior Court of the Province of Quebec, against a pilot named Paquet, who was one o he members of the corporation, to recover a sum of about $532, being the amount earned by him for services as a pilot of the Harbour of Quebec. In the court of first instance, Dorion, J. decided for the defendant, but on appeal to the Court of King's Bench for the Province this decision was reversed by a majority of the learned judges of that court, Cross, J. dissenting. Paquet died subsequently, and his personal representative is the first appellant.

The plaintiff corporation consists of the licensed pilots of the Harbour of Quebec and below. In 1860 they had been incorporated by a statute of the then Province of Canada. Under that statute the pilots had to hand over their earnings to the corporation, and out of the fund so constituted the former were paid by the latter, who were to distribute the surplus among the pilots.

After the quasi-federal distribution of legislative powers which was effected by the British North America Act in 1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion Parliament. Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in sect. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words trade and commerce, if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into sect. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in sect. 92 and there given exclusively to the Province would be trenched on if that section were to be interpreted by itself. But the language of sect. 92 has to be read along with that of sect. 91, and the generality of the wording of sect. 92 has to be interpreted as restricted by the specific language of sect. 91, in accordance with the well-established principle that subjects which in one aspect may come under sect. 92 may in another aspect that is made dominant be brought within sect. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.

The Dominion Parliament, after confederation, passed what is now c. 113 of the Revised Statutes of Canada 1906, the Canada Shipping Act. Part 6 of that Act dealt with pilotage. By sect. 411 the pilotage district of Quebec is defined, and by sect. 413 the Dominion Minister of Marine and Fisheries is to be the pilotage authority, in whom all the powers of the Harbour Commissioners of Quebec are vested. By subsequent sections the Minister was given powers to regulate the qualifications of pilots, the management and maintenance of their boats and the distribution of their earnings, the performance of their duties, and, subject to the limitation referred to in the case of the Quebec District, the mode and amount of remunerating the pilots, and the establishment of superannuation funds; but the alteration of the rates for pilotage in the Quebec District and of the administration or distribution of their earnings was excluded from the power of the Minister by sect. 434. For some purposes, other than those specifically conferred on the Minister, the respondent corporation retained powers, and among them were rights in certain cases to demand from the masters of ships pilotage dues. Out of the sums thus received the treasurer of the respondent corporation was to set aside 7 per cent. for a pilot fund, and the corporation was to account to the Minister for the administration of this fund, which was due to be employed for superannuation purposes.

It is however, in their Lordships' view unnecessary to determine precisely what powers remained to the respondent corporation after the passing of the Canada Shipping Act, for in 1914 another statute amending it was passed by the Dominion Parliament, and this statute applies in the case before them. It provides by sect. 1 that the Minister, subject to the provisions of the general Canada Shipping Act, is to have charge of the control and management of the pilots and their boats for the pilotage district of Quebec, and of all questions respecting pilotage arising in connection with such district, and of the collection of pilotage dues in respect of such district; and that all powers vested in the Corporation of Pilots of Quebec under Part 6 of the Canada Shipping Act are transferred

to and vested in the Minister. By sect. 2 all powers of the Corporation of Pilots with respect to the management and control of pilots and their duties, the collection of pilotage dues and the management and control of pilotage, were thereby repealed. By sect. 3 nothing in the Act was to be deemed to affect any power possessed by the corporation in connection with the management and disposal of the pilot pension fund, but such power was to be exercised under the supervision of the Minister as theretofore.

In their Lordships' opinion it is plain that whatever powers to demand dues, or to call on a pilot to hand over his earnings as received, may have survived to the respondent corporation after the passing of the general Canada Shipping Act, are now extinguished by the first and second sections of the Act of 1914. What right the corporation may have had as between itself and the original defendant Paquet to demand from him a contribution to the superannuation fund is not a question which is before their Lordships. It is enough for them to say that they are unable to take the view of the majority of the learned judges in the Court of King's Bench, that there is no repeal of the title of the respondent corporation to receive the pilotage dues which a pilot may now earn. The result of the Act of 1914 is to get rid altogether of the old title of the corporation, and to enable the Minister to direct that the payment shall be made to the pilot employed and no one else.

They will, therefore, humbly advise His Majesty that the judgment of the Court of King's Bench, which was in favour of the corporation as plaintiffs, should be reversed and that of Dorion, J., dismissing the action with costs, should be restored. The appellant Paquet will have his costs here, in so far as he has incurred costs, and in the Court of King's Bench. The Attorney-General for Canada, in accordance with the usual practice, will receive no separate costs.

Solicitors for appellants and intervener, *Charles Russell* and *Co.*

Solicitors for the respondents, *Stephenson, Harwood,* and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, June 22, 1920.

(Before McCardie, J.)

Steamship Magnhild (Owners of) *v.* McIntyre Brothers and Co. (*a*)

Charter-party — Cesser of hire during grounding of ship and consequent repairs—Construction of words "or other accident preventing the working of the steamer"—Ejusdem generis *rule.*

A charter-party contained a clause providing "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; but should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." The steamer forming the subject of the award was chartered in Aug. 1916 *to load at Sunderland and to discharge at a French port. The steamer was ordered by the French Government to discharge at Marans, which was a safe port within the meaning of the charter-party. She arrived at Marans Roads at* 6 *p.m. on the* 16*th Oct.* 1916, *and went aground on soft clay, while going up the river. She remained aground till* 1 *p.m. on the* 24*th Oct., and was damaged in consequence. The work of repairing began on the* 8*th Nov. and lasted for some time. The harbour contained no bar which would cause detention through grounding or otherwise. The arbitrator awarded that hire ceased* (*a*) *as from* 6 *p.m. on the* 16*th Oct.* 1916 *till* 1 *p.m. on the* 24*th Oct.* 1916 *and* (*b*) *during the time occupied while the damage to the steamer consequent upon such grounding was being repaired.*

Held, that the ejusdem generis *rule did not apply so as to restrict the meaning of the words, "or other accident preventing the working of the steamer," in the clause in question, there being no common or dominating feature in the specific words contained in such clause, and that therefore the award of the arbitrator must be upheld.*

Action on the award of an umpire stated in a special case for the opinion of the court.

The steamship *Magnhild* was chartered under the terms of a charter-party dated the 7th Aug. 1916, which contained the following clauses, amongst others:

Clause 1. The said owners agree to let, and the said charterers agree to hire, the said steamer for the term of six calendar months fifteen days more or less from the time . . . the said steamer is delivered and placed at the disposal of the charterers . . . to be employed in lawful trades . . . between good and safe ports or places within the following limits; United Kingdom, Continent Calais/Sicily limits where she can always safely lie afloat or safe aground as charterers or their agents shall direct.

Clause 5. That the said charterers shall pay as hire for the said steamer 3400*l.* per calendar month commencing from the time the steamer is placed at the disposal of charterers . . . 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; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account.

(*a*) Reported by R. F. Blakiston, Esq., Barrister-at-Law.

The following facts were found by the umpire:

(*a*) That the charterers fixed the steamer to load at Sunderland and to discharge at La Rochelle, La Pallice, Rochefort, or Tournay Charante.

(*b*) That by the instructions of the French Government the steamer was directed to proceed to the Ile d'Aix for orders, whence she was ordered by the French Government to discharge at Marans.

(*c*) That the steamer arrived at Marans Roads at 6 p.m. on the 16th Oct. 1916, and that she got aground on soft clay while proceeding up the river at a little bend between two buoys and remained so aground till 1 p.m. on the 24th Oct. 1916.

(*d*) That there was no bar in the river harbour or port which caused detention through grounding or otherwise.

(*e*) That Marans was a safe port within the meaning of the charter-party.

It was contended on behalf of the owners that upon the true construction of clause 12 of the charter-party the charterers were not entitled to a cesser of hire for the time lost (*a*) owing to the grounding of the vessel in the river as aforesaid, and (*b*) while repairing the damage to the vessel consequent upon such grounding. Subject to the opinion of the court the umpire awarded and determined that hire ceased (*a*) as from 6 p.m. on the 16th Oct. 1916 till 1 p.m. on the 24th Oct. 1916, while the steamer was aground as aforesaid, and (*b*) during the time occupied while the damage done to the steamer consequent upon such grounding was being repaired.

Leck, K.C. and *A. Jowitt* for the owners.—The main question in the case turns upon the construction of certain words in clause 12 of the charter-party, which is referred to in the special case. That clause runs as follows: "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; but should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost, and expenses incurred (other than repairs) shall be for charterer's account." It is submitted that the words "or other accident . . ." must mean something which rendered the steamer inefficient and that the operation of the clause, so far as those words are concerned, was confined to matters *ejusdem generis* with the words immediately preceding. The rule as to the construction of words *ejusdem generis* is laid down in the case of *Fenwick* v. *Schmaltz* (18 L. T. Rep. 27; L. Rep. 3 C. P. 313). The words in the present case refer to the inefficiency of the steamer and mean something in the nature of a breakdown. The accident referred to must be one affecting the steamer and lasting in effect. It would be different if the words were "any other accident whatsoever":

Mudie v. *Strick*, 11 Asp. Mar. Law Cas. 235; 100 L. T. Rep. 701.

The second part of clause 12 was inserted for the protection of the shipowners:

Schilizzi v. *Derry and others*, 4 E. & B. 873; *Carlton Steamship Company* v. *Castle Mail Packets Company*, 8 Asp. Mar. Law Cas. 325, 402; 78 L. T. Rep. 661; (1898) A. C. 486.

The effect of the latter part of clause 12 is to put the burden of delay arising from any deficiency of water on the charterers. The general purpose of the clause was to put the responsibility for the inefficiency of the ship on the ship owner, but any result which followed from the ship being ordered to shallow waters was a risk which attached to the charterers. Taking ground is not a "stranding" under the law of marine insurance, nor does it come within the words "or other accident" in clause 12 of the present charter-party. The charter-party expressly contemplated that the steamer might be used in shallow waters. On the facts found by the umpire there is nothing which brings the charterers within the first part of clause 12 of the charter-party, and the alternative award in favour of the owners is correct.

Stuart Bevan, K.C. and *Claughton Scott* for the charterers.—The two questions involved in the case are the application of the *ejusdem generis* rule and the effect of the second part of clause 12 of the charter-party. The question for the charterers is whether they have brought themselves within the terms of the first part of clause 12. The point of law raised is the application of the *ejusdem generis* rule to the words "or other accident preventing the working of the steamer." The court should consider the whole of clause 12. It is not open to the court to take a limited view of the latter part of the clause by reference to the earlier part:

Jersey (*Earl of*) v. *Neath Poor Law Guardians*, 22 Q. B. Div. 555.

There are four specified events; deficiency of men, deficiency of owners' stores, breakdown of machinery or damage to hull. Where is the *genus* to be found in these events expressly mentioned? Reference may be made to a passage in Scrutton on Charter-parties, 9th edit., p. 222, and to the case of *Fenwick* v. *Schmaltz* (*sup.*). With regard to the latter part of clause 12, I may refer to *Smailes and Sons* v. *Evans and Reid* (116 L. T. Rep. 595; (1917) 2 K. B. 54). It has never been suggested that damage did not include grounding. A contention not raised before an arbitrator cannot be put forward in saying that such and such facts have not been found by the arbitrator. The onus of proof lies on the owners to prove that the events which happened came within the latter part of clause 12 and disentitled the charterers to the protection of the first part. "Grounding" is included in the words "or other accident," and comes within the first part of the clause. The word "accident" must be taken generally and a wide and not narrow meaning must be given to clause 12. The words "where there are bars" relate to harbours, rivers, and ports, a "bar" being a natural obstruction and commonly found in such localities.

Leck, K.C. in reply.

McCardie, J. read the following judgment:—This award in the form of a special case involves the construction of a charter-party between the

owners of the steamship *Magnhild* and Messrs. McIntyre Brothers and Co.

The charter-party is dated the 7th Aug. 1916. It is in the form known as the Baltic and White Sea Conference Uniform Time Charter 1912 for European Trade (as revised at Berlin in 1912). [His Lordship read the material clauses of the charter-party.]

The facts, as found by the arbitrator, can be briefly stated. The steamer loaded at Sunderland and was fixed by the charterers to discharge at La Rochelle, La Pallice, Rochefort, or Tournay Charante in France. By the direction of the French Government the steamer was ordered to proceed to the Ile d' Aix for orders. She was then ordered by the French Government to discharge at Marans. She arrived at Marans Roads at 6 p.m. on the 16th Oct. 1916, and she got aground on soft clay while proceeding up the river at a little bend between two buoys. She remained so aground till 1 p.m. on the 24th Oct. 1916. She then got off. She was damaged by the occurrence. Repairs commenced on or about the 8th Nov., and they occupied a substantial time. Marans was a safe port within the meaning of the charter-party. There was no bar in the harbour, river or port, which caused detention through the grounding or otherwise. The arbitrator awarded that hire ceased (*a*) as from 6 p.m. on the 16th Oct. 1916, till 1 p.m. on the 24th Oct. 1916, and (*b*) during the time occupied while the damage to the steamer, consequent upon such grounding, was being repaired. The contention of the owners was that on the true meaning of the charter-party the charterers were not entitled to a cesser of hire for the time lost owing to the grounding of the vessel in the river as aforesaid, while the resultant damage to the vessel was being repaired.

This contention raises a difficult question as to whether or not the *ejusdem generis* rule does, or does not, apply to the words "or other accident preventing the working of the steamer."

Before the hearing of this case I had often felt a difficulty in stating, and an equal difficulty in applying, this rule. After hearing the able arguments here of Mr. Leck and Mr. Stuart Bevan, and reading many decisions, I realise still more acutely the difficulties which surround the real meaning and the juristic operation of the *ejusdem generis* doctrine. If I regard this case as it would be looked at by the ordinary layman of business experience and intelligence, I should have no real doubt that the words "or other accident preventing the working of the steamer" covered the facts of the present case. It is, I conceive, clear that there was an accident; and, indeed, if the fortuitous, unexpected and injurious event which here took place was not an accident, I know not what an accident can be. That the accident prevented the working of the steamer seems equally clear. *Prima facie*, therefore, the award of the arbitrator is right. But Mr. Leck has rested his argument upon the contention that the *ejusdem generis* rule applies to the words in question, and that they must be read subject to and limited by the preceding words of clause 12. Hence, I feel it may be useful to examine concisely the *ejusdem generis* doctrine and to refer to the more relevant decisions. It is an unfortunate circumstance that so important a matter of law should be surrounded with so large a measure of obscurity. The dangers of the rule have been indicated by high authority. Thus Fry, L.J. said in the *Earl of Jersey's* case (22 Q. B. Div. 555, p. 566) (where the document was a deed of conveyance reserving minerals): "The so-called doctrine of *ejusdem generis*, which I think has often been urged for the sake of giving, not the true effect to the contracts of parties, but a narrower effect than they were intended to have." These words of Fry, L.J. were cited, with approval, by Lord Loreburn, L.C., in *Larsen* v. *Sylvester* (11 Asp. Mar. Law Cas. 78; (1908) A. C. 295, p. 296) (a charter-party case), when pointing out the danger of loosely applying the *ejusdem generis* rule. In the same case (p. 297) Lord Ashbourne says that the above cited words of Fry, L.J. were "wise and reasonable words." Yet in this very case of *Larsen* v. *Sylvester* (*sup.*) I find that Lord Robertson says at p. 297: "I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the *ejusdem generis* rule of construction, because it seems to me that both in law and also as matter of literary criticism it is perfectly sound," and in the report of this decision in 13 Com. Cas., p. 333 (though this does not appear in the Law Reports), Lord Loreburn seems to have said at the end of the opinions: "I only desire to say that I agree with what my noble and learned friend Lord Robertson has said as regards the well-established rule of *ejusdem generis*."

Equally significant are the words of Rigby, L.J. in *Anderson* v. *Anderson* (72 L. T. Rep. 313; (1895) 1 Q. B. 749, p. 755) (a post-nuptial settlement case). He there stated: "The doctrine known as that of *ejusdem generis* has, I think, frequently led to wrong conclusions on the construction of instruments." But the rule exists, and it has been assiduously applied by the courts to statutes, commercial documents, and many other instruments. The risk seems to be that the rule may develop into a juristic fetish.

As to statutes, a large number of decisions are collected in Maxwell on Statutes, 5th edit., p. 537 *et seq.* That learned author at p. 538 says: "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same *genus* as those words; or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended." At page 546 he says: "Of course, the restricted meaning, which primarily attaches to the general word in such circumstances, is rejected where there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong." At page 549 he says: "The general principle in question applies only where the specific words are all of the same nature. Where they are of different *genera*, the meaning of the general words remains unaffected by its connection with them." These passages illustrate the complexity of the rule.

It is interesting to contrast the presumption of restriction apparently indicated by Maxwell with the following words from *Attorney-General of Ontario* v. *Mercer* (49 L. T. Rep. 312; 8 App. Cas. 767, p. 778 (per Lord Selborne) (a case on the construction of the British North America Act 1867): "It is a sound maxim of law that every word ought, *primâ facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject

of the context." At the root of many cases involving the applicability of the *ejusdem generis* rule there might well appear to be a question as to whether a presumption exists that general words are *primâ facie* limited by preceding special words. This point was stated, but expressly left unsolved, by Hamilton, J. in his powerful judgment in *Thorman* v. *Dowgate Steamship Company* (11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410, p. 420), a charter-party case. He there said that discussion has arisen "as to whether the presumption of law is that general words are general until they can be shown to be particular, or whether general words are *ejusdem generis* with the particular words until they can be shown to be general without any limitations. I do not think it is now necessary," he adds, "to embark on that discussion."

If any real presumption exists one way or the other it might substantially affect the interpretation of many documents. Nowhere, perhaps, has it been definitely and authoritatively laid down that any presumption exists. It is difficult to see how it could satisfactorily exist. For a fundamental rule of construction is that every part of a document must be fully considered before any portion of such document be interpreted. If so, it results that general words which are sequent to specific words cannot well be the subject of any presumption at all, inasmuch as they cannot be considered separately from the preceding words without violating the fundamental rule. In *Barton* v. *Fitzgerald* (15 East, 530, at p. 541), Lord Ellenborough said (in the case of a lease under seal): "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." And in *Hayne* v. *Cummings* (16 C. B. (N. S.) 421, at p. 427), Byles, J. said (in the case of an agreement for a lease): "I apprehend it is a sovereign rule in the construction of all written documents to give effect to the intention of the parties as expressed in the instrument itself, and to give effect, if possible, to every word, or, at all events, to every provision." If there is any presumption that the rule applied whenever general words followed special words, then an added point would be given to the remarks of Lindley, M.R. in *Re Stockport Industrial Schools* (79 L. T. Rep. 507; (1898) 2 Ch. 687), where he said, at p. 696: "I am quite aware that there have been cases such as *Anderson* v. *Anderson* (*sup.*) (to which I drew attention during the argument) where the court has protested against pushing the doctrine of *ejusdem generis* too far. It is very often pushed too far."

That any such general presumption exists seems, however, to be contrary to the view of Lord Esher in *Anderson* v. *Anderson* (*sup.*), where he said: "I entirely adopt the canon of construction which was laid down by Sir Knight Bruce, V.C., in *Parker* v. *Marchant* (1 Y. & C. Ch. 290), and I reject the supposed rule that general words are, *primâ facie*, to be taken in a restricted sense." But although there may be no general presumption applicable to documents so various as statutes, deeds, wills, or commercial contracts, yet it is impossible to overlook the fact that the *ejusdem generis* rule has been so frequently and firmly applied to such contracts as charter-parties, bill of lading, and policies of marine insurance, that undoubtedly both lawyers and commercial men habitually incline to the view that general words in such contracts are, in the majority of cases, normally to be restricted by preceding specific words. This is consistent with the observation of Bowen, L.J. in the *Earl of Jersey's* case (*sup.*), where he states that the *ejusdem generis* rule "is, after all, but a working canon to enable us to arrive at the meaning of the particular document." So, too, the judgment of Hamilton, J. in *Thorman* v. *Dowgate Steamship Company* (*sup.*), says: "The *ejusdem generis* rule is a canon of construction only. The object of it is to find the intention of the parties. The instrument, the nature of the transaction, and the language used, must all have due regard given to them, and, although it is a commonplace to observe it, I think it is important to bear in mind, first of all, that this is a clause of a kind very familiar in ordinary contracts of carriage or contracts connected with the carriage of cargoes." This observation explains the words of Lord Macnaghten in *Steamship Knutsford Limited* v. *Tillmanns* (11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) A. C. 406, at p. 409), where he said: "I think the rule of *ejusdem generis* applies as laid down in *Thames and Mersey Marine Insurance Company* v. *Hamilton* (6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695; 12 App. Cas. 484, at pp. 490 and 501), and I prefer to take the rule on a point of that sort from a case which did deal with bill of lading and shipping documents rather than from cases that dealt with real property and settlements."

Bearing these observations in mind, I next ask: What is this *ejusdem generis* rule? The matter was cautiously put by Lord Halsbury in the *Thames and Mersey Marine* case (*sup.*) at p. 490, where he said: "Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject matter in relation to which they are used. The other is that general words may be restricted to the same *genus* as the specific words that precede them." Now this statement seems to prevent the application of the rule unless a *genus* can be found. Such view is fully agreeable to the opinion expressed by the Court of Appeal in *Steamship Knutsford Limited* v. *Tillmanns* (99 L. T. Rep. 399; (1908) 2 K. B. 385). At p. 395 Vaughan Williams, L.J. says: "If a common *genus* is not to be found the necessary consequence would be that the words 'or any other cause' could not be limited by the doctrine of *ejusdem generis*." At p. 403 Farwell, L.J. said: "Unless you can find a category there is no room for the application of the *ejusdem generis* doctrine. At p. 409 Kennedy, L.J. said: "The *genus* must be first found, and then you must find whether the words that follow are applicable to the species enumerated belonging to the one *genus*." So too in *Larsen* v. *Sylvester* (*sup.*) at p. 296, Lord Loreburn said: "These words follow certain particular specified hindrances which it is impossible to put into one and the same *genus*." What, then, is a *genus*? I confess that I find great difficulty in answering the question. How the language of natural history came to be applied to the construction of commercial documents or statutes, wills and deeds, I know not. The phrases of science deal with precise things. The phrases of law deal

with matter of infinite ambiguity and cross division. Hence it was well said by Hamilton, J. in *Thorman's* case (*sup.*), at p. 422, that: "It is not necessary that either *genus* or *differentia* should be of extreme scientific precision." But the rule of *ejusdem generis* cannot be applied at all unless there be some broad test for the ascertainment of *genus*. So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature. Thus in *Fenwick* v. *Schmalz* (L. Rep. 3 C. P. 313), the words were "except in cases of riots, strikes, or any other accidents beyond his control." The court apparently thought that the words "other accidents" meant accidents *ejusdem generis* with riots and strikes, in which human instrumentality was concerned. So, too, in *Richardsons'* case (*Re Richardsons and Samuel and Co.*. 8 Asp. Mar. Law Cas 330; 77 L. T. Rep. 479; (1898) 1 Q. B. 261) (a charter-party case), the charter-party excepted, amongst other things, "strikes, lock-outs, accidents to railway," and also "other causes beyond charterers' control." The Court of Appeal held that the *ejusdem generis* rule applied. A. L. Smith, L.J., said: "Of course, there must be some limitation put upon these words (that is the general words) . . . In my opinion, this clause must be read as covering exceptions *ejusdem generis* with those that precede it, that is, matters that deal with the impossibility of getting the oil to the port and into the ship." Thus the court found that the specific words in question fell under a common category.

Speaking broadly, the judges in the past seem to have been somewhat acute to find, if reasonably possible, a common category in charter-parties, bill of lading, and policies of insurance. This seems evident from the decisions such as *Mudie* v. *Strick* (*sup.*) and *Thorman's* case (*sup.*). Several authorities are collected in the luminous work on charter-parties by Scrutton, L.J., 9th edit., pp. 221-222. I need only add that if the particular words exhaust a whole *genus*, the general words must refer to a larger *genus*: (see per Willes, J. in *Fenwick* v. *Schmalz*, *sup.*). But even if a common category be found, there still arises a question as to the operation of the *ejusdem generis* rule. Must the particular facts in question be similar to the one or other of the specified things before they can be allowed to fall within the general words, or will it suffice if they fall within the *genus*? Even on this point there seems much doubt. In the *Thames and Mersey* case (*sup.*), at p. 501, Lord Macnaghten said, when speaking of general words in a policy of marine insurance: "Ever since the case of *Cullen* v. *Butler* (5 M. & S. 461), when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases 'akin to' or 'resembling' or 'of the same kind as' those specially mentioned." In an earlier passage, however, he had said that "their office is to cover in terms whatever may be within the spirit of the cases previously enumerated." In *Thorman's* case (*sup.*), at p. 417, Hamilton, J. said: "The mere consideration that so many matters have been carefully enumerated (quite superfluously so, unless some restriction is placed upon the subsequent words 'any other cause beyond my control') would lead one to construe that clause according to the *ejusdem generis* rule, and to say that it was intended by the parties that the time should not count only if the various matters specifically enumerated, or any other cause, similar to them and beyond the charterer's control, interfered with the loading."

Yet Scrutton, L.J. points out in his work on Charter-parties (p. 222) as follows: "It must be remembered that the question is whether a particular thing is within the *genus* that comprises the specified things. It is not a question (though the point is often so put in argument) whether the particular thing is like one or other of the specified things. The more diverse the specified things the wider must be the *genus* that is to include them; and by reason of the diversity of the specified things the *genus* that includes them may include something that is not like any one of the specified things." This, I most respectfully think, is a most cogent, useful, and accurate statement. I need only add that the comparative ease with which the *ejusdem generis* rule can be prevented from applying is shown by *Larsen* v. *Sylvester* (*sup.*), where the words "of what kind so ever" were held sufficient for that purpose. Now, in directing the above observations to the present case I do not overlook the fact that unless the charterers can bring themselves within the first part of clause 12, hire continued to be payable throughout the chartered period: (see Scrutton on Charter-parties, 9th edit., art. 146, and notes).

Upon the best consideration I can give to this case, I come to the view that the *ejusdem generis* rule does not here apply. I cannot create a *genus* (whether scientific or other) out of the specific words. I see no common or dominating feature of such words. Default of the owners cannot, of course, be such a feature, for the matters mentioned in the specific words could arise either with or without such default. Unseaworthiness, whether due to owners' default or not, cannot be a common or dominating feature inasmuch as damage to hull might supervene, although the ship was perfectly seaworthy. Human agency cannot be a common or dominating feature, for damage to hull might arise through tempest or the like as well as through accident caused by human fault. If, then, there be no such common or dominating feature, the *ejusdem generis* rule cannot apply. Even if a genus could be found, it would, I think, be so wide (having regard to the totality of words) as to allow the present facts to fall within the general words. Those words are, moreover, "or other accident, &c.," which appear to suggest that the precedent *genus* (if any) was intended to cover cases of accidental occurrences to the ship which prevented her working for twenty-four hours or more. The latter part of clause 12, I also think, seems to assume a wide meaning of the first part. Upon clause 12 as a whole, I form the view that the parties intended that a suspension of hire should ensue under the circumstances here found by the arbitrator.

I therefore uphold the award. The owner must pay the costs of the proceedings before me.

Solicitors: *Botterell* and *Roche*; *William A. Crump* and *Son*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 26 *and May* 3, 1920.

(Before HILL, J.)

THE DISPERSER. (*a*)

Limitation of liability—Position of the parties—Reference—Claim statute-barred—Merchant Shipping Act 1894 (57 *& 58 Vict. c.* 60), *ss.* 503-504 *—Maritime Conventions Act* 1911 (1 *& 2 Geo.* 5, *c.* 57), *s.* 8.

In a reference following a limitation suit, in which the decree was pronounced more than two years after the collision which gave rise to the suit had taken place, a claim was properly filed, but the claimant had issued no writ. Another claimant objected that the claim was statute-barred.

Held, following The Bellcairn (5 *Asp. Mar. Law Cas.* 503, 582; 53 *L. T. Rep.* 686; 10 *Prob. Div.* 161), *that the claimants had against each other the same rights which they had against the limiting shipowner and the same rights which he had against them. One claimant was, therefore, entitled to object that the claim of another was statute-barred, but, if the objection was based on sect.* 8 *of the Maritime Conventions Act* 1911, *it was open to the court to exercise the discretion vested in it by that Act, and to allow a writ to issue.*

Observations on the exercise of this discretion where a writ had been withheld because limitation proceedings were pending.

MOTION in objection to the registrar's report.

The Maritime Conventions Act 1911 provides:

Sect. 8. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight . . . caused by the fault of the former vessel . . . unless proceedings therein are commenced within two years from the date when the damage . . . was caused. . . . Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit. . . .

The Merchant Shipping Act 1894, provides:

Sect. 504. When any liability is alleged to have been incurred by the owner of a British or foreign ship . . . and several claims are made or apprehended in respect of that liability, then the owner may apply in England or Ireland to the High Court . . . and that court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just.

The facts and contentions are fully set out in his Lordship's judgment.

Balloch for the owners of *The Marshalls*.

G. P. Langton for the owners of the *Caledonia*.

HILL, J.—This case raises a question which is not altogether easy, a question as to the relation between sect. 8 of the Maritime Conventions Act 1911, and the effect of a decree in a limitation suit. The collision happened between the steamship *Caledonia* and the lighter *The Marshalls*, which was in tow of the steamship *Disperser*. The fault was in the *Disperser*. There was damage to *The Marshalls* and the *Caledonia*. The *Disperser* was owned by Mr. W. H. Loveridge. *The Marshalls*, as has been found by the Registrar, was under demise to a syndicate or partnership, of which Mr. Loveridge was a member. At the reference which took place, the *Caledonia's* claim was agreed at 1053*l.* 6*s.* 5*d.* The registrar has found that the extent of the damage to *The Marshalls*, measured in money, after excluding Mr. Loveridge's interest, was 388*l.* 8*s.* 2*d.* That brings the total claims to over 1400*l.*

A limitation suit was brought by the owner of the *Disperser*, Mr. Loveridge, and he limited his liability to the sum of 1122*l.* 2*s.* On the reference in the limitation proceedings, in consequence of the limitation decree, those who represented the *Caledonia* objected to any claim in respect of *The Marshalls*, on grounds which have been found against them by the registrar mainly in respect of the ownership of *The Marshalls*, and upon the question of whether the claimants were the demise charterers and whether the person interested was not really Mr. Loveridge.

These objections were overruled by the Registrar. But on behalf of the owners of the *Caledonia*, the objection was also taken that the claim was barred by sect. 8 of the Maritime Conventions Act 1911, and that objection the Registrar has found to be good.

The Registrar reports on that point as follows: "In cases of limitation of liability, only those who have either commenced actions to recover damages or who are in a position to maintain actions at the time the decree for limitation is pronounced, are entitled to claim against the fund in court. The claimants here were not in such a position, and it would have been necessary for them to obtain an extension of the time fixed by the statute before any such action could have been maintained. The claim, therefore, must be disallowed." It is upon that ruling that the present motion is made on behalf of those parties who succeeded on the other grounds in respect of the claim for damage to *The Marshalls*. The material dates are as follows: The collision was on the 31st Oct. 1916. The two years, therefore, would expire on the 31st Oct. 1918. The decree in the damage action of the *Caledonia* against the *Disperser*, pronouncing the *Disperser* alone to blame, was on the 27th March 1918. Messrs. Botterell and Roche were acting at that time as solicitors for the *Disperser*. They were also instructed in respect of the damage to *The Marshalls*, and Messrs. Hearfield and Lambert, of Hull, were acting as solicitors for the *Caledonia*. On the 8th April 1918, Messrs. Botterell and Roche, writing to Messrs. Hearfield and Lambert, said: "We have been instructed by the charterers of the lighter *The Marshalls* to act for them in connection with their claim for damages against the *Disperser*. We are informed that the amount paid by them in settlement is in the vicinity of 500*l.* As we understand your claim is in the neighbourhood of 1000*l.*, the total of the two claims will exceed the limit of the *Disperser's* liability, and in these circumstances it will be necessary for us to

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

commence a limitation action." Messrs. Hearfield and Lambert, in reply, asked Messrs. Botterell and Roche for the names of their clients, the charterers of *The Marshalls*. Messrs. Botterell and Roche, being at the time misinformed, wrote stating that their clients were Messrs. W. H. Loveridge and Co. Limited, the charterers of *The Marshalls*. Messrs. Hearfield and Lambert on the 11th April 1918, said: "In any limitation proceedings you commence our clients will oppose the claim you intimate that the charterers of the lighter *The Marshalls* have against the *Disperser*."

There the matter rested for the time. The intimations up to this point were that the *Disperser* was bringing a limitation action; that in it the charterers of *The Marshalls* would claim, and that the *Caledonia* would oppose the claim. It seems to me that at that time both parties contemplated that limitation proceedings would be taken, and that means that claimants to the limitation fund would include the charterers of *The Marshalls*, and that that question would be determined in the ordinary way in the reference following upon the limitation decree. At that time two years from the initial collision had not expired. The claim put forward in respect of *The Marshalls* was in the name of Mr. Loveridge, but it subsequently turned out that several others were interested. Nothing happened until the 6th May 1919, when the writ in the limitation action was issued. On the 14th July 1919, the decree in that action was made. By that decree it was provided that all claims were to be brought in by the 14th Oct. 1919; it stayed all proceedings that were in existence, and referred all claims to the Registrar. The claim in respect of *The Marshalls* was filed on the 7th Oct. 1919, and was headed as a claim against the owners of the *Disperser* by five persons, who were named, including Mr. Loveridge. It turned out afterwards that Mr. Loveridge was interested in the *Disperser*, and his claim was disallowed. On the 22nd March 1920, the reference was heard, and the various points of objection by the *Caledonia* to the claim in respect of *The Marshalls* were taken. On the 25th March 1920 the Registrar made his report.

It is now said by Mr. Balloch that the limitation decree having been made directing all claims to be brought in, and *The Marshalls's* claim having been brought in within the time mentioned in the limitation decree, they were no further concerned with sect. 8 of the Maritime Conventions Act, and, further, he said that if the court thinks that the Maritime Conventions Act applies, then the time ought to be extended for commencing the proceedings under the discretion given by the proviso to sect. 8. Mr. Langton, on the other hand, contends that the effect of the limitation decree is not to alter the parties' rights except that it limits the amount for which the wrongdoer is liable, and that you have still to see whether the right of *The Marshalls* is statute-barred, and if it is there are no merits upon which the extension should be granted.

The case has been well argued on both sides. Upon these things there can be no doubt. In the first place, it seems to me quite clear that in the reference which follows a limitation decree it is open to any claimant to dispute the right of any other claimant against the fund. The limiting owner in general ceases to have any interest in disputing anybody's claim because he is liable only for the amount he has paid in, and, that being so, all rival claimants to the fund must be entitled to dispute one another's claims. It is further clear that a claimant cannot establish any right against the fund unless he can establish a good cause of action against the limiting owner. The case of the *Bellcairn* (5 Asp. Mar. Law Cas. 503, 582; 53 L. T. Rep. 686; 10 Prob. Div. 161) shows that. In that case, cross actions having been dismissed by consent and judgment entered accordingly, those parties were bound by the judgment, and had no longer got any legal right, and, whatever the merits were, they could not at the reference assert that they had any right against the fund.

If each claimant against the fund must establish a legal right against the limiting owner, and if each claimant may raise against the other any defence which the limiting owner could raise, I find it impossible to distinguish a defence given by sect. 8 of the Maritime Conventions Act from other defences, and it seems to me that it must be open to a rival claimant to raise a defence against another claimant that his action was barred by the effect of sect. 8. Possibly difficulties may arise where the limitation decree is made before the expiration of the two years.

But I have not to face that here. The limitation decree was made after the two years had expired. Whatever effect a limitation decree may have in preventing people from bringing an action, there was no limitation decree preventing the charterers of *The Marshalls* bringing an action within the two years. Mr. Balloch puts a case of great difficulty where, for instance, within one month of the expiration of the two years, the limitation decree is made; and he asks, is anybody who has a claim which he intends to bring in a limitation action, to rush in and issue a writ for fear it should be said that he is statute barred. But these difficulties are met by the consideration that the court always has it in its power under sect. 8 to extend the time.

What would have happened if the point had arisen in respect of a claim under Lord Campbell's Act? I need not pause to consider. It would have been more difficult because Lord Campbell's Act has not a proviso enabling the court to exercise a discretion. But the court always has it in its power under the Maritime Conventions Act to extend the time.

Notwithstanding the difficulties which Mr. Balloch has pointed out, I cannot see my way to saying that the effect of the limitation decree is to destroy the effect of sect. 8 as an answer to a claim when the claim is brought in in any limitation proceeding. But when the defence is raised by a rival claimant in limitation proceedings, then always under sect. 8 two issues arise. One is whether the two years have expired, and, secondly, if they have, is the case one in which the court is bound, or ought in its discretion, to extend the time? Those two issues must be determined in some way when raised on the reference. The Registrar is not the proper authority to deal with the question of extension of time and that must come before the court. I should think in ordinary cases if this point had been raised, it would be convenient for the Registrar to deal with all other matters and then withhold the decree until an opportunity had been given to the claimant to apply to the court for an extension of time, and upon that application the rival claimant could be heard in opposition.

Then this case, in my opinion, comes to this point. The Registrar has properly found, and it is not

disputed, that the two years have expired. That standing by itself, is an answer to the claim, and it is an answer which the rival claimant is entitled to set up, but the rival claimant cannot escape from having the other issue determined if the other claimant wants it determined. And here in this case Mr. Balloch applies to me to extend the time. Now I have to consider whether the time should be extended. I must take the Registrar's report as I find it. He has found that the people to whom he has made an award were the charterers by demise of *The Marshalls*, and that they have suffered damage. Mr. Langton says the claim has no merits in it. But I cannot go behind the report. I find that there are four people who have suffered damage, and who would undoubtedly be entitled to claim if they had issued their writ within two years. Ought they to have the time extended? I am bound to pay attention to the correspondence which passed because it seems to me that in 1918 it was contemplated by everybody that the claim in question would be dealt with in the limitation proceedings.

Therefore, I think it is a proper case for exercising a discretion under sect. 8 and for extending the time. And I should think that in most cases in which limitation proceedings are going on, they will be found to be proper cases for extending the time. I do not want what I have said to lead people to issue unnecessary writs. In general where limitation decrees are made I should think that a good reason for not issuing writs, and I hope therefore that when objections based on sect. 8 are taken in limitation cases it will be borne in mind that in general the extension of time ought to be granted if the non-issuing of the writ has merely ensued from the contemplation of the parties that a limitation action would be begun and a limitation reference held.

The result is that in this case I hold that the time ought to be extended, and in the circumstances there will be no costs of this motion.

Solicitors: *Botterell* and *Roche*; *Holman, Fenwick*, and *Willan*.

House of Lords.

July 2, 5, *and* 30, 1920.

(Before the Lord Chancellor (Lord Birkenhead), Lords Finlay, Shaw, Moulton, and Sumner).

British and Foreign Insurance Company Limited *v.* Wilson Shipping Company Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance — Marine risks — War risks — Ship chartered by Admiralty — Partial loss by marine risks — Unrepaired damage — Total loss by risk not covered by policy—Liability of marine underwriters.

When a vessel insured against perils of the sea is damaged by one of the risks covered by the policy and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, then the insurer is not liable for such unrepaired damage.

The respondents' steamship E. *was insured against marine risks only (including particular average) with the appellants, under a time policy dated the 16th 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 25th Jan.* 1918, *during the currency of the time policy with the appellants. The steamship, before she was lost, had sustained some damage by risks insured against during the currency of the same policy, which had depreciated her value at the date of her total loss 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 risk underwriters must make good that sum. 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.*

Bailhache, J. decided that the underwriters were not liable for such unrepaired damage, but his decision was reversed by the Court of Appeal.

Held, that the judgment of Bailhache, J. was right and should be restored.

Livie *v.* Janson (1810, 12 *East*, 648) *approved and followed.*

Decision of the Court of Appeal, which court sought to distinguish Livie *v.* Janson (14 *Asp. Mar. Law Cas.* 578; 122 *L. T. Rep.* 615; (1920) 2 *K. B.* 643), *reversed.*

Appeal from a decision of the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.), reported 14 Asp. Mar. Law Cas. 578; 122 L. T. Rep. 615; (1920) 2 K. B. 25, reversing a judgment of Bailhache, J. in favour of the present appellants.

The dispute arose on a policy of marine insurance subscribed for by the appellants on the respondents' steamship *Eastlands*, and the question for determination was whether the appellants were liable under the policy in respect of damage suffered by the ship, where the damage had not been repaired at the time of her total loss during the currency of the policy, or whether there was a merger of the partial loss in the total loss.

By a marine policy dated the 16th March 1917, for which the appellants subscribed, the respondents' steamship *Eastlands* was insured against marine risks only (including particular average) for a period of twelve months. At all material times the *Eastlands* was chartered to the Admiralty under the form of charter known as T. 99, whereby the Admiralty assumed all responsibility for war risks, and agreed in the event of a total loss from war risks to pay the owners the ascertained value at the time of the loss. In Sept. and Oct. 1917 the *Eastlands* suffered damage through collision, fire, and grounding; and in Jan. 1918 she was torpedoed by a German submarine and was sunk. At the time of her loss the previous damage, to the extent of 1770*l*., was left unrepaired. The Admiralty deducted this 1770*l*. from the sum agreed upon as the sound value of the ship at the time of her loss and the respondents brought an action against the appellants on the marine policy to recover their proportion of the 1770*l*.

Bailhache, J., on the authority of *Livie* v. *Janson* (12 East, 648) gave judgment for the appellants, but his judgment was reversed by the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.), and judgment was entered for the respondents for the sum claimed.

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

MacKinnon, K.C. and *Claughton Scott* for the appellants.

R. A. Wright, K.C. and *Jowitt* for the respondents.

The following cases were referred to:

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 Foster, 49 W. Rep. 271; (1900), P. 241;
Woodside v. *Globe Marine Insurance Company*, 73 L. T. Rep. 626; 8 Asp. Mar. Law Cas. 118; (1896), 1 Q. B. 105;
Arnould on Marine Insurance, 9th edit. 1914, vol. 2, 1298, s. 1032;
Phillips' Law of Insurance, 5th edit., ss. 1136 and 1137.

The House took time for consideration.

The LORD CHANCELLOR (Lord Birkenhead).—This is an appeal from an order of the Court of Appeal reversing a judgment of Bailhache, J. in an action brought by the respondents against the appellants for a loss under a policy of insurance.

The respondents were the owners of the steamship *Eastlands*, which was insured against marine risks under a time policy for the period from the 20th Feb. 1917 to the 20th Feb. 1918. The appellants were among the subscribers to that policy. There was no policy covering war risks, but during the whole of the currency of the marine insurance policy the vessel was chartered to the Admiralty under the form of charter known as T. 99, whereby among other obligations the Admiralty assumed all responsibility for war risks, and agreed, in the event of a total loss from such risks, to pay to the respondents the ascertained value of the vessel at the time of such loss.

On three several occasions, namely, on the 16th and 19th Sept. and the 29th Oct. 1917, the ship sustained damage from marine risks. On the 17th Dec. 1917 she was dry docked and surveyed at Cardiff, when temporary repairs were effected to make her seaworthy, but permanent repairs, estimated to cost 1770*l*., were postponed, and, in fact, were never executed for on the 25th Jan. 1918 the vessel was torpedoed by an enemy submarine and became a total loss.

The respondents have received from the Admiralty a sum of money which was calculated by deducting from the agreed "sound" value the sum of 1770*l*., which is the estimated cost of the repairs which were never executed.

There is no dispute as to the appellants' liability for the cost of the temporary repairs. They have paid their proportion, but as to their share of the estimated cost of the unexecuted repairs, they dispute liability on the ground that they are not bound to pay for damage which, before it was repaired, was followed during the currency of the policy by a total loss.

The question which requires decision is whether under a policy of marine insurance the assured can recover in respect of damage sustained by the ship insured during the currency of the policy when the ship is totally lost before the damage is in fact repaired.

It is evident that two aspects of this question may arise: (1) Where the total loss is caused by a peril insured against by the policy in question; (2) where the total loss is not covered by that policy. The first case, as to which no question is raised on this appeal, is governed by sect. 77 (2) of the Marine Insurance Act 1906. The second case which requires decision is not dealt with by the Act. Some attempt was made to found argument upon this omission, but no inference can properly be drawn from it either way. It is necessary to examine the law as established by the existing authorities, in conformity with the provision contained in sect. 91 (2) of the Act that "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

The earliest case which requires consideration is *Livie* v. *Janson* (12 East, 648), which was decided by Lord Ellenborough in 1810. The action was brought upon a policy of insurance upon the ship *Liberty*, the insurance being declared "to be on ship and cargo warranted free from American condemnation." During the currency of the insurance the ship was damaged by ice driving the ship ashore. The master and crew endeavoured without success to get the ship off, and the next morning she was discovered and seized by the American authorities. Lord Ellenborough, at p. 653, stated the issue in these terms: "The ship and goods were damaged by the perils of the seas and were afterwards seized by the American Government and condemned; and the question is whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect of the previous partial loss by sea damage?" And he states his conclusion at p. 654: "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. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?"

In whatever form the principle upon which this decision is based should be stated, the decision itself is clearly right. If not, the assured, whose vessel becomes a total loss during a voyage in the course of which she meets a succession of gales, each of which causes damage, would, in a case to which sect. 77 (2) of the Act of 1906 does not apply, be in a position to claim under his policies for each of these losses in succession, although none of them is or could be repaired, and he could at the same time recover the value of the ship as a total loss if she is wrecked during the currency of the policies. Such a result would, of course, be contrary to the principles upon which marine insurance has always

been conducted. The owner would not, in such a case, merely be indemnified against loss but he would receive a profit.

Stewart v. *Steele* (5 Sc. N. R. 927) was a case in which *Livie* v. *Janson* (*sup.*) was cited and discussed both during the argument and in the judgments. Maule, J. in the course of his judgment, at p. 949, stated the fundamental principle: "That the proper time to estimate the loss, where the party is put to no expense, is at the expiration of the risk." This principle underlies the decision of Lord Ellenborough, for, as Maule, J. in an earlier passage on the same page, says: "It is said that the plaintiff had a vested right of action at the moment of the happening of the loss which nothing could afterwards divest. That, I apprehend, is quite contrary to the doctrine laid down by Lord Ellenborough in *Livie* v. *Janson*." The learned judge was of opinion that, inasmuch as the time for assessing unrepaired damage is at the expiration of the risk, if the vessel is totally lost before the risk expires there is nothing upon which such assessment can be made.

Knight v. *Faith* (15 Q. B. 649) contains a comment by Campbell, L.C.J. upon *Livie* v. *Janson*, and the other judges of the court were parties to this comment. He remarked 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," and he pointed out that in *Livie* v. *Janson* the risk which caused the total loss was expressly excepted from the policy.

Such was the state of the authorities at the date when the last edition, which was prepared by the author of Arnould's Law of Marine Insurance, was published in 1857. In that work, 2nd edit., vol. 2, pp. 1003, 1004, the late Mr. Arnould stated the law in the following terms: "If a ship has been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either *quâ* average or as money laid out and expended in labouring for the safeguard and recovery of the ship under the general printed clause in the policy; but this rule only applies to repairs actually made; hence, where a ship was put back twice in distress, and on the first occasion was actually recoppered, but on the second occasion was only surveyed but not repaired, and in the course of the survey some of her wales, &c., were necessarily removed in order to examine her timbers, and never replaced, but sold, with the rest of the ship, as wreck, it was held that the cost of the recoppering might be recovered in addition to a total loss, but not the estimated cost of replacing the wales; where no repairs have been made, no previous partial loss by sea damage can be recovered from the underwriters as a particular average, in addition to a subsequent total loss, but where a previous partial loss, though unrepaired, is followed by a sale of ship, which, not being justifiable, does not transfer the property, nor operate a total loss, such partial loss may be recovered." It is clear from the footnotes that the learned author did not forget that the subsequent total loss might be from a risk excepted from the policy and that he did not consider that this circumstance affected the liability of the underwriters for unrepaired partial damage. In other words, if, after partial damage has been sustained and before it is repaired, the ship is totally lost during the currency of the policy, then, in his opinion, the underwriter is under no liability for such partial damage, whether he has to pay a total loss or not.

The next case of importance is *Lidgett* v. *Secretan* (1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. 942; L. Rep. 6 C. P. 616), decided by Willes, J. In that case, while a ship which had suffered partial damage was being repaired, the policy expired and shortly afterwards, before the repairs could be completed, she was totally destroyed by fire. During the argument the learned judge remarked that the reason for applying the doctrine of merger "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. But the same reason does not apply where the partial loss takes place during the period covered by one policy and the total loss whilst the ship is insured for a different voyage and under another policy," and in his judgment at p. 625, he reverts to this topic and comments on *Livie* v. *Janson*: "There is another case—viz., where after the vessel has sustained damage but has not been repaired, and has subsequently and during the currency of the policy been totally lost by a peril excepted out of the policy and in respect of which the assured was his own insurer. Such was the case of *Livie* v. *Janson*." Mr. Wright admitted that if this passage were good law, then the respondents must fail, but he contended that the dictum was wrong.

Lindley, J. in *Pitman* v. *Universal Marine Insurance Company* (4 Asp. Mar. Law Cas. 544; 46 L. T. Rep. 863; 9 Q. B. Div. 192) made a pronouncement to the same effect as that of Willes, J. and Mr. Wright also admitted that if this opinion was in law well founded the respondents in this case are wrong. *Pitman*'s case turned upon the question: What is the true principle upon which an unrepaired loss is to be estimated? In the course of his judgment Lindley, J. remarked: "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. If, in such case, the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the assured can only claim for a total loss: he cannot claim both." The judgment of Lindley, J. was upheld by the Court of Appeal, with a variation which is not relevant to this part of his judgment.

The authorities establish the existence of a rule whereby underwriters are not liable for unrepaired damage if there is a total loss before the expiration of the policy. As stated by Lord Ellenborough in *Livie* v. *Janson*, and by the Court of Queen's Bench in *Knight* v. *Faith*, the rule might appear

to be limited to the case where "the previous deterioration became ultimately a matter of perfect indifference to the assured's interests." Bailhache, J. (adhering to the view expressed by Willes, J. and Lindley, J. in the cases cited) came to the conclusion that there was no such limitation. The Court of Appeal, on the other hand, having regard to the statement of the rule by Lord Ellenborough and Lord Campbell, were of opinion that the condition was an integral part of the rule, and therefore that the present case was on the facts distinguishable from *Livie* v. *Janson*. If Lord Ellenborough's words are taken to mean that the circumstance more than once and somewhat pointedly insisted on is a condition to the application of the rule, the Court of Appeal may well have been right in the distinction which they drew. I have, however, come to the conclusion that no such condition ought to be admitted. Lord Ellenborough was dealing with unusual facts, and his judgment must be construed in relation to those facts, but the rule ought not to be limited in the manner suggested. I adopt the reasoning of Bailhache, J. in the following passage from his judgment: "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 true doctrine is that the smaller merges in the larger, and the rule is not limited to the ground upon which it was based by Lord Ellenborough, namely, that there was no continuing prejudice. The question in every case must be: Did the total loss happen before the underwriter's liability for the unrepaired damage accrued? If yes, he is not liable; if no, he is liable. It would be strange if an underwriter's liability should vary with the terms of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance."

It is beyond doubt that if the respondents had been their own insurers they could not have recovered. Their argument in effect is that by an independent contract of their own which confers on them a right of indemnity they have been enabled to increase the burden on the insurers, and this by reason of the circumstance that, as it has been applied, they have not obtained a complete indemnity. As to the amount which the Admiralty deducted from the "sound" value the respondents were their own insurers, and their loss is due therefore not to a peril insured against, but to their failure to obtain complete indemnity under the terms of their charter-party. Such a cause is no concern of the underwriters and cannot, in my judgment, be treated as a material fact in determining their liability.

The true rule is capable of statement in the following proposition. When a vessel insured against perils of the sea is damaged by one of the risks covered by the policy and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, then the insurer is not liable for such unrepaired damage. The rule so stated embodies the principle upon which underwriters and merchants have based their practice in such matters for upwards of a century, and, even if this House were of opinion that the rule did not correctly state the law, it would be a matter for grave consideration whether such a rule, which has been observed for so long, which has been expressly or impliedly incorporated in so many contracts, and which has profoundly influenced the course of dealing between merchants, should be reversed at this period of its history. In my opinion this question does not arise.

For the above reasons I am of opinion that the judgment of the Court of Appeal should be reversed and that of Bailhache, J. be restored, and I move your Lordships accordingly.

Lord FINLAY.—The facts in this case are few and simple.

The Wilson Company were the owners of the steamship *Eastlands*. That vessel was chartered to the Admiralty under the form of charter known as T. 99, under which the Admiralty are not liable for any sea risks, but undertake risks of war "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." The Wilson Company insured the steamer against sea risks in the value of 82,000*l*. under a time policy subscribed by the appellants, the British and Foreign Insurance Company, covering the period from the 20th Feb. 1917 to the 20th Feb. 1918.

In Sept. and Oct. 1917 the *Eastlands* sustained damage by sea risks and put into Cardiff for repairs. The repairs were estimated at 2698*l*. Repairs to the amount of 928*l*. were executed, but as the vessel was urgently wanted by the Admiralty the remaining repairs, estimated at 1770*l*., were not executed. The vessel proceeded to sea, and on the 25th Jan. 1918 she was torpedoed by a German submarine and sunk. The Admiralty agreed with the owners that 82,000*l*. represented the sound value of the *Eastlands* at the time of the loss, but claimed to deduct from this the value of the repairs which had not been executed—1770*l*. The amount paid to the owners was therefore 80,230*l*. The owners have been paid the value of the repairs actually executed at Cardiff, but the underwriters dispute their liability for the 1770*l*. in respect of the unexecuted repairs on the ground that the total loss occurred during the currency of the policy of insurance against sea risks and that the recovery for the unrepaired partial damage is barred under the authority of *Livie* v. *Jansen* (1810, 12 East, 648).

The case came before Bailhache, J., who decided against the claim on the authority of *Livie* v. *Jansen*. His decision was reversed by the Court of Appeal, where it was held that the principle there laid down did not apply if in the event the owner was damnified by the partial loss, and that there was such damnification in the present case, inasmuch as but for the unrepaired damage the Admiralty would, under the contract of charter-party, have paid to the owners 1770*l*. beyond the 80,230*l*. actually paid.

The liability of the insurer in the case of total loss in any ordinary insurance is for the value of the vessel at the commencement of the risk. If the indemnity given by the Admiralty against war risks had been in that form no claim for the partial loss would have arisen, as the payment for the total loss would have been on the sound value of the ship at the commencement of the risk.

The question in the case is whether the shipowners are entitled for this purpose to rely on the fact that by reason of their special bargain with the Admiralty there fell to be deducted from the value of the vessel the sum of 1770*l.* in respect of the unrepaired damage as taking them out of the rule in *Livie* v. *Jansen*. In that case the insurance was on ship and cargo from New York to London, warranted "free from American condemnation," these last words having reference to an embargo that had been imposed by the United States Government. The vessel, in leaving New York, was driven by floating ice upon the rocks and seriously damaged. She was seized by the officers of the American Customs House, and the ship and cargo were condemned for breach of the embargo. The policy covered the deterioration in the vessel and cargo due to the sea damage, while in respect of the total loss by seizure and condemnation the owner was his own insurer. Lord Ellenborough held that the underwriter could not be made liable for the sea damage. He said: "Considering the deterioration of the ship and cargo then as the extent of what is referable of sea damage, we think we may lay 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 interest, he cannot make it the ground of a claim upon the underwriters. . . . If the property, whether damaged or undamaged, would have been equally taken away from him and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?"

If the damage resulting from the sea perils had been repaired the amount disbursed for that purpose would have been recoverable on the policy in spite of the subsequent loss. But if the repairs have not been executed the liability cannot accrue until the termination of the risk under the policy, and if, before that happens, there is a total loss, the partial loss is "swallowed up" in the total.

The decision in *Livie* v. *Janson* is attacked by Mr. Phillips in his Treatise on the Law of Insurance (5th edit., vol. 1, ss. 1136 and 1137). I am unable to agree with the criticisms there made. *Livie* v. *Janson* was carefully considered by Willes, J. in *Lidgett* v. *Secretan* (1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. 942; L. Rep. 6 C. P. 616). In that case there was an outward policy at and from London to Calcutta, and for thirty days after arrival, and a homeward policy at and from Calcutta to London, both of which were underwritten by the defendant. On the outward voyage the vessel sustained damage from sea perils. She reached Calcutta, and was dry-docked for repairs. While repairs were in progress the outward policy expired, and afterwards, and while the ship was still at Calcutta, she was totally destroyed by fire. It was held that under the homeward policy the assured were entitled to recover for total loss in respect of the fire, and that under the outward policy the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage on the outward voyage without reference to the sum actually expended on her repairs. During the argument an extract was read from a shorthand note of a judgment by Willes, J. in a previous case, *Potter* v. *Campbell* (16 W. Rep. 401), in which he said: "The doctrine of merger must be limited to a loss happening during the period over which the underwriters' liability extends." On the same page (620) Willes, J. is reported as having said, in the course of the argument, that the doctrine of merger could not apply where the partial loss takes place during the period covered by one policy, and the total loss while the ship is insured on a different voyage and under another policy. Willes, J. develops this at some length in the judgment, and the decision was that there was no merger.

This amounts to a recognition of the correctness of the decision in *Livie* v. *Janson*, while it is pointed out that the decision has no reference to a case in which the risk under the policy convering the partial damage has run out before the total loss.

Livie v. *Janson* was decided in 1810, and has always been recognised in England as a decision of authority. It was referred to with approval in *Stewart* v. *Steele* (1842, 5 Sc. N. R. 927) by Maule, J. during the argument, and in his judgment in *Knight* v. *Faith* (15 Q. B. 649) it was recognised by Lord Campbell, while it was pointed out that in the particular circumstances of that case its doctrine did not apply. It has been generally recognised in the text-books. In my opinion *Livie* v. *Janson* is good law, and the only question is as to the limits within which the doctrine there laid down is applicable.

Lord Ellenborough, in *Livie* v. *Janson*, pointed out that by the supervening total loss the unrepaired partial loss had become a matter of indifference to the owners. In *Knight* v. *Faith* Lord Campbell said that in *Livie* v. *Janson*: "The assured in the event which happened were not in any degree prejudiced by the partial loss, which only rendered the ship less valuable to the American Government, the assured being in the same situation as if the partial loss had never occurred."

In the present case the applicants contend that they have been prejudiced by the partial loss inasmuch as in respect of it they have received 1770*l.* less from the Admiralty than they would otherwise have received. This is true, but the clause of indemnity in the charter-party is a special one. Under the ordinary policy what is recovered in respect of a total loss is the value of the ship at the commencement of the risk. If the indemnity under clause 19 of the charter-party had been in respect of the value of the steamer at the commencement of the risk, there would have been no prejudice to the assured by reason of the partial loss. He would have recovered the value of the vessel as it stood at the commencement of the risk, when the partial loss had not occurred. It is only by reason of the special bargain with the Admiralty contained in clause 19 of the charter-party that he received from them less in respect of the unrepaired partial damage.

Bailhache, J., in the course of his judgment, said: "It would be strange if an underwriter's liability, which is that a ship should remain unhurt by a peril insured against during the currency of the policy, and whose liability is determined by her loss during the insured term by an excepted peril should vary with the terms of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract

of insurance. . . . In my judgment, the plaintiff's position by reason of his charter-party with the Admiralty is an irrelevant circumstance."

The judgments in the Court of Appeal do not appear to me to deal adequately with this point. They proceed on the basis that the very special nature of the bargain with the Admiralty which reduced the amount payable by the value of the unrepaired damage may be disregarded. They treat the loss of the 1770*l.* as if it had happened in the ordinary and natural course of things, whereas it occurred only by reason of the special terms in clause 19 of the charter-party.

There is no evidence that the existence of this special clause was known to the insurers in respect of sea risks. Indeed, counsel for the appellants, in answer to a question put by the Lord Chancellor, disclaimed resting his case upon any such ground. I express no opinion as to what would have been the liability of the insurers in the present case if there had been evidence from which it could be inferred that their contract of insurance was entered into with reference to the special liability of the Admiralty for total loss under the charter-party.

In my opinion, the appeal should be allowed.

Lord Shaw.—I entirely agree with the judgment of Bailhache, J. in this case, and I venture to express my full concurrence with the views set forth by my noble and learned friend on the Woolsack in his address.

Out of respect to the Court of Appeal, I think it right to add these few words.

The *Eastlands* was torpedoed by an enemy submarine, and became a total loss on the 25th Jan. 1918. She had had during the preceding few months several mishaps, and then had been sufficiently repaired to make her seaworthy. All these repairs have been met by the underwriters. There was, however, unrepaired damage done to the vessel to the extent of 1,770*l.* When the vessel was totally lost, the "sound" value of the steamer was ascertained to be 82,000*l.*, and the damaged value necessarily 1770*l.* less. Had accordingly that 1770*l.* been expended by the owners on the repair of the vessel, they would have received 82,000*l.* for the total loss. What the owners, however, now claim is that they are entitled to finance the situation on the footing that, having received 80,300*l.* from the Admiralty, they are entitled to receive a further payment of 1770*l.* from the appellants in order to indemnify them against making good a repair on the vessel to the extent of 1770*l.*, although the fact is, no repair upon the vessel is now possible. The question is whether the law of England justifies such a demand.

In my own opinion, no doubt can be cast on the accuracy of the judgment in the case of *Livie* v. *Janson*. It is one of a long series. It has never been disapproved. On the contrary, has been uniformly accepted as sound law.

Livie v. *Janson* (12 East, 648) was decided in 1910. In 1842 came *Stewart* v. *Steele* (5 Sc. N. R. 927); in 1850, *Knight* v. *Faith* (15 Q. B. 649); in 1871, *Lidgett* v. *Secretan* (1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. 942; L. Rep. 6 C. P. 616); and in 1882, *Pitman* v. *Universal Marine Insurance Company* (4 Asp. Mar. Law Cas. 544; 46 L. T. Rep. 863; 9 Q. B. Div. 192). It will not be found in this series of cases of high authority that doubt has been cast upon *Livie* v. *Janson*.

There are two dicta in the course of that series to which I wish to make special reference.

In *Stewart* v. *Steele* Maule, J. puts the actual issue involved in the argument of the appellants thus: "It is said that the plaintiff had a vested right of action at the moment of the happening of the loss, which nothing could afterwards divest." The answer he gave was clear: "That, I apprehend, is contrary to the doctrine laid down by Lord Ellenborough in *Livie* v. *Janson*." Further, according to Maule, J., and in this, I think, he stated acknowledged law, that the proper time of estimating the loss where the party is put to no expense is at the expiration of the risk.

Further, what appears to me to approach most nearly to the fundamental principle of such cases is to be found clearly set forth in the judgment of Lord Justice Lindley (then Lindley, J.) in *Pitman's* case. I venture to repeat it.

"Against what did the underwriters agree to indemnify the insured? 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 insured 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 for the injury he has sustained. If in such case a ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all. And if she was lost by a peril insured against, the assured can only claim for her total loss, but cannot claim both for a total loss and for the previous partial loss, as he might if the damage had been actually repaired." That is expressly the principle which underlies sect. 77 (2) of the Marine Insurance Act of 1906. It is true, of course, that that section is framed to cover the case of a partial loss, and a total loss, "under the same policy." But the common law of England was not repealed by that statute, and, in my opinion, no argument to that effect can be derived from sect. 77 (2) dealing with the one specific case.

When a ship, damaged but only partially repaired, is totally lost, it becomes impossible to complete her repair. No contract of indemnity can apply to being recouped for such repair, because that would be to present a false and impossible demand for indemnification, *i.e.*, indemnification for an expenditure which can never be made. If once the principle of indemnity were extended the length of permitting a mere right of action to be the ground or the measure of the indemnity, then the reality of the case is lost sight of, for the right of action is a mere abstraction and represents in truth a right to be recouped for expenses which can never be laid out, and the word "indemnity," or the word "recouping" fails on account of sheer self-inconsistency. One finds oneself not in the region of indemnity against loss, but in the region of profit-earning. This is contrary to all sound principles of marine insurance, and, apart from all those authorities which have been most properly canvassed, I am of opinion, on the principle I have just stated, that this appeal should succeed.

Lord Moulton.—The question raised by this appeal is one of great gravity. It is in substance the question whether the law laid down by the decision in *Livie* v. *Janson* (12 East, 648) should be reversed. This decision, delivered by a judge of great eminence, has formed part of the law of marine

insurance in this country for more than a century. It has been accepted and acted upon again and again without hesitation by our courts, and the respondents have been unable to produce to us any later decision that throws doubt upon it. Judges of great eminence have taken part in decisions which have treated it as sound law. It is so treated in all the text-books, and there can be no doubt that contracts of insurance to which it applies have during this long series of years been framed on the basis of its authority. Under such circumstances, I should have felt great reluctance in setting aside such a decision even if I felt some doubt as to whether the reasoning of the judgment might not be open to criticism. But I feel no such doubt. In my opinion the decision was right in every respect, and I am glad that your Lordships' House has an opportunity of giving to it its express authority. Indeed, if the case of *Livie* v. *Janson* had been decided otherwise, the decision would, in my opinion, have been so inconsistent with the principles of our law of insurance that it would not have stood test of time, but would have been speedily differed from by other courts, and would ultimately have been set aside. The only alternative to that decision would have been to hold that when damage was done by perils insured against there instantly accrued a pecuniary claim against the insurer for the estimated cost of the repairs, whether done or undone, a doctrine which, among other things, would have led to the absurd result that all the damage done to a ship immediately before or in a storm in which she was totally lost might be claimed as particular average by an owner who had not insured against total loss.

I am aware that the judgments of the learned Lords Justices in the court below are not formally based on a dissent from the decision in *Livie* v. *Janson*. They purport to distinguish it upon a point arising out of the special facts of that case, and accordingly they give such an interpretation of the judgment delivered by Lord Ellenborough in that case to make it inapplicable to the case now before us. I am of opinion that the interpretation which they give to the decision makes it turn on a matter which did not constitute any portion of the reasoning which led to that decision. But I go farther. In my opinion the facts of this case, so far as they are relevant to the right of the parties, make it an exact parallel to the case of *Livie* v. *Janson*, so that, however the language of the judgments in that case be interpreted, the present case must fall within it. It is only by admitting into their consideration facts which ought to have been excluded by reason of their being *res inter alios actæ* that the learned members of the Court of Appeal have been able to raise a doubt as to whether this case comes precisely within the law as laid down in *Livie* v. *Janson*.

The facts of this case are very simple. The steamship *Eastlands*, belonging to the respondents, was insured with the appellants against total loss on a valued policy for 182,500*l*. That policy included also an insurance against particular average. War risks were excluded. She sustained damage at sea which was partially repaired at Cardiff at a cost of 928*l*., and this sum has been duly paid to the respondents by the insurers. There remained unrepaired damage to an estimated amount of 1770*l*. The ship then sailed from Cardiff and was totally lost by an excepted risk. The above are all the facts relevant to the liability of the appellants under the policy, and, according to the decision in *Livie* v. *Janson*, the total loss of the vessel puts an end to all claim for the cost of the unexecuted repairs which have now been rendered impossible by the total destruction of the thing to be repaired.

What is then the claim of the plaintiffs in the action? They allege that they made a contract with the Government relative to the charter of the vessel which, while covering them to a certain extent from the excepted perils, did not cover them with regard to unexecuted repairs. What have these matters to do with the liabilities of the insurers under the policy which they signed? It is admitted in the frankest manner by the counsel for the respondents that the insurers had no connection whatever with the contract between the respondents and the Government, or with the circumstances under which the respondents entered into that contract. It is also admitted (as is otherwise evident) that the losses sued for in this action are solely due to the special provisions of that contract. To quote from the judgment of Bankes, L.J., "the question is . . . what have the appellants (*i.e.*, the present respondents) 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?"

These considerations appear to me to decide the rights of the parties to this action. The insurer's liabilities are fixed by the contract that he has signed and cannot be increased by an act of the assured to which he is no party. It is true that those liabilities may in some cases be lessened by such acts as in a case where the assured has made further contracts which give rise to rights of contribution. But they cannot be increased. This rests on something deeper than the special law of insurance. It is a fundamental principle of our law of contracts. So far as the insurers were concerned they might therefore assume that the assured was making no insurance against the excepted perils, and was taking the war risks on himself. It was immaterial to them whether he was so doing or not so long as they remained strangers to any action that he might take in the matter. I fully agree with the language of Bailhache, J. in his judgment in this case when he says: "It would be strange if an underwriter's liability, which is that the ship should remain unhurt by a peril insured against during the currency of the policy and whose liability is determined by her loss during the insured term, should be increased by reason of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance," and I also agree with his language at the conclusion of his judgment to the effect that "the plaintiff's position by reason of his contract with the Admiralty is an irrelevant circumstance."

It is because I am of opinion that the court below should have on these grounds excluded the matter of the contract with the Admiralty from their consideration in determining the liabilities of the appellants that I regard this case as differing in no respect from the case of *Livie* v. *Janson*, which I hold to have been rightly decided. I am, therefore, of opinion that this appeal should be allowed, and the judgment of Bailhache, J. should be restored and that the appellants should have their costs here and in the Court below.

Lord SUMNER.—Sect. 77 (2) of the Marine Insurance Act, by using the words "under the same policy," enacts something narrower than the decision in *Livie* v. *Janson*, for in that case a partial loss, insured under the policy in suit, was followed by a total loss during the same voyage, but not insured under that policy. I do not know why this course was taken. The section is one of a fasciculus of sections headed "Measure of Indemnity," throughout which the words "a policy" and "the policy" are constantly used to denote not merely a single instrument, whether subscribed by one underwriter or by many, but also an entire insurance on the same subject-matter, which is spoken of as one insurance and referred to as if it was expressed in one instrument, although, in fact, the total value insured in respect of that subject-matter may only be fully covered under several instruments or even may only be partially covered by them, while for the residue the assured, as it is said, "becomes his own underwriter."

I surmise, therefore, that what this section is really referring to by these words is not a single instrument covering two losses, which are not simultaneous, but is an aggregate insurance effected in one or more policies on one subject-matter, in which the assured is his own underwriter, both for any uncovered part of the total value of his insurable interest in it, and also for any uncovered peril among the aggregate of the perils, to which the subject-matter is actually exposed. If so, the words "under the same policy" mean "during the adventure insured," whether it be a voyage or a period of time.

The question is more curious, however, than important, for sect. 91 (2) preserves *Livie* v. *Janson* (12 East, 648), and to its full extent according to the true construction, unless or until it is overruled. What I think is important is, that the Act says nothing about the partial loss becoming ultimately a matter of perfect indifference to the assured's interest, but only speaks of a sequence in time between a partial loss and a total loss, and of the partial loss not having been repaired. No inference against taking the rule in *Livie* v. *Janson* in its widest sense can be drawn from the Marine Insurance Act, but I think that the language of sect. 77 (2) is against the limited construction placed on that rule by the Court of Appeal.

In my opinion, Lord Ellenborough's language does not mean that two conditions must concur to relieve an underwriter from liability for unrepaired damage; first, the occurrence of a subsequent total loss; and, second, an absence of any pecuniary interest whatever in the unrepaired partial loss. The words: "And the previous deterioration becomes ultimately a matter of perfect indifference to his interests" explain the effect which the subsequent total loss has on the prior unrepaired damage, and so justify the rule.

Bankes, L.J. reads the words as though Lord Ellenborough had only said "where the previous deterioration becomes ultimately a matter of perfect indifference to his interests," had confined the rule to that case; but they do not really except out of the rule cases where, owing to matters not within the terms of the insurance, the partial loss happens to affect the rights of the assured under contracts, to which the underwriter is a stranger. It is simply a fuller expression of the idea afterwards expressed by the word "merger." If the rule means that unrepaired partial losses are swallowed up in subsequent total loss, when the assured is none the worse for them, but survive, and must be paid for, if he would be out of pocket unless he recovers for them on the policy, inadmissible results would follow.

I do not see why on this argument the unrepaired partial loss by marine perils should not be recoverable from the marine underwriters on the simple ground that, owing to the insolvency of war-risk underwriters, no indemnity at all can be got for the subsequent total loss by hostilities. So stated, the principle is independent of proximate or direct causation. It would not matter whether the pecuniary prejudice was the direct or the indirect consequence of the partial loss. If indirect prejudice, directly due to the form of the charter T. 99, enables the assured to recover for the partial loss unrepaired, so would diminution of freight-earning power under the charter, consequent on the damage being unrepaired. On the other hand, if there were a rise in shipping values after the damage was done, which partially or wholly restored the value of the ship as at the date of the total loss to what it had been before the damage was done, this, by throwing on to the Admiralty under the charter part or the whole of the amount of the depreciation due to the absence of repair, would diminish or do away with the marine underwriter's liability. In this case his liability would be made to depend on market fluctuations of the value of the ship during the currency of the policy.

Nor am I pressed by the statement that in some cases "the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." If *Livie* v. *Janson*, where the assured had no policy against capture, was not such a case, *a fortiori* the present case is not such an exception. Further, the illustrations put for the purpose of showing that the rule in *Livie* v. *Janson*, widely applied, may produce anomalous consequences, seem to me to be either fortuitous hard cases or to be instances of want of skill in arranging the details of the insurances effected. If an assured chooses to be his own underwriter against collision, and look only to the ship that is to blame, no doubt he may come off worse than if he had insured, but this is not a reason for increasing the liability of the underwriters, with whom he insured, beyond what it would have been, if he had taken out a policy against the risk of collision.

I do not see anything intrinsically in conflict with a contract of insurance in the proposition, that perils insured against have not caused any direct loss, where, although the ship was damaged, the owner had nothing to pay, and although the ship was depreciated, she ceased to exist as a ship before the time came for measuring the amount to be recovered. At that date there was no pecuniary loss against which the owner would be indemnified.

I agree that it is not now practicable to overrule the law as it has so long been understood to have been laid down in *Livie* v. *Janson*. I do not, however, rely merely on its authority. I think it is fully consistent with what I take to be the principles of marine insurance. In practice contracts of insurance by no means always result in a complete indemnity, but indemnity is always the basis of the contract. Where all the risks to which a ship is exposed at one time are covered by each of several underwriters, and it is only

the total amount of the insurance that is distributed, the aggregate of the insurance is regarded as having been designed to give one indemnity, and for certain purposes the policies are so applied. If the assured has not insured the full value insurable, he is deemed to be his own underwriter for the residue.

The foundation of the rule in *Livie* v. *Janson*, of course, is that an assured cannot be allowed to recover under a contract of indemnity both a total loss, which he has suffered, and a partial loss, which in substance he has not. It is said, and truly, that it is a rule to prevent the assured from recovering more than a full indemnity, not to save underwriters from having to pay a full indemnity, but—what is a full indemnity? If the application is limited to the one policy in suit, or to the one subscriber sued, the whole attempt to restrict the assured to one full indemnity fails at once. If it extends to the whole body of assurances, which he takes out in respect of all risks affecting the subject matter of insurance during the voyage or time adventured upon, the measure of a full indemnity is only got by looking at the risks run, not at the persons liable for them. Otherwise, the indemnity would be full or more than full at the mere choice of the assured.

It seems to me that the aggregate of the insurances is to be looked at, where it is the perils insured against that are distributed, and some perils causing loss or some categories of loss, caused so, are covered by one person and some by another. I do not see why an assured should be allowed to recover more than an indemnity where his war risk is placed with A. and his marine risk with B., if he could not have done so had both been placed with A. or both with A. and B. in equal moieties. Further, and for the same purpose, namely, that of reducing insurance as far as possible to a complete indemnity, I do not see why an assured should not be considered to be his own underwriter where he places one set of risks with one set of underwriters and another with another, just as much as where one set of underwriters covers, although not to the full amount.

If he has not assured a complete indemnity by the owner effecting contracts, which will procure it for him, he must to the extent of the deficit be treated as having underwritten it himself. I regard art. 19 of charter T. 99 as an insurance policy for this purpose. In the event, which happened, it fell short by 1770*l.* of covering the full value, in which the assured was interested, when the contracts were first effected. Accordingly, I think he must be treated as being his own underwriter for the difference between the ship's value when totally lost, which is all he covered with the Admiralty, and the ship's value at the inception of the risk, which is her value for the purposes of the other policies according to ordinary rules and apart from special valuations, which do not seem to affect the principle. Whether he insured in this manner with the Admiralty because he chose to do so, or because he could not help himself is immaterial.

I agree further that the 1770*l.* was lost directly by the form in which the liability of the Admiralty is expressed, in the sense that from the time when the charter became effective the assured had made himself the party to bear any depreciation from unrepaired partial damage, which might exist at the time of the total loss. Of course it is not contended that he can alter the meaning of his marine policy by the arrangements that he chooses to make with the Admiralty, but I think it is equally impracticable to say that the marine policy impliedly promises to pay for unrepaired damage if less than the original value is recoverable under the charter for a subsequent total loss, but not to pay for it when the charter provides otherwise.

I therefore think that the appeal succeeds and that the judgment of Bailhache, J. should be restored.

Appeal allowed.

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

Solicitors for the respondents, *Downing, Hancock, Middleton,* and *Lewis.*

July 15, 16, 19, *and Nov.* 26, 1920.

(Before Lord BIRKENHEAD, L.C. and Lords FINLAY, SHAW, MOULTON, and SUMNER.)

OWNERS OF STEAMSHIP ALEXANDER SHUKOFF *v.* OWNERS OF STEAMSHIP GOTHLAND.

OWNERS OF STEAMSHIP LARENBERG *v.* OWNERS OF STEAMSHIP GOTHLAND. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Compulsory pilotage — Duty of master and crew to assist pilot.

They who seek to establish the defence of compulsory pilotage, which is of statutory origin, must show that the collision was due solely to the fault of the pilot, and if there is neglect on the part of the master and crew of the ship of which the pilot is in charge which cannot be shown to be unconnected with the collision they do not discharge that onus.

A pilot is entitled to the assistance of a look-out and timely reports of material incidents, and, if this assistance is not given, it cannot be said that the pilot ought to have known of incidents without being told of them, and therefore that the blame is his alone

Where a pilot was navigating a ship at full speed in narrow waters among a large number of vessels and the course taken was such that it must have been obvious to the master either that the pilot did not know of a risk, or that, if he did know, he was undertaking an unwarrantable risk, it was held that the master owed a duty to his owners and to the pilot to call the pilot's attention to the risk, and was not justified in doing nothing.

APPEALS from two decisions of the Court of Appeal varying decisions of Hill, J.

The question arising on the facts in each case was as to the nature and extent of the duty of the master and crew of a vessel in charge of a compulsory pilot to render assistance to the pilot.

The litigation arose out of a collision which occurred between the *Gothland* and the *Alexander Shukoff* and a consequent collision between the *Larenberg* and the *Gothland* in the South Edinburgh Channel in the Thames shortly before noon on the 4th Dec. 1916.

The *Aberdale*, the *Alexander Shukoff*, and the *Gothland*, which with several other ships had been detained in the Black Deeps, were proceeding down the channel in the order named. The *Aberdale*,

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

which was a good way ahead of the *Alexander Shukoff*, was signalled by a torpedo boat to anchor, and she turned round in the channel to pass up to the Black Deeps for anchorage. This signal, which was general, was apparently not seen by the other vessels. The *Aberdale* thus met the *Alexander Shukoff*, and the two vessels exchanged port helm signals, and were about to pass port to port, the *Alexander Shukoff* altering her course about half a point to port for that purpose. At this time the *Gothland*, which was proceeding at full speed, was rapidly overhauling the *Alexander Shukoff* on her starboard quarter, and she suddenly starboarded, intending to pass across the bow of the *Alexander Shukoff*. There was not time to effect this, and the port bow of the *Gothland* came into contact with the starboard bow of the *Alexander Shukoff*, and considerable damage was done to the latter ship.

Hill, J. held that the *Gothland* was solely to blame for the collision, and, finding as a fact that the master and crew did not report to the pilot the position of either the *Aberdale* or the *Alexander Shukoff*, he held that the defence of compulsory pilotage failed inasmuch as the pilot had not received from the master and crew the assistance to which he was entitled, and the owners of the *Gothland* had not shown that the neglect of the master and crew was not a contributory cause of the collision.

The Court of Appeal reversed this decision on the ground, first, that there was no duty to call the pilot's attention to this particular vessel before the moment when, according to the evidence, the pilot became fully aware of her position, and, secondly, that at the time the pilot himself could by the exercise of reasonable care and skill have avoided the accident. The Lords Justices therefore, accepting the advice of their nautical assessors, differed in their view of the facts, and accordingly held that the defence of compulsory pilotage had not been made out.

In the second action the *Larenberg*, which was proceeding down the Thames following behind the *Gothland*, on seeing the *Gothland* steering her course so as to run across the bow of the *Alexander Shukoff*, slowed her engines but did not stop them. After the first collision the *Larenberg* reversed her engines, but the *Gothland* came across her course before she could take all her way off, and as the result the *Larenberg* struck the *Gothland* on her port quarter and did her serious damage. The *Larenberg* was at the time also under compulsory pilotage.

Hill, J. held that both vessels were to blame and apportioned the blame as to two-thirds to the *Gothland* and as to one-third to the *Larenberg*. He also held that the fault on the *Gothland* was not solely that of the pilot, but that the fault on the *Larenberg* was solely that of the pilot, and he gave judgment for the owners of the *Larenberg* for two-thirds of the damage sustained, and dismissed the claim of the *Gothland*.

In this case also the Court of Appeal varied the judgment of Hill, J., and held that the *Larenberg* was alone to blame, but that as the fault was solely that of her pilot the *Gothland* could recover nothing.

Laing, K.C. and *J. B. Aspinall* for the appellants in the first case.

Laing, K.C. and *Lewis Noad* for the appellants in the second case.

Butler Aspinall, K.C., *Bateson*, K.C., and *D. Stephens*, K.C. for the respondents.

The following cases were referred to:

The Iona, 16 L. T. Rep. 158; 1867, L. Rep. 1 P. C. 426;
The Valasquez, 16 L. T. Rep. 777; 1867, L. Rep. 1 P. C. 494;
The Tactician, 10 Asp. Mar. Law Cas. 534; 97 L. T. Rep. 621; (1907) P. 244;
The Benue, 14 Asp. Mar. Law Cas. 24; 116 L. T. Rep. 220; (1916) P. 47; *Clyde Navigation Company* v. *Barclay*, 3 Asp. Mar. Law Cas. 390; 36 L. T. Rep. 379; 1876, L. Rep. 1 App. Cas. 790;
The Sanspareil, 9 Asp. Mar. Law Cas. 59, 78: 82 L. T. Rep. 606; (1900) P. 267;
Radley v. *London and North Western Railway*, 35 L. T. Rep. 637; 1 App. Cas. 754.

The House (Lord Birkenhead, L.C., Lords Finlay, Shaw, and Moulton—Lord Sumner dissenting in the first case, but agreeing in the second) after consideration reversed the order of the Court of Appeal in each case and restored the judgment of Hill, J.

Lord BIRKENHEAD, L.C.—It will, I think, be convenient if I read the speeches I have prepared on these matters consecutively, putting the questions, of course, separately from the Woolsack afterwards. I take first the case of the *Alexander Shukoff*.

This is an appeal from an order of the Court of Appeal dated the 12th Feb. 1919, reversing a decree of Hill, J. dated the 17th June 1918.

The action was brought by the appellants in respect of a collision in the Thames between the steamship *Alexander Shukoff* and the steamship *Gothland* during the morning of the 4th Dec. 1916. Both vessels carried pilots by compulsion of law. Hill, J. held that the *Gothland* was solely to blame and that the defence of compulsory pilotage was not made out. The Court of Appeal, while agreeing that that vessel was solely to blame, held that the defence of compulsory pilotage was made out, and accordingly this appeal has been brought.

There was considerable conflict of evidence in the trial court, and there can be no doubt that Hill, J. was right in refusing to accept the explanations and statements of facts offered on behalf of the *Gothland*. The real issue is whether the defence of compulsory pilotage has been established by the owners of that vessel.

The collision in question occurred shortly after 11 a.m. on the 4th Dec. 1916, in fine clear weather in the South Edinburgh Channel between No. 5 and No. 3 buoys. The learned judge found that the tide was on the ebb between one and two knots setting south-easterly. The *Alexander Shukoff*, a vessel of 257ft. in length, capable of eight knots, and the *Gothland*, which is 490 ft. long and capable of thirteen knots, were among a large number of other vessels which had been at anchor in the Black Deeps, and had obtained permission to proceed. As the North Edinburgh Channel was closed they all had to pass through the South Edinburgh Channel. There were therefore at the time a large number of vessels in the vicinity. The entrance to the channel is marked on the port side by No. 5 buoy.

The first ship whose manœuvres require notice is the steamship *Aberdale*, which entered the channel ahead of the other two, and when in mid-channel was ordered by a torpedo boat to anchor instantly. This signal, which was general, was apparently not seen, and was certainly not obeyed by the other

ships. The *Aberdale* swung round with her head pointing north-west and, while she was so heading, the *Alexander Shukoff* was seen about a quarter of a mile away heading in a south-easterly direction a little on the port side of the channel. As she entered the channel she was going about eight knots. The *Gothland* was seen by the *Aberdale* almost at the same moment as the *Alexander Shukoff*. She was about three-quarters of a mile away heading down channel, in a south-easterly direction, on the starboard quarter of the *Alexander Shukoff* and proceeding at full speed. The *Aberdale* and the *Alexander Shukoff* exchanged port helm signals, and passed port to port, the latter altering her course about half point to port for the purpose. The *Gothland* was about a quarter of a mile from the latter vessel and overhauling her when the signals were exchanged. She was on the *Aberdale's* starboard quarter. Both passed the *Aberdale* on courses which, though nearly parallel, were none the less converging. The evidence given on behalf of the *Gothland* was not evidence of truth, but certain facts are nevertheless established. This vessel was proceeding at full speed in narrow waters among a large number of ships. The pilot was in charge. The master and second officer were on the bridge, the chief officer was on the forecastle head, and there was a man in the crow's-nest as look-out man.

The pilot stated that he first saw the *Alexander Shukoff* when she was one or two ships' lengths away, and in cross-examination put the distance at 700ft. No one reported her to him. The master did not see her until they had passed ahead of the ship at anchor, and he said that there were so many ships about that they could not notice any one in particular. The second officer, who was near him, first saw her when she was about a ship's length off a little abaft the beam, and his observation was so perfunctory that he seems to have thought that she was overtaking the *Gothland*. The chief officer noticed the *Alexander Shukoff* when she was on their port side, perhaps half a ship's length away, at the moment when they were manœuvring to pass round the stern of the ship at anchor, but he obviously did not think it his duty either to keep a look-out or to report. It does not appear whether the look-out saw her, but certainly he made no report to anyone. Nor was any report made to the pilot as to the *Aberdale*. In these circumstances the *Gothland* continuing to come on, the two ships collided at a fine angle, the starboard bow of the *Alexander Shukoff* coming into contact with the port bow of the *Gothland*. Hill, J. held that the *Alexander Shukoff* did nothing wrong, that the *Gothland* was proceeding at a reckless and excessive speed, and did nothing to avoid the collision until it was too late, because no one on board was paying attention to the other vessel. The learned judge did not decide whether it was the duty of the master to interfere having regard to the rate of speed, which in his view made the duty of rendering every possible assistance to the pilot all the greater. This duty, which should have been present to the minds of all the officers, was not discharged at all. In his view the failure to report a ship which was being overtaken and on a converging course fine on the *Gothland's* bow, left the pilot without proper assistance, and therefore the defence of compulsory pilotage failed.

The Court of Appeal reversed this decision on the ground, first, that there was no duty to call the pilot's attention to this particular vessel before the moment when, according to the evidence, the pilot became fully aware of her position, and, secondly, that at that time the pilot could by the exercise of reasonable care and skill have avoided the accident. The Lords Justices, therefore, accepting the advice of their nautical assessors, differed in their view of the facts. On the question of speed, they pointed out that interference with the pilot is only justified in extreme cases, of which this was not one. They therefore held that the defence of compulsory pilotage had been made out.

In cases where such a defence is set up there are two factors which must be taken into account. The first is that this defence, which is of statutory origin and has been repeated in successive Acts of Parliament, is part of the settled policy of the country, and is not to be narrowed or diminished in force by decisions of the courts. The second is that this rule, which is intended as a measure of security, does not mean, and must not be taken to mean, that a pilot when once he is in charge of a vessel is so circumstanced that the master and crew owe him no duty to inform him of circumstances which, whether he has noticed them himself or not, are material for him to know in directing the navigation of the vessel. The master and crew are not mere passengers when a pilot is on board by compulsion of law. The pilot is entitled to their assistance, and to apply the defence of compulsory pilotage to a case where the accident would have been averted if such assistance had been given though in fact it was not, would defeat the policy which has created the defence, and so far from increasing the safety of navigation would actually increase its risks. The law has been laid down in a number of cases, though not, I believe, in this House. In *The Iona* (16 L. T. Rep. 158; (1867) L. Rep. 1 P. C. 426), the Judicial Committee, after pointing out that it was for defendants to make out the defence and that therefore they must prove not merely that there was fault or negligence on the part of the pilot, but that the damage was occasioned exclusively by such default, proceeded at p. 435 to point out that if the pilot had been made earlier aware of the position of a certain barge the accident might never have occurred. Thus the neglect of duty on the part of the look-out man not only might have been conducive to the disaster, but was in all probability the ultimate cause of it. Again, in *The Velasquez* (16 L. T. Rep. 777; (1867) L. Rep. 1 P. C. 494) the Judicial Committee laid down the rule in these terms: "The cases have clearly established that if, for any act or omission which contributed to the accident the master or crew is to blame—then, although the pilot is also to blame, the owners are not exempted from liability," and the judgment adds: "That it is the duty of the crew, by means of a sufficient look-out, to give to the pilot the earliest possible information of an approaching vessel and accurately to describe her position was the principle enforced in the case of *The Iona*, and in the present case it may reasonably be inferred that if the pilot had received earlier information he would not have given the order to starboard at all or would have given it at a time when on a starboard helm he could have gone clear of the barque." In *The Tactician* (10 Asp. Mar. Law Cas. 534; 97 L. T. Rep. 621; (1907) P. 244) Lord Alverstone, L.C.J. stated (at p. 250) the rule in these

terms: "The cardinal principle to be borne in mind in these pilotage cases . . . is that the pilot is in sole charge of the ship," and he expressed his agreement "with the opinions of the very learned judges from Dr. Lushington downwards . . . as to the danger of a divided command and of interfering with the conduct of the pilot and that if anything of that kind amounts to an interference or a divided command serious risk is run of the ship losing the benefit of the compulsory pilotage. . . . But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out and a well-found ship. . . . The cases in which the master has to interfere at all with the pilot very rarely occur . . . but there is or may be a distinction between interference and bringing to the pilot's notice anything which the pilot ought to know. The pilot has a good many things to attend to, particularly in a place like the Thames, and certainly it is not putting the case too high to say that he is entitled to full information with regard to any surrounding fact which it is important he should know."

It must be borne in mind that, as Lord Selborne pointed out in *Clyde Navigation Company* v. *Barclay* (3 Asp. Mar. Law Cas. 390; 36 L. T. Rep. 379, 1 App. Cas. 790, at p. 796), there are three things necessary to be proved: first, that a qualified pilot was acting in charge of the ship; secondly, that the charge was compulsory; and, thirdly, that it was his fault or incapacity which occasioned the damage.

Your Lordships have to apply these principles to the facts of this case. If the pilot, having received timely information of the position of the *Alexander Shukoff* and the *Aberdale*, acted so negligently as to cause the collision, there can be no doubt that the fault would be his alone. The evidence establishes clearly that so far from receiving such information in time he was given none at all. In circumstances which called for the greatest care and fullest assistance he was left to his own observation. It is obvious from his own explanation that he was not fully aware of the position and intentions of both these vessels at the time of the collision. It may be (though I am not satisfied upon this point) that he ought to have been aware, but a pilot's duty is that of controlling the navigation of the ship and his attention must at times be concentrated on some particular fact. He is entitled to have the assistance of a look-out and timely reports of material incidents. He is in charge, but he is not in charge without assistance. If that assistance is not forthcoming it is difficult, if not impossible, for the owners to say that the pilot ought to have known without being told, and therefore that the blame is his alone, for this reason, that it by no means follows that, if the pilot had been informed, as he should have been, of the respective positions of these two vessels at a time when a report ought to have been made, he would have acted as he did. When he first saw the *Alexander Shukoff* he was only a short distance away, and he was committed, at a late period in the development of events, to a course which, as events proved, brought his vessel into collision with her. Had a proper look-out been kept and had information been given him in time he would not have been placed in a position in which he found himself forced to come to a swift and peremptory decision whether to hold on or to alter his course. Even although at the actual moment of decision the collision might have been avoided if he had acted differently, it cannot be said that he would have found himself obliged to come to an instant decision at that moment, and in those circumstances, if he had received the assistance to which he was entitled. There is also another consideration which must have considerable weight—namely, that the pilot was navigating the ship at full speed in narrow waters among a large number of vessels. It cannot be contended that in this case it was the master's duty to take the vessel out of the pilot's charge, but the course taken was such that it must have been obvious to the master either that the pilot did not know of the risk to which he was subjecting the ship or that if he did know he was undertaking an unwarrantable risk. The master owed a duty to his owners and to the pilot to call the pilot's attention to the risk so that the latter might have his attention directed to the danger that was imminent unless more care was taken. Yet the master did nothing.

Your Lordships have to decide whether in these circumstances the respondents have established that the collision was due solely to the fault of the pilot. In my opinion they did not discharge that onus, but, on the contrary, there was neglect on the part of the master and crew of the *Gothland* which cannot be shown to have been unconnected with the collision.

The Lord Chancellor then read the following judgment in the case of the steamships *Larenberg* and *Gothland*:

This appeal is concerned with a collision between the steamship *Larenberg* and the steamship *Gothland*, which took place very shortly after the collision between the latter vessel and the steamship *Alexander Shukoff*. It is unnecessary to recapitulate the facts up to the time of the first collision as I have already fully stated them in my speech in that case. The steamship *Larenberg* is a vessel of 326ft. in length and at the material time was in ballast. At the moment she entered the South Edinburgh Channel she was following the *Alexander Shukoff* and ahead of the *Gothland*, but before the first collision the latter ship had passed her, and but for that collision the events which happened could not have taken place. At that time the *Larenberg* was astern of the other two vessels and further over to the east side of the Channel. The *Gothland's* case was, shortly, that, after the first collision was over, she was again on her down channel course when she had to manœuvre for a vessel at anchor, and the *Larenberg* overtaking her failed to keep out of her way. The case for the *Larenberg* is that as a result of the collision the *Gothland* came across the course of the *Larenberg*, which had slowed down before the first collision and had reversed about the time that event took place, and that in consequence of the *Gothland's* coming across the *Larenberg's* course she collided with the latter before that vessel had lost all her way.

The evidence was very conflicting, and Hill, J. accepted the evidence of the *Larenberg's* pilot with one exception. This witness's evidence was that the *Larenberg* was following the *Alexander Shukoff* at about the same speed, and when squared up in the channel was about 500ft. or 600ft. off on the port quarter. The *Gothland* approached the *Alexander Shukoff* from the southward towards

the east, and the first collision took place when the *Larenberg* was about 300ft. behind the *Shukoff*, still on her port quarter. Before that collision the *Larenberg's* pilot slowed his engines and went inside No. 5 buoy, and at the time of that collision his engines were going slow. After that collision the *Gothland* passed ahead of the *Shukoff* across her bows, being on a starboard helm. The *Larenberg* at the time of that collision went full speed astern and the *Gothland* also was going astern, with the result that the *Larenberg's* stem came into contact at right angles with the port side aft of the *Gothland*, which had by then stopped her engines. The place of this second collision was near No. 3 buoy. The witness estimated that three minutes elapsed between the two collisions. He was of opinion that the *Gothland* could have avoided the *Larenberg* without getting into shoal water by going ahead on her port engine. As the learned judge pointed out, the *Larenberg* was only 100 yards behind the *Gothland* when the first collision occurred, and the place of the second collision was only about 500 yards away from the spot where the former occurred, and therefore the *Larenberg's* engines cannot have been reversed so soon as the witness said, and consequently not so soon as they ought to have been.

The *Gothland's* pilot attributed his actions to the need for avoiding a vessel at anchor right across the channel. It is a remarkable circumstance if this were the case that he did not notice her until after the first collision; the omission means that he did not observe a vessel anchored right across his course in a narrow channel along which he was proceeding at full speed. Nor do the other witnesses appear to have seen this vessel. It is obvious that the pilot was seeking for an excuse, but, even if this vessel was where he places her, the excuse will not avail, as he ought to have seen her before and, moreover, he did not know, nor was he informed, that he was bringing the ship across the *Larenberg's* course. The evidence for the *Gothland* was conflicting and difficult to understand. It is not remarkable therefore that the learned judge found it impossible to reconcile this evidence with the known facts. He found both vessels to blame, but held that the *Gothland* was not, but that the *Larenberg* was, protected by the defence of compulsory pilotage. The Court of Appeal, while agreeing that the position of the *Gothland* was due to the negligence of those placed in charge of her, was nevertheless of opinion that the *Larenberg's* pilot could have avoided the *Gothland* if he had exercised proper care and skill, and therefore held the *Larenberg* solely to blame. As, however, the court held that the negligence was that of the pilot who was in charge by compulsion of law they gave effect to the defence of compulsory pilotage. From this decision the *Larenberg* has appealed to your Lordships' House. In coming to a decision upon these facts it is important to observe that the *Larenberg* should have reversed her engines at the very moment of the first collision, as indeed her pilot claimed that she did. It is impossible in this respect to acquit her of an act of negligence, which probably led to the collision and certainly made the shock more severe than otherwise it would have been. The *Gothland* was also negligent not only in respect of the earlier collision but also by not taking proper steps to clear the *Shukoff* and avoid coming across the channel. Had she not come across in continuing negligence the second collision would have been avoided. It is clear that the master and crew of the *Gothland* did not report the *Larenberg* to the pilot, who, according to his own story, did not know of her until, hearing a shout from her, he saw her about half a ship's length away. This conduct shows that the pilot and the master and crew were guilty of negligence right up to the time of the second collision. This is not in my view the simple case of a vessel which was negligent but whose negligence was not the cause of the accident. In this case the *Gothland* had by negligence got into a position which contributed greatly to the second collision. It was her duty to do all that she could to prevent any untoward result of that negligence. She failed in that duty and it is impossible to say that in those circumstances she has proved that the blame must be placed solely upon the *Larenberg*.

Both vessels are therefore to blame, but in the case of the *Larenberg* the defence of compulsory pilotage is established. The *Gothland* cannot avail herself of that defence. As I have already stated, the first collision was a cause which contributed to the second, and, on the facts, the master and crew failed in their duty in that case. They also failed in their duty to keep a proper look-out and keep the pilot informed after the first collision. The result is that the order of the Court of Appeal must be reversed and the decree of Hill, J. restored.

Lord FINLAY.—I will read first my judgment in the case of the *Alexander Shukoff*. (*a*)

The appellants in this case, the owners of the steamship *Shukoff*, brought an action against the respondents, the owners of the steamship *Gothland*, for damage sustained by them in a collision between the two vessels which occurred in the South Edinburgh Channel in the Thames on the 4th Dec. 1916 shortly before noon. There was a counter-claim by the owners of the *Gothland*. The case was tried before Hill, J. sitting with the Elder Brethren. He decided that the *Gothland* was solely to blame and that the defence of compulsory pilotage failed. The Court of Appeal agreed that the *Gothland* was solely to blame, but held that the defence of compulsory pilotage had been established. The only question on the present appeal is as to the defence on the ground of compulsory pilotage. The *Gothland* was under compulsory pilotage, but Hill, J. held that the master and crew were also to blame for the collision on the ground that they had failed to report the *Shukoff* to the pilot and that this default had contributed to the collision. With regard to the contention that the master of the *Gothland* ought to have interfered with the pilot on the ground that the speed at which he was going was excessive and reckless, Hill, J. thought that it was unnecessary for him to express any opinion. The Court of Appeal reversed the decision of Hill, J. on the question of compulsory pilotage. They held that the collision was solely the fault of the pilot on the ground that he was aware of the presence of the *Gothland* in time to prevent the occurrence of the collision by the exercise of reasonable care and skill, and that no case had been made out to show that the master ought to have interfered with the pilot.

The *Shukoff* was proceeding down the South Edinburgh Channel, and at the same time a considerable number of other vessels which had been detained

(*a*) Lord Finlay subsequently refers to this vessel as the *Shukoff*.

in the Black Deep and its vicinity, and had received permission to put out to sea, were also proceeding in the same direction. One of these ships was the *Gothland*, which had a speed of thirteen knots as against the eight knots of the *Shukoff*. Those on board the *Shukoff* first noticed the *Gothland*, according to their preliminary act, about half-a-mile distant astern and on the starboard quarter of the *Shukoff*. A steamship called the *Aberdale* had been proceeding down the river a good way ahead of the *Shukoff*, when she was signalled by a torpedo-boat to anchor at once. The *Aberdale* turned round in the Channel in order to pass up to the Black Deep for anchorage. She met the *Shukoff*, which was coming down, and the two vessels were about to pass one another port to port. They had exchanged signals for that purpose, and the *Shukoff* had ported half a point. The *Gothland* was overtaking the *Shukoff*, and for some reason starboarded and attempted to pass between the stem of the *Shukoff* and the stem of the *Aberdale*, these vessels being then at no great distance from one another. The port bow of the *Gothland* struck the port bow of the *Shukoff*, doing a good deal of damage. The pilot of the *Gothland*, when asked in cross-examination why he did not port so as to pass clear of the *Shukoff*, gave as his excuse for not doing so that there was a vessel on his starboard bow a little further down the Channel which made this impossible, but there is no confirmation of this statement, and it cannot be accepted.

No report was made by the look-out or officers on board the *Gothland* to the pilot as to the presence either of the *Shukoff* or of the *Aberdale*. It appears from the evidence that no reports whatever were made on board the *Gothland* of any ships in the Channel. It is said that there were so many ships that such reports would have been useless, as the pilot could see the vessels himself, and that reports might have distracted his attention from the proper discharge of his duties. I quite agree that at some points in the Thames, owing to the multitude of shipping, it must be impossible to report every vessel, and that to attempt to do so might be mischievous. It is, however, impossible to justify the course which those on board the *Gothland* followed in reporting nothing at all. From time to time there must be cases in which a report is desirable even in so crowded a river if a vessel is in such a position as to call for some action on the part of the pilot in charge. Even if the pilot can see the vessel himself his attention may for the moment have been diverted elsewhere, and a report would ensure that he becomes aware of a possible source of danger.

Hill, J. found that there was default on the part of the master and crew of the *Gothland* in not reporting the *Shukoff* as the *Gothland* overhauled her, and that this contributed to the collision. But the Court of Appeal found that the pilot of the *Gothland* was perfectly aware of the presence of the *Shukoff* in time to enable him to avoid her, and that the fault was absolutely his. I should not be prepared to hold that the failure to report the *Shukoff* contributed to the collision. The *Gothland* had been overhauling her for some time, and it is obvious that the statement of the pilot that he saw her himself is true. He undertook the somewhat risky manœuvre of taking his vessel across her bows, trusting no doubt to the superior speed of the *Gothland* to carry him through this manœuvre in safety.

But the failure to report the *Aberdale* stands on a very different footing. The pilot states that he did not notice the *Aberdale*. Her presence proceeding up the channel a little on the port bow of the *Shukoff*, which was coming down, and at no great distance from her, was a matter which certainly should have been reported to the pilot. It may be that the pilot was not speaking the truth when he said that he did not see her. Indeed some of his evidence was of such a character that it is impossible to attach much importance to any unsupported statement of his. But it is quite possible that he is speaking the truth in this instance. His attention may have been concentrated on the *Shukoff*, across whose bows he was about to take the *Gothland*. The appearance of the *Aberdale* proceeding up channel after she had turned was a new phenomenon which ought to have been reported so as to call the pilot's attention to her. Her presence in that position was a most material element in determining as to the propriety of attempting to cut across the bows of the *Shukoff*.

In my judgment it is impossible to accept the proposition that there is no duty to report anything that the pilot can see for himself. The fact that the master or officer in charge of the ship can see an object does not excuse the failure of the look-out to report it. Apart from the fact that two pairs of eyes are better than one, the attention of the officer in charge may have been for the moment turned in some other direction. The pilot is there to take charge of the ship, and in doing so he is entitled to the same assistance from the look-out as the master or officer would in ordinary course receive. I think that the failure to report the *Aberdale* under the circumstances was inexcusable. The principle on which the master and crew of the *Gothland* acted, that they need report nothing on the ground that the pilot, if he uses his eyes, could see for himself, is at once novel and dangerous. The attention of the pilot ought to be called by a proper look-out to the appearance of anything which should be taken into account with reference to the proper navigation of the ship. If, in the present case, his attention had been called to the presence of the *Aberdale* it might have led him to think twice before he attempted to cut in across the *Shukoff's* bows between her and the *Aberdale*.

It was alleged on behalf of the *Shukoff* that the speed of the *Gothland* was reckless and that it was the duty of the master at least to give some warning to the pilot on this score. The *Gothland* was going at fifteen knots and there was a great deal of shipping about, but, on the other hand, it has been urged that with a good speed the vessel answers to her helm more readily and therefore that the speed really made for safety. The question of speed is a matter for the pilot in charge of the ship, and it might be productive of danger if your Lordships laid down any rule of conduct which might appear to encourage interference with the pilot. Except in extreme cases, and under very special circumstances, unasked advice might rather tend to worry and distract the pilot in the discharge of his very responsible duties.

I agree with the Court of Appeal that no circumstances existed in the present case which called for any interference by the master of the *Gothland* whether in the way of advice or otherwise. Hill, J. expresses no opinion upon this point.

But on the ground which I have already stated—failure to report by the look-out—I think that the collision cannot be held to be the fault exclusively of the pilot and that the defence on the ground of compulsory pilotage of the *Gothland* fails, and I think, therefore, that the judgment of the Court of Appeal must be reversed.

I now proceed to deal with the collision between the steamship *Larenberg* and the *Gothland*.

The *Larenberg* is a Dutch steamer of 3625 tons gross, and she came into collision with the *Gothland* within a few minutes after the collision between the *Gothland* and the *Shukoff*. An action for damage was brought by the owners of the *Gothland*, and there is a counter-claim by the owners of the *Larenberg*.

Hill, J. found that both ships were to blame, the *Gothland* to the extent of two-thirds and the *Larenberg* to the extent of one-third, but in the case of the *Larenberg* he held that the defence of compulsory pilotage had been established. The Court of Appeal held that the *Larenberg* was solely to blame and that the defence of compulsory pilotage was made out.

In this case it appears to me that Hill, J. was right in finding that both the *Larenberg* and the *Gothland* were to blame. The *Larenberg* came down the South Edinburgh Channel behind the *Gothland* and more to the east. She had the *Gothland* on her starboard bow. She was under compulsory pilotage, and the pilot, apprehensive of danger ahead from what he saw of the behaviour of the *Gothland*, put her inside No. 5 buoy so as to pass down with that buoy on his starboard side and slowed down his engines. He witnessed the collision between the *Shukoff* and the *Gothland*, and says that he at once reversed his engines. The *Gothland*, after the collision with the *Shukoff*, angled off towards the shoal water to the east of the channel. She was so angling across, abreast of No. 3 buoy, when the *Larenberg* came down the channel, and, going at about four knots, struck her on the port quarter nearly at right angles.

We are advised by our nautical assessors that if the engines of the *Larenberg* had been reversed immediately when the first collision—that of the *Shukoff* and the *Gothland*—took place the collision between the *Larenberg* and the *Gothland* would in all probability not have happened at all, or, at all events, that the violence of the blow would have been much less than it was. This advice is in accordance with that given by the Elder Brethren in the Admiralty Court, and I think that we should act upon it. The *Larenberg*, therefore, must be held to blame. As regards the *Gothland*, she clearly was in fault with regard to the second collision, as she had been with regard to the first. The fact that she was angling across the channel in the manner I have described was due in the first instance to her own negligence which brought about the collision with the *Shukoff*. I am further of opinion that there was negligence on the part of the *Gothland* after the first collision in two respects. Her look-out was again defective. Those on board her were unaware that the *Larenberg* was coming down the channel until she was close upon her, and, in my opinion, if they had been so aware the *Gothland* could, by porting, have got out of the way of the *Larenberg*. For these reasons I think the judgment of Hill, J. that both vessels were to blame was right.

Both the *Larenberg* and the *Gothland*, however, raised the defence of compulsory pilotage. In the case of the *Gothland* that defence must fail as the master and crew failed to report the *Larenberg*, and therefore the fault of the negligence subsequent to the first collision cannot be imputed solely to the pilot, and it was by the failure of the look-out on board the *Gothland*, as well as by the default of the pilot, that the first collision had taken place, bringing the *Gothland* into the way of the *Larenberg*. The *Larenberg* was also under compulsory pilotage, and there is nothing in her case to show that any blame can be thrown upon the master and crew, so that that defence in her case is established.

The decision of the Court of Appeal that the *Larenberg* was solely to blame for this collision proceeds, in my opinion, upon a mis-application of the doctrine acted upon in the case of *The Sanspareil* (9 Asp. Mar. Law Cas. 59, 78; 82 L. T. Rep. 606; (1900) P. 267). The principle of law applied in the *Sanspareil* case is very old. In that case it was held by the Court of Appeal that the tug with a vessel in tow was guilty of bad seamanship and negligence in keeping her course and speed so as to cross in front of the Channel Fleet, which was proceeding up the Channel. The Court of Appeal, however, held that that initial negligence on the part of the tug was not really part of the effective cause of the subsequent collision, which was solely due to the manner in which the *Sanspareil*, one of the vessels of the fleet, was handled.

It is often a question of great nicety whether the negligence of the plaintiff was in the transaction itself or occurred at an earlier stage of the history. In the case of the *Sanspareil* it was held that it was not really part of the incidents of the collision itself, but was entirely antecedent. In the present case it seems to me clear that the negligence of the *Gothland* was in the transaction itself which immediately led to the collision, and that the ordinary rule of contributary negligence is applicable.

I therefore think that in this case judgment should be entered that both vessels were in fault, but that the *Larenberg* is exonerated on the ground of compulsory pilotage.

Lord SHAW.—In these cases I desire to say to your Lordships that in the course of considering them I was favoured with the perusal of the judgment of Lord Finlay, and I so entirely concur in the statement of the facts of those cases that my noble and learned friend gave, and the verdict and reasons for which he has pronounced that I feel it not to be incumbent upon me even to presume to add to or vary his judgment. I make this exception only to pronounce one sentence and it is in reference to the case of the *Shukoff*. When a ship is put under compulsory pilotage it is no doubt true that the entire control of her movements is under the command of the pilot so charged with the vessel. It is not, however, in any sense true that the pilot is thus charged with a vessel deprived of the ordinary and proper services of her crew. It would be a strange result if it were so. The testing instance is the case of the man on the look-out. His responsibility as the servant of the vessel remains, and if there are degrees in such a case it is, of course, specially acute when the vessel is under compulsory pilotage. If it were not so the situation in law would indeed be peculiar, because it would place the pilot, who presumably was in a position where exceptional

skill and knowledge are required for the navigation of the vessel, in a situation in which he had to render those services to it deprived of the ordinary and elementary facilities for navigation which were afforded by the active and vigilant services of the man on the look-out. I do not think that the law countenances either such reasoning or such an absurd result. If such services are not rendered, and that materially contributes to the collision, the ship fails to obtain a quittance of liability by reason of the compulsory pilotage. I have that fully in view when I pronounce my adherence to the views given by my noble and learned friend.

Lord MOULTON.—I will give my opinion first in the case of the *Alexander Shukoff*.

The litigation in the case of the owners of the steamship *Shukoff*, and in the associated case of the owners of the steamship *Larenberg* against the same defendants, arises from two collisions which took place in the Thames on the morning of the 4th Dec. 1916.

The vessels concerned had been at anchor through the night in the Black Deeps in company with a considerable number of other vessels which were waiting for daylight to proceed down the South Edinburgh Channel on their respective voyages. The *Shukoff* was an iron steamship somewhat over 250ft. long and was proceeding to Dunkirk laden with a cargo of coals and was at the time moving with a velocity of about eight knots through the water. The *Gothland*, which was a much larger vessel, about 490ft. in length fitted with twin screws was starting on a voyage to New York. At all material times her engines were working full speed ahead and she was making about thirteen knots. Both vessels were under compulsory pilotage.

The case is complicated by the circumstance that the Courts below have come to the conclusion (and, in my opinion, rightly) that the case set up on behalf of the *Gothland*, mainly on the evidence of the pilot of that vessel, cannot be relied upon in any way, and it is indeed in its important features obviously fictitious. Nevertheless, the circumstances of the actual collision are not difficult to arrive at. The *Shukoff* was originally coming down the channel considerably in advance of the *Gothland* which would appear to have been delayed somewhat in her course by having to pass round a vessel lying much higher up in the channel. Inasmuch as the *Gothland* was going at the high speed of thirteen knots an hour, it rapidly overtook the *Shukoff*. If any reliance is to be placed on the evidence of the pilot of the *Gothland*, the time at which he first became aware of the *Shukoff* as a ship to which he had to pay attention, was when she was a little forward of his port beam and about 700ft. away. I can see no reason for doubting the substantial accuracy of these figures. They are not essential to the decision of the case.

Some little time before this, the steamship *Aberdale* had been passing down the channel much in advance of the other two vessels, having started considerably before either of them. But she had met a torpedo boat, which promptly directed her to anchor. Instead of anchoring on the spot, the *Aberdale* turned round in the channel and proceeded to pass up it towards the north-west before coming to an anchor. In so doing, she became aware of the *Shukoff* ahead of her and coming down the channel on her port bow and exchanged port helm signals with her, in consequence of which the *Shukoff* quite properly altered her course slightly to starboard.

The position of the three vessels, therefore, at the moment when it is necessary to consider them, was that the *Gothland* was proceeding at a speed of thirteen knots down the channel, the *Shukoff* was also proceeding down the channel at about eight knots an hour on an almost parallel course nearly level with the *Gothland*, but lying about 700ft. on her port side. The *Aberdale* was lying still further to the north-eastern side of the channel and was coming up the channel and about to pass the *Shukoff* port to port.

It was when the three ships were in these positions relative to one another that the *Gothland* undertook the extraordinary manœuvre which led to the accident. It attempted to pass the *Shukoff* by shooting across its bows. Even if the *Aberdale* had not been there, this would have been a sufficiently improper manœuvre, but inasmuch as the *Aberdale* was coming up the channel to pass on the further side of the *Shukoff* it seems almost incredible that the pilot could have adopted such a rash and dangerous course if he had been aware of the position and movements of the *Aberdale*. It is evident that the pilot of the *Gothland* in trying thus to rush across the bows of the *Shukoff* must have starboarded and gone full speed ahead. In spite of his great speed, he failed to clear and his port bow collided with the starboard bow of the *Shukoff*, and this is the collision with which we are concerned in this case. So soon as it occurred, the *Gothland* was obliged to stop and reverse, no doubt in order to prevent his getting into trouble with the *Aberdale* and also to allow the latter to continue on its course up the channel. His own statement is that he did it to avoid a small steamer which he had not previously noticed and which lay in mid-channel. But there is no ground for believing the truth of this statement, unless it refers to the *Aberdale* itself.

That the collision was due to the improper navigation of the *Gothland* is clear beyond dispute. Indeed, it has been "practically conceded" (to use the words of the judge at the trial) "throughout." The defence relied upon by the owners of the *Gothland* is that of compulsory pilotage, namely, that the collision was wholly the fault of the pilot. If this is established, the plaintiff's case fails. But we must bear in mind that the fact that the pilot was guilty of negligence in directing the movements of the vessel is not sufficient by itself to establish such a case.

The further question arises whether those on board the ship had given to him the assistance which he was entitled to receive from them in order to enable him to fulfil his duty. I am content to accept the law on this point as laid down by the president of the Court of Appeal in his judgment in this case: "The pilot is entitled to the fullest assistance from the officers and crew of the vessel of which he is in charge by compulsion of law and that assistance includes the keeping of a good look-out so that the pilot should be informed of the position and movements of and possible danger to other ships."

We must ask ourselves, therefore, whether in this case the pilot received this assistance from the officers and crew of the *Gothland*. The evidence shows clearly that he received from them no such assistance at all. Nothing was reported to him

by them from the beginning to the end of the history. He was left entirely to his own unaided observation. This is the finding of the learned judge at the trial, and it is not differed from by the Court of Appeal, and I agree with it entirely. Indeed, it is not denied by the defendants.

The real defence set up by the defendants is not that this duty was in fact performed by the master and crew of their ship, but that it would have made no difference if it had been performed. They say that the pilot either knew all that they could have reported to him, or that if he did not know it, he ought to have found it out for himself. The first alternative in this excuse is negatived by the evidence. The pilot states that he had not become aware of the existence of the *Shukoff* until a late stage, and he excuses himself for this by saying: "I was too much engaged noticing my own ship to take notice of the other." And so far as the evidence shows, he was never aware of the proximity of the *Aberdale* or that it was travelling up the channel on its way to pass the *Shukoff* port to port until after the collision. Both these facts were matters of prime importance which should have been reported to him.

The second alternative in the excuse is at once more specious and more dangerous. The defendants say that the pilot ought to have found out these things for himself, and that, therefore, they are excused from having omitted to report them to him. Now it must be remembered that the pilot has many things to think of, especially where, as in the present case, he is leaving the port in company with other vessels and new incidents may at any moment arise. He needs, therefore, to be in a position of feeling that he can give his whole attention to his duties of management secure that all relevant occurrences will be duly reported to him. No doubt one of his duties is to observe that which is going on around him, but compulsory pilotage is not a case where the law intends that the pilot shall double the *rôles* of captain and crew and "look-out." When the matter relates to vessels or occurrences within the sphere of that which may reasonably influence the action of the pilot, it is in my opinion no adequate excuse to one whose duty it is to report that he thought that the pilot ought to discover it without his assistance.

Let me examine for a moment the issue that we are deciding. It is a severe, but no doubt a just, law that says that a shipowner whose ship has been damaged through the careless navigation of another ship shall have no redress in the case of compulsory pilotage, if the accident be due solely to the negligence of the pilot. But the law does not unconditionally shift the responsibility of a ship and crew to the shoulders of one man. To justify the application of the law, the pilot must be a duly instructed pilot. The master and crew of the ship are not freed from their obligations of watchfulness and proper service, but the recipient of these services is now the pilot and the condition of the owner receiving the benefit of the provision is that his master and crew should have fulfilled these obligations in all material respects. It is for this reason that I scrutinise so closely such suggestions as that: "Although I ought to have reported the matter to the pilot, yet he ultimately found it out himself, or ought so to have done in time to enable him to avoid the accident."

This is not a question of negligence between two ships which are equally responsible for their own proper navigation, but a question whether the owner of a ship is entitled to benefit by the provision which relieves him from liability on the ground of compulsory pilotage. He does not earn the exemption if he has not performed the part incumbent on him. If it was the duty of his master and crew to report, and they did not do so, he is not entitled to excuse himself in the way suggested, for it may well be that if notice had been duly given to the pilot at the proper time, he would never have permitted the ship to have got into the difficulties from which he failed to extract himself. In such a case the owner would not, in my opinion, be entitled to the benefit of the provision, because he would have failed, in a material respect, to fulfil the fundamental condition of his exemption from liability.

Speaking for myself, I look in vain for any excuse for the master and crew of the *Gothland* having thus wholly made default in their duty to report to the pilot, more especially in respect of the presence and position and movements of the *Shukoff* and the *Aberdale*. The excuse of the master is: "There were so many ships under way as a matter of fact that we could not notice any one ship in particular." This excuse comes badly from the mouth of one whose ship is coming through this alleged crowd of ships at a speed of thirteen knots. But I do not believe this statement of the master. There might have been other ships in the neighbourhood, although there is no evidence of it, but these must, in general, have been ships with which the *Gothland* had no concern, while both the *Shukoff* and the *Aberdale* were ships of which she was bound to take particular notice, not only at the moment of the manœuvre, but even before.

The opinion of the learned judge at the trial was not only that the collision was due to the negligence of the *Gothland*, but that this default on the part of the master and crew to give to the pilot the assistance he had a right to demand from them, is fatal to the plea of compulsory pilotage which the defendants have set up. I am in entire agreement with this decision, and am, therefore, of opinion that this appeal should be allowed and the judgment of the learned judge at the trial restored, and that the appellants should have their costs here and in the court below.

There is another consideration which I have not allowed to influence me in arriving at the conclusion that the plea of compulsory pilotage is not made out, because it is not necessary to enable me to arrive at that conclusion. But it is a matter which comes into such prominence in this case, and, in my opinion, is one of such importance, that I cannot refrain from dealing with it.

When the pilot of the *Gothland* starboarded to rush across the bow of the *Shukoff*, and thus got himself into difficulties with the advancing *Aberdale*, the chief officer of the *Gothland*, who was standing by him on the bridge, must have been aware of the danger that he was thus recklessly incurring. In my opinion, it was the duty of the master to call the pilot's attention to the danger that he was thus voluntarily running. In saying this, I am not suggesting that such a crisis had arisen as to justify the master in taking the ship out of the control of the pilot, although it is settled law that in very extreme cases it is his duty so to

do. But, short of cases such as that, there must be many cases in which the action of the pilot is so obviously dangerous to the safety of the ship that it is the duty of the master to call the pilot's attention to it. It may be that the pilot has failed to perceive something gravely affecting the course he ought to take, or that he has failed to interpret rightly what he has seen. Whether omissions such as this are the cause of a dangerous manœuvre, or whether it is the wilful or perverse choice of the pilot is a matter which the master cannot decide. Therefore, where, as in the present case, a glaring and very serious risk is being run for no apparent justification, it may well be, and I think it was in this case the duty of the master to call the pilot's attention to the risk he is running, so as to prompt him to reconsider his course of action. I fully realise the absolute authority of the pilot and the importance of not interfering with him, but it is, in my opinion, no more an interference with his authority to call his attention to such a matter in a proper case than it is an interference with him to tell him of something which he might himself see, but may have allowed to pass unnoticed. The case where a master is bound thus to point out to a pilot the risk he is running will be rare, because it is manifestly the wiser course to refrain from so doing in ordinary cases. Whether any particular case comes within the class where the master is justified or bound to call the pilot's attention to the matter, so that he may reconsider his action, must be a matter of judgment in the circumstances of each case, but, personally, I think that in the present case the master ought to have done so, and that, if he had done so, the collision would probably have not occurred.

Lord MOULTON's judgment in the case of the *Larenberg* was as follows:—

The collision which has given rise to this litigation is closely connected with the collision between the *Shukoff* and the *Gothland*, which has been dealt with by this House, in the judgment which has just been delivered.

The *Larenberg*, which was a steamship of the length of 326ft., was coming down the south Edinburgh Channel light—so light, in fact, that its propeller was half out of the water—a little behind the other two vessels and further over to the east side of the Channel.

The judge who tried the case found the facts as follows: That the *Larenberg* saw the *Gothland* steering its course so as to run across the bows of the *Shukoff*, and, being afraid that there would be trouble between them, slowed his engines, but did not stop them. She was about 100 yards behind the *Shukoff* at the moment of the first collision. Some little time after the first collision the *Larenberg* reversed its engines, but the *Gothland* came across her course before the *Larenberg* had succeeded in taking off all her way, and thus the *Larenberg* struck the *Gothland* on her port quarter and did her serious damage. Under these circumstances the learned judge held both vessels to blame, apportioning the blame as to two-thirds to the *Gothland* and one-third to the *Larenberg*. The negligence of which he found the *Larenberg* guilty was that she should have reversed her engines earlier, and at least as soon as the first collision. He says: "The pilot of the *Larenberg*, having the colliding *Shukoff* and *Gothland* so close and so fine on the bow, had no business to speculate as to how the *Gothland* would clear, and he ought to have appreciated the risk of not at once taking off his way, and ought to have reversed at once. If he had, the collision would most probably not have happened, and certainly the blow would have been much less severe."

With regard to the *Gothland*, he finds that the negligence which caused the first collision was a contributing cause to the second collision.

I agree with the judgment of the learned judge that both vessels were to blame. I am unwilling to differ from his view that the *Larenberg* was to blame for not reversing earlier, and with regard to the *Gothland* I am of opinion not only that its negligence in bringing about the earlier collision contributed to the second, but I am also of opinion that she made no effort to extricate herself from the position in which the collision left her, excepting by allowing herself to get across the channel down which the *Larenberg* was coming, and that this itself was a continuing act of negligence which contributed to the second collision. Her pilot was primarily responsible for this, but it was no doubt partly caused by the negligence of the master and crew of the *Gothland* in not making any report to their pilot, who says that he saw nothing of the *Larenberg* until he heard a shout from her and found that she was close on his port quarter, not half a ship's length away.

For these reasons I agree with the judgment of the judge at the trial that both vessels were to blame, but the Court of Appeal has varied this judgment and has held the *Larenberg* alone to blame, although the misconduct of the *Gothland* was unquestionably the cause of the whole trouble. The Court of Appeal has done so on the ground that they are advised by their nautical assessors that if the pilot of the *Larenberg* had acted as he ought to have acted when he realised danger, this collision would not have occurred, and that this is sufficient to make the *Larenberg* solely to blame.

I differ fundamentally from this proposition. It entirely puts out of consideration the conduct of the *Gothland*, which made no effort to extricate itself from the position in which the collision left it, so as to avoid the collision with the *Larenberg*. Its not doing so was a continuing act of negligence leading up to the collision, and I lean to the belief that if the *Gothland*, after the collision, had ported down the channel so as to get into a course parallel with that of the vessels that were also running down the channel, including the *Larenberg*, the same consequences would have followed as those which the judge at the trial considers would have followed if the *Larenberg* had reversed its engines earlier, namely, that the collision would most probably not have happened, and certainly the blow would not have been much less severe.

There is great danger of mis-applying the doctrine for which *Radley* v. *London and North-Western Railway* (35 L. T. Rep. 637; 1 App. Cas. 754) is quoted as an authority. The language sometimes used by the Courts on this point would seem to imply that a ship guilty of the initial negligence is relieved from all responsibility, and that the other ship alone has to bear the task of avoiding the consequences, and that if it could have done so by proper navigation it is solely to blame. This is not the true rule. The ship guilty of the initial negligence remains bound to do everything that it

can to prevent the consequences of that negligence, and the burden upon it is to show that it has done so before it can claim that the negligence of the other ship is the sole cause of the accident. Otherwise, we should be putting a premium on taking the initiative in negligence. In the present case, the *Gothland* continued to be negligent until the moment of the collision with the *Larenberg*, and thereby aggravated, if it did not wholly cause, the danger; and although the *Larenberg* was also negligent, it must share the blame.

The negligence of the *Gothland* in the original collision is part of the negligence which caused the second collision, and as, in my opinion, it was contributed to by the default of the master and crew of the *Gothland* not duly reporting to the pilot, its consequences are not covered by the plea of compulsory pilotage. But I am of opinion also that the continuing negligence of the *Gothland* in allowing itself to get across the channel without heeding the *Larenberg* that was coming down it on its port side, was also contributed to by the same cause, so that the plea of compulsory pilotage fails altogether with regard to the *Gothland*. On the other hand, it is scarcely contested that the negligence of the *Larenberg* is covered by that plea. In both these respects I agree with the judgment of the judge at the trial, and am of opinion that the appeal of the *Larenberg* against the decision of the Court of Appeal, to the effect that it was solely to blame, should be allowed with costs, and that the plea of compulsory pilotage should be held to be good in the case of the *Larenberg* but should be disallowed in the case of the *Gothland*.

Lord SUMNER.—Both courts below have found that the *Gothland*, the overtaking ship, was at such a lateral distance and on such a bearing from the *Shukoff* when the *Gothland's* pilot himself became aware of the *Shukoff's* position, that clearly he could then have averted the collision by appropriate action. The reason given by the pilot for not doing so has been found to be false, nor does he allege that the actual position of the *Aberdale* placed him in a difficulty. I am satisfied that, when he saw where the *Shukoff* was, he must equally have seen where the *Aberdale* was, and I see no reason for assuming some explanation of his conduct arising out of the latter vessel's actual position, which he does not even offer for himself. If so, his failure to give way to the *Shukoff*, when he saw where she was and could have done so, is the sole cause of this collision.

This conclusion makes it unnecessary to come to any decision about the alleged default of the *Gothland's* officers and crew in not assisting the pilot by reporting the *Shukoff* and her change of course when she gave way to the *Aberdale*. I do not think it is open to your Lordships to consider any possible default on the part of the *Gothland's* master in not expostulating with the pilot after he had seen the *Shukoff* and still did not keep out of her way. It is a new case, not made by questions put to the witnesses. I only desire to say that I do not wish to be understood to favour either class of alleged default, in view of the importance of leaving a pilot to himself as much as possible, where he has only to use his eyes and his wits in order to be more fully informed than any look-out can make him.

As to the *Gothland's* speed, I understand the advice given to your Lordships to be that, under the circumstances, it was not excessive, and in this I concur.

In the case of the *Larenberg* I agree that she did not reverse her engines soon enough. If that had been done when engine action was first considered necessary by her pilot, the accident would not have happened. This, however, was solely her pilot's fault, and she succeeds in the defence of compulsory pilotage.

I think the *Gothland*, equally with the *Larenberg*, contributed by her negligence to bring about the collision. For this purpose it is not necessary to inquire whether that negligence consisted in the default which brought her into collision with the *Shukoff*, or in some default in her handling after she had struck the *Shukoff*, for even in the first case that default continued to operate and to determine her position up to the time of the collision with the *Larenberg*. There may even have been negligence contributing to the collision in both respects.

After she struck the *Shukoff* the *Gothland* certainly was under control to some extent, and was brought by her pilot over towards the north-east side of the channel, so as to angle across the course of down-coming traffic. As the story he tells is again not true, there is some doubt what he actually did, but it does not appear to me possible to say that the *Gothland* was simply shot across the channel in a helpless condition by reasons of the first collision. She was manœuvred into the position in which she was struck, and did nothing to avoid the downcoming traffic at all, as she ought to have done. In this state of things the *Larenberg* was never reported to her pilot, and as he was visibly and fully occupied with the position he had got into after the first collision, he ought to have had the benefit of such a report. No doubt he had seen her some minutes before, but I do not think this exonerated the *Gothland's* look-out. No doubt the *Larenberg* was the overtaking ship, but I think that the position into which the *Gothland* had got by colliding with the *Shukoff* was so exceptional that those in charge of the watch on the *Gothland* would not be justified in leaving to the *Larenberg* the whole responsibility for keeping out of the way, or in treating her as a ship with which neither they nor their pilot need concern themselves.

I am, accordingly, of opinion that the *Gothland* has not made out the defence of compulsory pilotage in the case of the *Larenberg*.

Solicitors for the appellants in the first appeal, *Thomas Cooper* and *Co.*

Solicitors for the appellants in the second appeal, *Stokes* and *Stokes.*

Solicitors for the respondents, *Pritchard* and *Sons.*

Judicial Committee of the Privy Council.

Aug. 3 *and Oct.* 19, 1920.

(Present: The Right Hons. Lords DUNEDIN and ATKINSON, and DUFF, J.)

SCRUTTON, SONS, AND CO. *v.* ATTORNEY-GENERAL FOR TRINIDAD. (*a*)

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD.

Docks—Government ownership—Damage caused to ship owing to an alleged misleading buoy—Petition of Right.

A steamship belonging to the appellants was proceeding to enter a Government floating dock under a contract for repairs. She had to pass a shoal where buoys had been placed and in avoiding it struck a concealed rock. The appellants by a Petition of Right claimed damages, alleging that the Government authorities were under contractual liability to afford safe access to the dock, and were liable for the misleading character of the buoys.

Held, that the Petition failed as there was no warranty of the safety of the particular part of the channel where the rock was situated.

APPEAL from a judgment of the Supreme Court of Trinidad, dated the 7th Jan. 1919, reversing a decision of the Chief Justice in favour of the now appellants.

Dunlop, K.C., Sir *H. A. Alcazar*, K.C. (Trinidad), and *Balloch* for the appellants.

Raeburn, K.C. and *R. F. Hayward* for the respondent.

The considered opinion of their Lordships was delivered by

Lord DUNEDIN.—The Government of Trinidad are proprietors of a floating dock which is moored in Chaguaramas Bay, the use of which they let for hire to shipowners or to ship-captains requiring it. The plaintiffs, the appellants, are owners of the steamship *Savan*. This ship being at Port of Spain, and having lost a blade of her propeller, it was arranged that she should proceed to the dock for repairs. The captain navigated the ship from Port of Spain to the bay without asking the services of a pilot, and arrived there safely at 10.10 a.m. on the 3rd March 1915. The time for the reception of the ship had been arranged for 10.30 a.m. On the ship's arrival a boat was sent to her by the dock authorities to inform the captain that the dock was not yet ready for the reception of the ship, and the captain anchored in the middle of the channel at a point about 350ft. distant from the warping buoy which is itself distant about 625ft. from the entrance of the dock. The effect of the wind on the ship as it lay at anchor was to blow the ship athwart the entrance to the dock so that she lay with her head to the eastward, the dock being directly to her north. At 10.30 a.m. the captain was informed that the dock was ready; he then requested one of the dock officials to come aboard, and Mr. Sharpe, who was in charge of the dock, came aboard. The position of the ship was such that it could not straighten on her starboard helm and enter the dock straight. The captain, therefore, determined to go round on a port helm seawards until he had sufficient room to turn completely round and head straight into the dock.

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

The bay in which the dock lies may be roughly described as pear-shaped, the dock being situated at the narrow end of the pear. The bounding land on the east has an irregular point which is the point on which Nora Villa stands. To the north of this there is shoal water, and with a view to marking the presence of a shoal the dock authorities had put a buoy with two other buoys directly to the north. The principal buoy was anchored in 3½ fathoms, and the engineer who put it there as well as the fishermen who frequented the bay were not aware that outside the line of that buoy and the two small buoys there was any danger to shipping. As a matter of fact there was a concealed rock. The captain while turning round on the port helm asked Mr. Sharpe if it was safe outside the buoy and was told it was. He directed his course close to the line of the three buoys and struck the rock.

The plaintiffs raised their action by way of a Petition of Right and claimed as damages the sum which was lost by direct injury to the ship and by demurrage while the ship was being repaired. The learned trial judge gave judgment in favour of the plaintiffs, but his judgment was reversed by the full court of Trinidad. From this judgment the present appeal is brought.

A Petition of Right must be founded on contract and not on tort. The appellants accordingly argue that in respect of the contract with the dock authorities the authorities were under a contractual liability to afford him safe access to the dock; that the buoy, as placed, was misleading, and that the ship suffering damage while passing outside the buoy showed a breach of warranty on the part of the respondent. The learned trial judge cited a number of authorities on which he relied. He sought to draw a parallel between this case and the well-known case of *Indermaur* v. *Dames* (16 L. T. Rep. 293; L. Rep. 2 C. P. 311). This may at once be put aside. *Indermaur* v. *Dames* proceeded entirely upon the fact that the defendant was in control of the premises upon which he invited the plaintiff and in which he allowed to lurk a hidden danger. It is obvious that the dock authorities were not in control of a portion of the sea in this bay in the sense that the defendant was in *Indermaur* v. *Dames*. As little can the appellants get help from the case also cited by the learned judge of *Reney* v. *Kir cudbright Magistrates* (67 L. T. Rep. 474; (1892) A. C. 264). In that case the ship was entirely under the orders of the harbour-master and bound to do what the harbour master told him; the accident occurred in consequence. Here the ship was not under the control of Mr. Sharpe nor was the captain, the actual operation of entering the dock not having begun, under his orders in any sense whatsoever.

Their Lordships accept the law as laid down in the cases of *The Moorcock* (6 Asp. Mar. Law Cas. 357, 373; 60 L. T. Rep. 654; 14 Prob. Div. 64), *The Calliope* (6 Asp. Mar. Law Cas. 359, 440, 585; 63 L. T. Rep. 781; (1891) A. C. 11), and *Reg.* v. *Williams* (9 App. Cas. 418). If the appellants could equiparate the facts in this case to the facts dealt with in those cases they would be entitled to succeed, but in their Lordships' opinion it is not possible for them so to do.

In *The Moorcock* the part of the channel which it was held that the defendants had impliedly warranted to be safe was the channel close up to the quay, without resting on the bottom of which it was impossible to use the quay. In *The Calliope*,

where upon the facts no liability was held to exist, Lord Watson, it is true, used the expression "access to the dock." His expression, however, must be interpreted *secundum subjectam materiam*, and the place which was being discussed as an access was a few feet distant from the place where the vessel was destined to lie. In *Reg.* v. *Williams* the concealed snag was close to the staith which was provided by the dock authorities for the vessel to moor at. If the wreck here had been in the jaws of the dock or even in close proximity to the warping buoy, the case might have been a parallel one, but the wreck here was in no proper sense in the access to the dock. There was an ample fairway by which the dock could be approached. All fairways fringed by a shore must have a limit, and it was a very proper thing for the authorities to do to put a buoy in a shoal where the distance to the shore was very near. But to extract from that fact a guarantee on the part of the authority that there was absolute safety on the outside, however near to the buoy a ship might go, is a proposition for which their Lordships know of no authority.

The appellants then argued that there was liability in respect of the statement made by Mr. Sharpe that there was safety outside the buoy. As a matter of fact Mr. Sharpe in so saying was telling what he believed to be true. No one knew of the concealed rock, not even the fishermen. But even had he known, for any tortious statement of Sharpe the respondent cannot be held liable, and it is clear that once it is settled that the dock authorities had not by their contract warranted that there was absolute safety outside the buoy, Mr. Sharpe had no authority to impose upon them such a warranty.

Their Lordships, therefore, come to the conclusion that the appeal fails and must be dismissed with costs, and will humbly advise His Majesty accordingly.

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

Solicitors for the respondent, *Burchells.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 1 *and* 26, 1920.

(Before BANKES, WARRINGTON, and SCRUTTON, L.JJ.)

Re AN ARBITRATION BETWEEN OWNERS OF STEAMSHIP LORD (COGSTAD AND CO.) AND H. NEWSOM, SONS, AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Arbitration — Appeal—Case stated by arbitrator—Arbitration Act 1889 (52 & 53 *Vict.* c. 49), *ss.* 7 *and* 19.

Where an arbitrator states a special case for the opinion of the court without indicating whether he is acting under sect. 7 *or sect.* 19 *of the Arbitration Act* 1889, *it is necessary to consider, in order to ascertain under which section such special case is stated, whether the arbitrator intended to part with the matter for good and all, so far as his jurisdiction over it was concerned; or whether, whilst retaining his jurisdiction, he merely sought the direction of the court upon some point which had arisen before him.*

If the language used indicates that the arbitrator desires the case to go back to him in order that he may give his final award after the court has expressed its opinion, then the special case is stated under sect. 19 *and no appeal will lie to the Court of Appeal.*

When stating a special case arbitrators should state under which section of the Act it is intended to be stated.

APPEAL from a judgment of Bailhache, J.

By a charter-party, dated the 8th April 1916, for a voyage from Liverpool to Archangel it was provided by clause 9 that the master was to prosecute his voyage with the utmost dispatch, and, by clause 14, that all losses and damage occasioned by "negligence, default, or error of judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer" were to be absolutely excepted. The vessel sailed from Liverpool on the 26th Sept. 1916, and arrived at Honningsvaag, in the north of Norway. From there, owing to the danger of German submarines, a special route to Archangel was prescribed by the British Admiralty and the Norwegian War Insurance Association; the master, however, after waiting some days, decided to proceed by another route, and reached Vardö on the 11th Oct. 1916. Subsequently the crew refused to continue the voyage to Archangel owing to reports as to the presence of hostile submarines, and in spite of the charterer's protests the voyage was abandoned and the cargo discharged. The claim of the owners for the hire and of the charterers for damages for breach of the charter-party were referred to arbitration.

The umpire found as facts: (*a*) That the voyage Liverpool to Archangel was a voyage which the charterers were entitled to order the steamer to perform and was so accepted by the owners as a voyage duly approved by the directors of the Norwegian War Insurance Association; (*b*) that it was a voyage undertaken by the charterers in sufficient time to be considered in season; (*c*) that, in disregarding the advice of the Norwegian War Insurance Association on arrival at Honningsvaag to proceed from there direct to Archangel at a considerable distance from the Norwegian coast, the captain of the *Lord* was guilty of a grave error of judgment and was influenced thereto by fear of the consequences to himself and the crew, and that his failure to sail was a breach of clause 9 of the charter-party; (*d*) that if the *Lord* had so sailed in accordance with the advice of the Norwegian War Insurance Association there was a strong probability of her reaching Archangel; (*e*) that in giving no instructions to the captain of the *Lord* at Honningsvaag to proceed on his voyage without delay the owners of the *Lord* connived at and are responsible in damages to the charterers for the failure so to proceed; (*f*) that having elected to proceed to Archangel by way of Vardö it was incumbent upon the captain to complete the voyage to Archangel; (*g*) that on the 13th Oct. the Norwegian War Insurance Association, who "undertook the responsibility which might be involved thereby," directed the *Lord* to remain at Vardö

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

pending their further instructions, and the owners instructed the captain to follow such orders; (*h*) that these orders were temporary in character, and that on the 21st Oct. 1916, permission was given to proceed. The *Lord* was accordingly timed to leave Vardö on the 23rd Oct., but in consequence of alarming reports the captain abandoned the attempt; (*i*) that, although attended by great danger, a successful passage to Archangel by the route chosen by the captain was at this time by no means an impossibility, as vessels had considerable protection from the prevailing weather as well as from the fact that there was darkness for about seventeen out of twenty-four hours in those latitudes; (*k*) that the embargo against sailing continued until the 31st Oct., when, in consequence of the lateness of the season and the weather conditions prevailing, the Allied Governments directed that a number of steamers of which the *Lord* was one should not proceed to Archangel; (*l*) that the voyage was abandoned as from that date and was frustrated; (*m*) that the owners were justified in withdrawing the steamer in consequence of the non-payment of hire, and that the measure of their damages was the charter-party rate of hire and expenses as per charter-party up to the date of discharge of the steamer at Trondhjem at noon on the 23rd Nov. 1916; (*n*) that the owners committed a breach of clause 9 of the charter-party, and I assess the damages for this breach at 4586*l.* 11*s.* 4*d.* The award concluded:

"20. Subject to the opinion of the court upon any point of law, I find that there is nothing due by the owners to the charterers, but that there is due by the charterers to the owners the sum of 1840*l.* 9*s.* 9*d.* in full settlement of all accounts. . . .

"21. The question for the opinion of the court is whether upon the true construction of the charter-party and the facts stated by me the decisions at which I have arrived are correct in point of law. If they be correct my award is to stand, but if incorrect in any particulars I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the court."

Bailhache, J. (15 Asp. Mar. Law Cas. 19; 123 L. T. Rep. 64) held that the decision of the master not to follow the prescribed route was an error of judgment as to route, and not an error of judgment "in the management or navigation" of the ship, and that consequently the owners were not protected by the exceptions in clause 14 of the charter-party, and upheld the award.

The owners appealed.

The respondents, the charterers, took the preliminary objections that no appeal lay.

The Arbitration Act 1889 (52 & 53 Vict. c. 49) provides by

Sect. 7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—(*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court. . . .

Sect. 19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a 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.

Le Quesne (*MacKinnon*, K.C. with him), for the respondents, took the preliminary objection that no appeal lay to the Court of Appeal on the ground that the award was not final, and was not stated under sect. 7, but under sect 19 of the Arbitration Act 1889. He referred to

Re Holland Steamship Company and Bristol Steam Navigation Company, 95 L. T. Rep. 769.

Neilson, K.C. and *Jowitt* for the appellants.—The award is a final award. It is not the less a final award, because the umpire said: "If incorrect in any particular, I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the court." A case is always sent back to the arbitrator under sect. 10 of the Act if the court disagrees with the arbitrator in point of law. The umpire was only requesting that that should be done which the court would do of its own accord. An arbitrator cannot be expected to indicate all possible views, and to say what is to be done in every case, according as one view or other of all the possible views is taken by the court. The question in each case is whether the arbitrator is giving his decision without the aid of the court, or whether he is asking the court to help him to the proper decision:

Re Knight and Tabernacle Building Society, 67 L. T. Rep. 403; (1892) 2 Q. B. 613;
Re Kirkleatham Local Board and Stockton Water Board, 67 L. T. Rep. 811; (1893) 1 Q. B. 375.

In the present case the arbitrator was not invoking the court in its consultative capacity, but was making a final award subject to the opinion of the court upon any point of law. The case is therefore within sect. 7; the award is a final award, and an appeal lies to the Court of Appeal.

Le Quesne replied.

Cur adv. vult.

The following judgments were read:—

BANKES, L.J.—In this case the preliminary point is taken that no appeal lies to this court because the special case stated by the arbitrator for the opinion of the High Court was not a final award embodied in a special case under sect. 7 of the Arbitration Act 1889, but was a case stated for the opinion of the court under sect. 19 of the same Act.

It is well settled that no appeal lies to this court if the special case is one stated under sect. 19. The arbitrator has not stated on the face of the special case under which section he intended to proceed. It is necessary to arrive at a conclusion on the point from an examination of the language used by the arbitrator. The essential difference between the two kinds of special case is, I think, this. In the one case the arbitrator intends to part with the matter for good and all, so far as his jurisdiction over it is concerned; in the other he intends to retain his jurisdiction, but asks the court for its direction on some point which has arisen before him. If by the language used in a special case an arbitrator has sufficiently indicated that the matter must go back to him, after the court has expressed its opinion, in order that he may give his final opinion upon it, then the special case is one stated under sect. 19, and no appeal will lie.

Re Holland Steamship Company and Bristol Steam Navigation Company (95 L. T. Rep. 769)

is a case in point. In that case the arbitrators stated their award in the form of a special case. They decided two points, and then went on to say that if the court held that the two points were correctly decided, then the award was to stand, but if the court should be of opinion that either point was wrongly decided, then the matter " is to be remitted to us to give effect to the true construction of the contracts in our interim and final awards." In arriving at a decision the court laid no stress upon the particular language in which the arbitrators expressed their intention to have the case sent back to them, in the event of the court disagreeing with their findings. What appears to have impressed the court was that the special case did not state the question for the opinion of the court in such a way, that whichever way the court answered that question the award would be final.

On this point the present case is indistinguishable from the *Holland Steamship* case (*sup.*). The arbitrator here has come to no decision in reference to the damages which may become payable in the event of the court not accepting the decision to which he has come; but he desires that the award may be referred back to him for reassessment of the damages due in accordance with the decision of the court if they disagree with his decisions. The only distinction which can be drawn between the present case and the *Holland Steamship* case (*sup.*) is that in the one the arbitrator desires that the award *may* be referred back, and in the other the arbitrator states that the matter *is* to be referred back. I should construe both expressions as evincing the same intention—namely, to retain seisin of the case—but whether that view is the correct one or not, I think that any drawing of fine distinctions between the decisions of this court will only add to the uncertainty and confusion produced by the present state of the law in reference to these two classes of special case.

In the case of *Shubrook* v. *Tufnell* (46 L. T. Rep. 749; 9 Q. B. Div. 621) the point now under discussion was not raised.

Until the law is altered, of which there is apparently some probability, I think arbitrators would be well advised when stating a special case to state on the face of the case under which section it is intended to be stated. In my opinion the objection must prevail and the appeal dismissed with costs.

Warrington, L.J.—In this appeal from an order of Bailhache J. upon a case stated by an umpire the preliminary objection is taken that no appeal lies, because, it is said, the case was stated not as an award in that form, but for the purpose of obtaining the opinion of the court in the course of the arbitration, the function of the court being in that view consultative only.

The document we have to deal with purports to be an award in the form of a special case, but I think it must be admitted that it is the duty of the court in such matters to look at the substance and not merely at the form. The question seems to be: Did the umpire intend to dispose finally of the question submitted to him? or did he, in the event of the decision of the court being of a particular nature, purport to retain seisin of the matter for further consideration and adjudication?

In the present case, after stating certain findings of fact, and conclusions of law, the umpire proceeded: " The question for the opinion of the court is whether upon the true construction of the charter-party, and the facts as stated by me, the decisions at which I have arrived are correct in point of law. If they be correct, my award is to stand, but if incorrect in any particulars, I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the court."

Now this clearly indicates that in his view, in the event of the decision of the court being of one nature, there remained a matter covered by the submission which had not been disposed of and which must be disposed of before his function as umpire would be completely fulfilled. As a mere matter of construction I should say that this special case asked for an opinion which in one event only would dispose of the matter, and in the other would leave something for the umpire to do under the original reference. But if I were of a contrary opinion, I should consider myself bound by the decision of this court in the *Holland Steamship* case (95 L. T. Rep. 769). I can find no substantial distinction between the two cases. It is true the " is to be referred back " of that case is rather more peremptory than the " I desire that the award may be referred back " of the present one, but in this, as in the other, the umpire shows that he considers the reference is not finally concluded. In *Shubrook* v. *Tufnell* (*sup.*) the present question did not arise. On the whole, I agree with Bankes, L.J. that the preliminary objection ought to prevail, and the appeal must be dismissed.

Scrutton, L.J.—When this appeal was called on in court, objection was taken by the respondents that no appeal lay.

There are two classes of special cases under the Arbitration Act. There is, first, an award stated in the form of a special case for the opinion of the court under sect. 7 of the Act. From the decision of the court on such a special case an appeal lies: (*Re Kirkleatham Local Board and Stockton and Middlesbrough Water Board*, 67 L. T. Rep. 811; (1893) 1 Q. B. 375). There is, secondly, a special case stated for the opinion of the court at any stage of the proceedings under a reference. From this consultative case, as it is sometimes called, no appeal lies: (*Knight and the Tabernacle Permanent Building Society's Arbitration*, 67 L. T. Rep. 403; (1892) 2 Q. B. 613).

The importance of the distinction has been much lessened by the recent decision of the House of Lords in the *British Westinghouse Electric Limited* v. *Underground Electric Railways Company of London* (107 L. T. Rep. 325; (1912) A. C. 673), that when the arbitrator in his final award purports to act on the consultative opinion given by the court that opinion can be questioned by legal proceedings up to the House of Lords on the ground of error of law appearing on the face of the award. The distinction, at present, only added another legal hearing to the numerous existing facilities.

In the present case the experienced umpire purports to make his award; he finds facts, he finds liability in law and assesses damages. If his findings stand, his award is final. He then says: " The question for the opinion of the court is whether upon the true construction of the charter and the facts as stated by me the decisions at which I have arrived are correct in law. If they be correct, my award is to stand, but if incorrect in any particular, I desire that the award may be referred

back to me for re-assessment of the damages due in accordance with the decision of the court."

The question is whether this award is final, under sect. 7, or consultative, under sect. 19 of the Act. A special case under sect. 19 can be stated at "any stage of the proceedings," which, on the words of Lord Halsbury in the *Knight and Tabernacle* case (*sup.*) must be before the proceedings have come to an end by a completed award. Lord Bowen defines the distinction in the *Kirkleatham* case (*sup.*) as the case where the arbitrator has stated his award in the form of a special case, and a case where he has asked the opinion of the court by interlocutory proceedings in order to assist him to form his judgment. He elaborates this in the *Knight and Tabernacle* case (*sup.*) by saying: "Sect. 19 contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject matter of the arbitration. He is still clothed with the final duty of determining the case."

If the question in this case is whether the arbitrator expressed his final opinion and asked whether it was right, or whether as an interlocutory proceeding he asked a question the answer to which he could consider in making his final award, I have no doubt the former is the correct view. But it is said for a case to be final and the decision of the Court subject to appeal, the arbitrator's award must provide for every contingency so that, whatever view the court took of the questions asked, the award finally determined the matter. It was said that if the arbitrator said simply: "On the facts my final award is so and so, the question for the opinion of the court is whether my award is correct," that this, though purporting to be final, was merely interlocutory, and to be final the award must anticipate and provide for every possible view of the law the court might take. This would impose a very heavy burden on commercial arbitrators. But it seems, also, inconsistent with the decision of the Court of Appeal in *Shubrook* v. *Tufnell* (*sup.*). There the arbitrator found the facts, stated the question, and continued: "If the court shall be of opinion in the affirmative, then the case is to be referred back to the arbitrator. If the court shall be of opinion in the negative, then judgment is to be entered up for the defendant with costs of suit." The Divisional Court entered judgment for the plaintiff and sent the case back to the arbitrator. On appeal to the Court of Appeal it was objected that no appeal lay, but Jessel, M.R. and Lindley, L.J. were clearly of opinion that an appeal lay. In that case the arbitrator had not expressed his own opinion; the case is much stronger where, as here, he expresses his final opinion.

The case relied on by the appellants was *Holland Steamship Company* v. *Bristol Steam Navigation Company* (*sup.*), in which, as it happens, I was umpire. The case was a peculiar one, the award being fully set out in the report. There was an agreement made to avoid competition providing for a pool and the joint running of two steamship lines. The agreement worked with great friction, and a permanent arbitrator was appointed, who had continually to decide what the agreement meant and what should be done. Though he came to final decisions on particular points their application always gave rise to fresh disputes. He decided finally certain points of construction and stated a case as to whether his decision was right. If it was wrong, further liabilities might arise according to the view taken by the court, and the award continued: "If either or both points are wrongly decided the matter is to be remitted to us to give effect to the true construction of the contract in an interim and final award." Objection was taken that no appeal lay from the decision of the court in this case, and Collins, M.R. and Farwell, L.J., stating the distinction was rather a fine one, held that as the umpire had said the case was to go back to him, the case was under sect. 19. They do not appear to have considered the bearing of *Shubrook* v. *Tufnell* (*sup.*) in their decision.

I remain of the opinion that my decision in that case was a final decision (as it was stated to be, and was certainly intended to be), and not an interlocutory one. But, in the present case, the arbitrator certainly does not retain conduct of the case. He "desires," not "directs," the matter to be remitted to him, if he is wrong, which is the course the court would usually take under sect. 10 of the Act, if he did make a final award in the form of a special case, and gave no direction or expressed no desire as to what was to happen if his decision was erroneous.

Finding two conflicting decisions of the Court of Appeal, I think I am at liberty to take my own view, which is that where the arbitrator expresses his final opinion in the form of a special case, he need not work out all the possible results which may follow from the possible other views the court may take. If he is stating his final view, as distinguished from an interlocutory request for an opinion to guide him in forming his final view, I think he is stating the case under sect. 7, and not under sect. 19, of the Act.

Arbitrators would, however, be well advised to state in their award for the consideration of the court under which section they intend to act.

The point in the present case has no merits, for if it succeeds the case must go back to the arbitrator to make a final award; and if in that he states that he followed the opinion of the court, all the appeals would follow which the objection intends to avoid. The respondents, however, desire the point to be taken; it fails in my opinion, and, in my opinion, they should pay the costs occasioned by taking it, and the appeal must proceed.

Preliminary objection upheld.

Solicitors for the owners, *Botterell* and *Roche*; for the charterers, *Thomas Cooper* and *Co.*, for *Hill Dickinson* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 20 *and June* 21, 1920.

(Before ROWLATT, J.)

JONES *v.* EUROPEAN AND GENERAL EXPRESS COMPANY. (*a*)

Carriage of goods—Shipping agents—Obligations—Loss of goods—Pilferage—Insurance—Liability of the forwarding agent.

In July 1918 *the plaintiff forwarded to the defendants, who were shipping agents, eight bales of cloth to be shipped to a French port and thence to be forwarded by rail to a consignee at Lyons. The defendants undertook to have the goods insured against pilferage during transit from warehouse to warehouse. They held an open policy of insurance under which they were able to declare the goods in question and obtain the protection of the underwriters' undertaking. The defendants made the usual and proper arrangements with steamships and railways for the carriage of the goods in question to their destination, and also made proper arrangements with the underwriters for the insurance of the goods during transit. While the goods were in the custody of the French Customs' authorities two bales were lost, and only six bales reached their destination. It was thought that the two bales were stolen. There was no evidence of any negligence or default on the part of the defendants having caused the loss of the goods.*

Held, that the obligation imposed upon the defendants was, not to carry the goods, but to make arrangements with the carriers, and to make such arrangements as might be necessary for the intermediate steps in the journey between the different sets of carriers and others who had successive possession of the goods.

As to the contract to insure, the defendants were only obliged to place the plaintiffs' risk with the underwriters, for whose subsequent actions they were not responsible.

In discharging these obligations the defendants had shown no negligence.

ACTION tried by Rowlatt, J., sitting as a commercial judge, without a jury.

The plaintiff, who was a woollen manufacturer carrying on business at Leicester, sued the defendants, who were shipping and forwarding agents, for the loss of two bales of cloth during transit from Leicester to Lyons.

The plaintiff's case was that he employed the defendants to forward eight bales of cloth to a consignee at Lyons. In July 1918, he forwarded to the defendants eight bales of cloth. The goods were to be shipped by the defendants to a French port, from whence they were to be forwarded by passenger train to Lyons. Of the eight bales of cloth forwarded only six reached their destination. The two bales of cloth in respect of which the action was brought were lost while the goods were in the custody of the French Customs authorities.

The plaintiff contracted with the defendants that the defendants would have the goods insured against, among other things, pilferage during transit, or, in other words, theft from warehouse to warehouse. The defendants held an open policy of insurance, under which they were able to declare these goods and obtain the protection of the underwriters' undertaking. Accordingly, the defendants insured the goods in accordance with their contract.

The eight bales of cloth were duly shipped on a vessel called the *Corea* and forwarded to Caen. Being subject to duty, they were discharged at that port into the custody of the Customs authorities of France. As the duty on these goods was not payable until the goods arrived at their ultimate destination, which was Lyons, the journey to Lyons would have to be made in bond. The goods had to remain in the custody of the French Customs authorities until they could be put on rail for Lyons, and then they would have to go forward in bond. It was thought that the two missing bales were stolen at the port of Caen, after discharge from the steamship *Corea*, and while they were in the custody of the French Customs authorities at that port. The goods were, in fact, lost while they were thus in the custody of the Customs authorities at that port.

The plaintiff alleged that the loss was due to the negligence of the defendants, and he claimed the value of the goods from the defendants on the ground of their alleged negligence in losing the goods and in not insuring them as agreed.

The defence was that the defendants had undertaken, on the terms of their printed conditions, to forward the goods. They relied on an express condition that they were not acting as common carriers, but as forwarding agents. They denied negligence, and said that they had insured the goods against theft in accordance with their contract.

The defendants counterclaimed for work and labour and for a declaration with regard to certain fines payable to the French Government under a law of 1791.

Russell Davies for the plaintiff.

Rayner Goddard for the defendants.

ROWLATT, J.—In this case the plaintiff sues the defendants, who are forwarding agents, for the loss of two bales of cloth merchandise, and for damages for the breach of the contract to insure the said goods.

The defendants were employed to insure these goods against (*inter alia*) pilferage, and they held an open policy which enabled them to declare these goods and obtain the protection of the underwriters' undertaking. But the underwriters say that they are not satisfied with the evidence of the loss. They may be right, or they may be wrong; in their absence I am not entitled to express any opinion on their attitude. The defendants, however, never guaranteed that the underwriters would pay or would make no dispute. They undertook to place the plaintiff's risk with the underwriters at that time and they did so, and there is no ground for complaint against them because the underwriters take what the plaintiff thinks is an unjustifiable view with regard to the facts and their position.

But, of course, the underwriting was only, collateral protection for the plaintiff, and he is independently altogether of that, entitled to recover from the defendants, if he can make out that the loss was due to the defendants' negligence in carrying out what they were instructed to do. It must be clearly understood that a forwarding agent is not a carrier. He does not obtain possession of the goods and he does not undertake to deliver them. All he does is to act as agent for the owner of the

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

goods, and make the necessary arrangements with the people who do carry—steamship, railways, and so on—and to make arrangements, as far as they are necessary, for the intermediate steps between the ship and the rail, the Customs or anything else; so that the liability of the defendants, if any, depends on their failing—if they have failed—to carry out those duties that I have described.

The goods in question in this action were shipped on board the *Corea* and they were landed at Caen. They had to be discharged into the custody of the Customs authorities at that port. That is quite clear, and as the duty was not payable until the goods arrived at their ultimate destination—namely, Lyons, it is obvious that they remained in the custody of the Customs authorities until they could be put on rail for Lyons and go forward in bond. The goods were still in the custody of the Customs authorities when the two bales of cloth were lost or stolen. That much is quite clear.

It is impossible for me to say that the loss was due to the default of the defendants. They had to do what was necessary in the ordinary course of their business, and the ordinary course, from which the defendants could not escape, was that these goods were landed into the clutches of the Customs, and followed the routine prescribed by the Customs, into whosever hands and on whosever premises that routine led them. There is not the slightest evidence to show that the defendants delayed these goods. The defendants were powerless to alter the ordinary course which was followed in this case. The delay at Caen was probably due to congestion, and there was no default on the part of the defendants. There is nothing to show that the goods were lost through any delay at the port of Caen for which the defendants were in any way responsible. The facts are quite consistent with the story that the goods may have been stolen on the day of their arrival at that port. In these circumstances the claim against the defendants breaks down.

There is a counter-claim by the defendants. They are asking for a declaration of a novel kind. Under the law of 1791, if goods are shipped to France and there is a shortage against the manifest, the consignee is liable to pay what is called a fine to the French Government because dutiable goods have disappeared. I do not think it is a penal sum. It is really compensation for goods disappearing without paying duty. I cannot make the declaration. It is extremely improbable that this fine will ever be exacted. I understand that if the loss is due to theft the fine in question is not exacted. Therefore, if the fine is levied on the defendants, it will be because the French authorities will take, and act on, a view of the facts of this case, which is contrary to the one now put forward. There must be judgment for defendants on the claim and the counterclaim must be dismissed.

Judgment for the defendants.

Solicitors for the plaintiff, *Vizard, Oldham, Crowder*, and *Cash*, agents for *Owston, Dickinson, Simpson*, and *Bigg*, Leicester.

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

Wednesday, July 7, 1920.

(Before Bailhache, J.)

Behrens and Co. Limited v. Produce Brokers Company Limited. (a)

Sale of goods—Delivery—Interruption of discharge—Buyer's right to reject—Sale of Goods Act 1893 (56 & 57 *Vict. c.* 71), *s.* 30.

If a ship which has begun to discharge a parcel of cargo at the port of delivery leaves the port to deliver other cargo elsewhere before the discharge of that parcel is complete, her action, in the absence of special stipulations to the contrary, is a breach of the contract to deliver, notwithstanding that she subsequently returns and offers the balance of the parcel.

Although the buyer is not entitled to continuous delivery, yet if the vessel leaves the port before the whole of his parcel is discharged he may reject the whole consignment, or the part undelivered when the ship sailed, as provided by sect. 30 *of the Sale of Goods Act* 1893.

Special case stated for the opinion of the court. The award of the umpire and the special case stated by him were (omitting immaterial parts) in the following terms:

By a contract in writing, dated the 8th July 1919, Messrs. Behrens and Co. Limited (hereinafter called the sellers sold to the Produce Brokers Company Limited (hereinafter called the buyers) 200 tons of Sakellarides Egyptian cotton seed to be shipped per steamer from Alexandria and (or) Port Said and (or) Ismailia during Aug. and (or) Sept. 1919 at 32*l.* per ton. By a similar contract, dated the 12th Sept. 1919, the sellers sold to the buyers about 500 tons of Tayumi Egyptian cotton seed at 26*l.* per ton to be shipped per steamer from Alexandria and (or) Port Said and (or) Ismailia during Oct. 1919 to London. By a letter of the 15th Sept. 1919 the buyers gave to the sellers the option of shipping the said 500 tons in Sept. 1919. Each of the said contracts provided that the seed was to be delivered in London to buyers' craft alongside; that particulars of shipment were to be declared in London within twenty-four hours after receipt of documents in this country; that payment was to be made in London in fourteen days from the seed being ready for delivery by net cash in exchange for shipping documents and (or) delivery order; that the seed was to be received (during custom house hours) immediately it was ready for delivery from the steamer. Each of the said contracts further provided that any dispute arising thereout should be referred to arbitration in accordance with the rules endorsed thereon. Copies of the contract notes and letters were attached to and formed part of the case. By two letters dated the 6th Oct. 1919 the sellers gave notice to the buyers that they appropriated in part fulfilment of the contract of the 8th July 1919 176 tons per steamship *Port Inglis* bill of lading dated the 20th Sept., and in part fulfilment of the contract of the 12th Sept. 1919 400 tons per the same steamer, bills of lading dated the 19th Sept., which appropriations were accepted by the buyers. The said quantities of 176 tons and 400 tons had been in fact shipped at Alexandria on the said steamer under the said bills of lading.

(a) Reported by R. F. Blakiston, Esq., Barrister-at-Law.

The said steamer docked at Regent's Canal Dock, London, on the 13th Oct. 1919, and on the following day the buyers paid the sellers for the said 176 tons and 400 tons, and took up the bills of lading therefor. The steamer commenced her discharge on the 14th Oct. 1919. The buyers duly presented the bills of lading, and were ready and willing to take delivery of the whole bill of lading quantity. The steamer, however, failed to deliver, and the buyers were unable to obtain more than (about) 15 tons of Tayumi seed and (about) 22 tons of Sakellarides seed, which were discharged on the 17th and 18th Oct. The steamer then left for Hull, having still on board the balance of about 384 tons and 153 tons of seed. By letter of the 21st Oct. 1919 the buyers gave to the sellers notice of arbitration and contended that the vessel had completed her voyage and that the contracts were at an end, and requested the return of the amounts paid against the undelivered quantities. On the 3rd Nov. 1919 the steamer again docked in the Regent's Canal Dock, London, and on the 5th Nov. 1919 began to discharge the balance of the said seed. The discharge was completed on the 11th Nov. On the 28th Oct. 1919 it had been agreed between the parties that the buyers should take delivery of the balance of the said seed in the steamer on her arrival in London, and the buyers accordingly took delivery without prejudice to their rights under the contracts. The dispute which had arisen between the sellers and the buyers was referred to arbitration according to the terms of the said contracts. The umpire appointed by the two arbitrators, who were unable to agree, awarded as follows: That the sellers committed a breach of the said contracts by failing to deliver the said balance of the seed in accordance with the contracts and that the sellers should pay to the buyers the sum of 6*l.* per ton on the quantity of Tayumi seed and the sum of 13*l.* per ton on the quantity of Sakellarides seed respectively delivered to the buyers on or about the 5th to the 11th Nov. 1919, and the costs of the reference and award.

The following special case was stated by the umpire, at the request of the sellers, for the opinion of the court:

Case.

The sellers contended before me:

(*a*) That the sellers had completed their obligations by delivering documents against payment.

(*b*) That the buyers' rights (if any) were in any case limited to recovering damages for breach of contract.

(*c*) That the sellers had not been guilty of any breach of contract, and were not responsible for the acts of the shipowner in proceeding to Hull before delivering the balance of the goods.

(*d*) That even if the sellers had been guilty of a breach of contract that such breach did not justify the buyers in claiming to reject part of the goods or to claim repayment of any appropriate amount.

(*e*) That if the sellers had been guilty of any breach of contract the damages were limited to the cost of insuring the then undelivered balance from London to Hull and back, together with interest on the proportionate purchase price during the delay consequent thereon.

The buyers contended:

(*a*) That it was the duty of the sellers to deliver the cotton seed in London to buyers' craft in sound and merchantable condition.

(*b*) That by the long-established custom and usage of the trade payment is made on advice from the sellers of arrival of ship net cash in exchange for shipping documents, and (or) delivery order, and that such payment is without prejudice to the duty of the seller to deliver the goods into buyers' craft in sound and merchantable condition.

(*c*) That the buyers paid for the said documents on the basis detailed above.

(*d*) That the sellers failed to deliver the said goods in accordance with the said contract, and only delivered 22 tons (about) under the contract of the 8th July 1919 and 15 tons (about) under the contract of the 12th Sept. 1919.

(*e*) That the ship then abandoned the voyage and sailed away to another port; that the buyers were thereupon entitled to claim a refund of the amounts paid by them for the cotton seed which the sellers so failed to deliver and the brokerage which they thus failed to earn.

In addition to the facts set out in pars. 1 to 10 of the special case, I find:

1. That on the 18th Oct. 1919, and at the time of delivery of the balance of the said seed to the buyers, the market price of the said seed was below the contract price.

2. That the steamer did not discharge the balance of 384 tons and 153 tons on her first visit to London because other goods were loaded above, and the object of her proceeding to Hull was to discharge such other goods. She returned to London without undue delay after finishing the discharge of such other goods.

3. That in so far as it is a question of fact, the voyage of the said steamer ended at London before she commenced to discharge on the 14th Oct. 1919, and that the buyers were then entitled to delivery.

The question for the opinion of the court is:

Whether upon the facts above stated the buyers were legally bound under the said contracts to take delivery of the balance of 384 tons and 153 tons of seed loaded on the said steamer on her return to London on the 3rd Nov. 1919. If the court shall be of opinion that the said question should be answered in the negative, then my award is to stand. If the court shall be of opinion that the said question should be answered in the affirmative, then I award that the buyers are not entitled to recover anything from the sellers, and that the buyers pay to the sellers one-third part of the said costs of the reference and award.

R. A. Wright, K.C. and *W. A. Jowitt* for the sellers.—The contract in this case is somewhat peculiar. It is not a c.i.f. contract, and it is not a "delivered" contract. The sellers have done everything that they were required to do under the contract. It will be noticed that neither in the contract nor in the correspondence is any time fixed for delivery, nor is there any finding in the award on this point. It must be taken, therefore, that a reasonable time for delivery was contemplated by the parties. And there is no suggestion that the actual delivery of the larger part of the goods was unreasonable in point of time. The real remedy of the buyers is against the ship. They had no right to accept part of the goods delivered and reject others, even if they were entitled to reject the whole consignment:

Jackson v. *Rotax Cycle Company*, 103 L. T. Rep. 411; (1910) 2 K. B. 937.

Stuart Bevan, K.C. and *F. van den Berg* for the buyers.—The real question is what are the obligations of the sellers under the contract? It is a "delivered" contract, and not a c.i.f. contract, and delivery in the terms of the contract is a condition. Clauses 1 and 2 of the contract must be read together and show that delivery in London was of the essence of the contract and that no

deviation was allowed. Reference may be made to:

Sargant and Sons v. *East Adriatic Company Limited*, 21 Com. Cas. 344;
Bowes v. *Shand*, 36 L. T. Rep. 857; 2 App. Cas. 455.

The goods were received but not accepted; even if part of the goods were accepted that does not constitute acceptance of the whole consignment: (see Benjamin on Sale, p. 566). Even if the buyers cannot reject part of the goods delivered, they are entitled to damages.

W. A. Jowitt in reply. *Cur. adv. vult.*

July 7.—Bailhache, J.—In this case the sellers, by two contracts of sale, and in the events which happened, bound themselves to the buyers to deliver in London, ex the steamship *Port Inglis*, to the buyers' craft alongside, two separate parcels of cotton seed, one of 176 tons and the other of 400 tons. The buyers, on their part, had to pay for these parcels against shipping documents, and to send craft to receive the goods. The buyers fulfilled both these obligations, and received from the *Port Inglis* some 15 tons of one parcel and 22 tons of the other. When these had been delivered it was discovered that the rest of the seed was lying under cargo for Hull, and the *Port Inglis* stopped delivery and left for that port, promising to return and deliver the rest of the seed. She returned in about a fortnight's time, and the seed was tendered to the buyers, but they had meantime informed the sellers that they regarded the departure of the *Port Inglis* with the remainder of their seed on board as a failure to deliver and a breach of contract. They kept so much of the seed as had been delivered to them, and demanded repayment of so much of the contract price as represented the seed undelivered.

The umpire has decided in favour of the buyers, and I am asked to say whether he was right. Everything depends upon whether the departure of the *Port Inglis* for Hull with the greater part of both parcels of seed on board was a failure to deliver, notwithstanding the promise to return and complete delivery. Both contracts between the parties are in the same terms, and neither has any express provision on the subject. In my opinion, the buyer under such a contract, and where each parcel of goods is indivisible, as here, has the right to have delivery on the arrival of the steamship, not necessarily immediately or continuously; he must take his turn, or the goods may be so stowed that other goods have to be discharged before the whole of the buyers' parcel can be got out. To such delays and others which may occur in the course of unloading the buyer must submit, but in the absence of any stipulation to the contrary the buyer, being ready with his craft, is entitled to delivery of the whole of an indivisible parcel of goods sold to him for delivery from a vessel which has begun delivery to him before she leaves the port to deliver goods elsewhere. If this is so, the rest of the case is covered by sect. 30 of the Sale of Goods Act, and the buyer can either reject the whole of the goods, including those actually delivered, in which case he can recover the whole of his money; or he may keep the goods actually delivered and reject the rest, in which case he must pay for the goods kept at the contract price, and he can recover the price paid for the undelivered portion: (see *Devaux* and *Conolly*, 8 C. B. 640). I think that the award is right.

Solicitors for the buyers, *Walton* and *Co.*
Solicitors for the sellers, *Thomas Cooper* and *Co.*

Tuesday, July 27, 1920.
(Before McCardie, J.)

J. and J. Denholm Limited v. Shipping Controller. (*a*)

Ship — Requisition — Charter-party — Accident — Liability for continuous hire.

A ship was requisitioned under charter-party T. 99, *by which the Shipping Controller was entitled to make certain deductions from the freight in the event of the voyage being protracted by the deficiencies of the steamer. The concluding subsection of the clause allowing these deductions provided as follows: "If through any accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and reloading same to be deducted from the hire." In the course of the voyage time was lost in discharging and reloading on account of a fire which broke out in the cargo. The fire could not be attributed to any particular cause. The Shipping Controller claimed the right to make the deductions.*

Held, that the meaning of "accident" depends upon the circumstances and intentions of the parties concerned. An accident may or may not arise from negligent or wilful acts or from causes unconnected with negligence or wrongdoing. In this case there was no accident in the sense contemplated by the parties.

Even if the fire had been an accident, the Shipping Controller must still have failed, since it would have been accident to the cargo, not to the ship.

In any event the Shipping Controller could not succeed, since hire runs continuously in favour of the shipowner in the absence of clear provisions to the contrary. The provisions relied upon in this case were ambiguous.

Award stated in the form of a special case by the arbitrator, Mr. Raeburn, K.C.

The claimants were Messrs. Denholm Limited, who were the owners of the steamship *Carron Park*. The respondent was the Shipping Controller. The *Carron Park* was requisitioned by the respondent under the terms of a charter-party known as T. 99. The question raised in the special case turned upon the construction of clause 25 of the charter-party, which was in the following terms: Clause 25 (*a*). "If from deficiency of men or stores, breakdown of machinery, or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period, of whatever duration, during which the vessel is inefficient." Clause 25 (*b*). "Partial inefficiency.—Any work that may be done during a period of partial inefficiency of the steamer, except proceeding to a port for repairs, or to replenish bunker coals owing to an accident, shall be paid for on the basis of the time it would have occupied had the steamer remained efficient. If upon the voyage her speed

(*a*) Reported by R. F. Blakiston, Esq., Barrister-at-Law.

be reduced by a defect in or breakdown of any part of her machinery, damage to propeller, rudder or by any other mishap of hull or engines or cargo, the time so lost and the cost of any extra coal consumed in consequence thereof shall be deducted from the hire; but should the steamer be driven into port or to anchorage by stress of weather or for coals, such detention or loss of time shall be at the Admiralty expense. In the event, however, of breakdown at sea or other accident necessitating the steamer proceeding to a port of refuge for repairs, or to replace or land crew, hire to cease until the steamer arrives back in a similar position to that in which she was at the time of the breakdown or accident, &c., and any coals used to be replaced or paid for by owners, whichever Admiralty may elect." Sub-clause (*c*), with the marginal note, "Period of inefficiency not to count," ran as follows: "If through accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and reloading same to be deducted from the hire. Any time so lost shall count as part of the term of charter named in clauses 2 and 7, but the Admiralty have the option of keeping the steamer for an additional period equivalent to the whole or part of the time lost." The facts on which the dispute between the parties arose were as follows: On the 12th and 13th Feb. 1917 the *Carron Park* loaded a cargo of coals at Barry Dock on behalf of the respondent. On the evening of the 13th Feb. she left the docks and went into Barry Road, bound for Rochefort. The weather being thick fog, she anchored in the Roads at 8 p.m., and there stayed fog-bound that night and the next day. At 10 p.m. on the 14th Feb., while the ship was still at anchor in the Barry Roads, a fire broke out in the cargo of coal in No. 2 hold. Efforts to extinguish the fire failed, and it was decided to take the vessel back to dock to discharge the coal and so get at the fire. This was done, and when she was moored in dock coal was discharged from several holds. The discharge was finished on the 21st Feb. at 1 p.m. The total amount of coal discharged was 742 tons, but the amount damaged by fire was 30 tons only. The 742 tons discharged was, through error, loaded in the steamship *Prosper* and not on board the *Carron Park*. A substituted load of 742 tons of coal was placed in the *Carron Park*. The loading of the latter tonnage began on the 25th Feb. and ended on the 26th Feb. The actual number of hours employed in the actual process of discharge was but thirty-nine and a half hours. The actual number of hours employed in the actual operation of loading on the 25th and 26th Feb. was but twelve hours.

Sir *Gordon Hewart* (A.-G.), *D. Mackinnon*, K.C. and *L. F. C. Darby* for the Shipping Controller.—The point raised in this case is a short one, and is whether the Shipping Controller was entitled to deduct hire for a certain period while the steamship *Carron Park* was, according to the case for the Crown, inefficient by reason of a fire which broke out in part of her cargo. The vessel was requisitioned by the Shipping Controller under the terms of the well-known charter-party "T. 99." She loaded a cargo of coals at Barry Dock for Rochefort. She then proceeded to the Barry Roads, where a fire broke out in the cargo. Ineffectual efforts were made to extinguish the fire, and it was then decided to take the ship back into dock and discharge some of the coals so that the seat of the fire could be reached. The *Carron Park* discharged 742 tons of coal, and thirty-nine and a half hours were occupied in so doing. She then took on a fresh supply of coal and proceeded on her voyage. No damage was done by the fire to the ship. Ten days elapsed between the outbreak of the fire and the sailing a second time, and the Crown contend that they are justified in deducting hire for that period under the clause of the charter-party which runs as follows: "If through accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and re-loading to be deducted from the hire." In the alternative, the Crown claimed that the delay came within the words of the accident clause; that there was a mishap to the cargo in consequence of which time was lost and that the Crown were entitled to a deduction from the hire paid for the vessel.

Leck, K.C. and *D. H. Leck* for the claimants.—The clause referred to has reference to an accident happening to the ship, not to the cargo. The award is right and should be upheld.

McCardie, J.—This is an award in the form of a special case stated by the arbitrator, Mr. W. N. Raeburn, K.C. The claimants are Messrs. Denholm Limited, owners of the steamship *Carron Park*. The respondent is the Shipping Controller. The *Carron Park* was at all material times under requisition by the respondent under the terms of a charter-party known as T. 99. The rate of hire was 39*l.* 14*s.* 6*d.* per day. The point at issue is an important one, and turns on the construction of clause 25 of the charter-party, which is well known and widely used. The clause, with marginal words in big letters "Inefficiency" runs as follows, clause 25 (*a*): "If from deficiency of men or stores, breakdown of machinery or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of whatever duration during which the vessel is inefficient." "Partial inefficiency" (*b*): "Any work that may be done during a period of partial inefficiency of the steamer, except proceeding to a port for repairs or to replenish bunker coals owing to an accident shall be paid for on the basis of the time it would have occupied had the steamer remained inefficient. If upon the voyage her speed be reduced by a defect in a breakdown of any part of her machinery, damage to propeller, rudder, or by any other mishap of hull or engines or cargo, the time so lost and the cost of any extra coal consumed in consequence thereof shall be deducted from the hire; but should the steamer be driven into port or to anchorage by stress of weather or for coals, such detention or loss of time shall be at the Admiralty expense. In the event, however, of breakdown at sea or other accident necessitating the steamer proceeding to a port of refuge for repairs, or to replace or land crew, hire to cease until the steamer arrives back in a similar position to that in which she was at the time of the breakdown or accident, &c., and any coals used to be replaced or paid for by owners, whichever the Admiralty may elect." Then sub-clause (*c*), with marginal note "Period of inefficiency not to count," says: "If through accident any part of the cargo or bunkers have to be discharged the time occupied in discharging and reloading same to be deducted from the hire. Any time so

lost shall count as part of the term of charter named in clauses 2 and 7, but the Admiralty have the option of keeping the steamer for an additional period equivalent to the whole or part of the time lost." No other clause in the charter assists in the interpretation of clause 25. [The learned judge, after stating the facts as given above, proceeded as follows:] The following is a material paragraph of the award by the arbitrator, clause 5: "I am unable to find the cause of the fire, but it was not due to any negligence or default on the part of either the claimants or respondent, or any person or persons for whom they are responsible. It was an accidental fire. The ship herself was in no way damaged."

By the finding in clause 5 I understand the arbitrator to mean only that the fire did not arise either through negligence or wilful act. The question for my decision is whether upon the facts found the arbitrator was right in holding that the respondent was not entitled to deduct hire for "time occupied in discharging and reloading." I think that the first point to determine is whether or not there was an "accident" at all, within the meaning of sub-head (*c*) of clause 25. It appears perhaps, to have been assumed before the learned arbitrator that this fire on board the *Carron Park* was an accident. In my view it may often be important in charter-parties and the like documents to distinguish between an "incident" and an "accident." The two may be quite different. Every accident is an incident. But every incident is not an accident. Was the fire which broke out in this vessel an incident or an accident? To mark the distinction between the two let me give two examples. To illustrate an incident with regard to cargo, let me assume that the cargo on board a vessel is perishable fruit. Let me then assume that owing to the vessel remaining fog-bound, some of the fruit began to deteriorate in such a manner and to such an extent as to render discharge necessary. Could this event be called an accident? I think the answer is no. To illustrate an accident with regard to cargo is scarcely necessary. An obvious case would arise if the upper goods in a hold fell upon goods below and crushed them, and rendered a discharge of all or some of them necessary. This, I conceive, would be an accident as well as an incident. There was no evidence here as to how the fire arose, whether from something akin to spontaneous combustion or from some other cause. Nor was there anything to show whether the cause, whatever it was, existed before the voyage started or arose afterwards. In the case of *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 44, 212; 57 L. T. Rep. 726; 12 App. Cas. 518), Lord Halsbury said (at p. 524 of L. Rep.): "I think the idea of something fortuitous and unexpected is involved in both words 'peril' and 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas." The distinction between incident and accident is shown, I think, by the judgments in the case of *Kendall* v. *London and South-Western Railway* (26 L. T. Rep. 735; L. Rep. 7 Ex. 373), where, at p. 377 of L. Rep., Baron Bramwell says: "If perishable articles—say, soft fruit—are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable." The passage suggests an obvious distinction between incident and accident of transit. [Compare, also, sect. 178 of the 2nd edit. of Macnamara on the Law of Carriers by Land.] The word "accident" has, I suppose, several meanings. The definition given in one well-known dictionary is this: "Chance, or what happens by chance; an event which proceeds from an unknown cause or is an unusual effect of a known cause, and, therefore, not expected; often in the sense of an unforeseen and undesigned injury to human life and limb; casualty, mishap." Such definitions as these are of no real value in the solution of legal problems. A helpful statement was made in the case of *Fenton* v. *Thorley* (1903) App. Cas., at p. 453) by Lord Lindley. He there said: "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events." This passage, though useful, throws but little light on the present case. The difficulties raised by the use of the word "accident" are amply indicated by the authorities cited in Stroud's Judicial Dictionary (1903, 2nd edit.), title "Accident," vol. 1, and in the supplement published in 1909. They are equally emphasised by MacGillivray on Insurance Law, p. 918 and following pages, where the decisions with respect to "accident policies" are well reviewed. In the case of *Musgrove* v. *Pandelis* (120 L. T. Rep. 601; (1919) 2 K. B. 43) affirming Lush, J. (1919) 1 K. B. 314), the Court of Appeal discussed the meaning of sect. 86 of the Fires Prevention Metropolis Act 1774, which contains the words "any fire which shall accidentally begin."

In the case of *The Torbryan* (9 Asp. Mar. Law Cas. 358, 450; 89 L. T. Rep. 265; (1903) P. 194) the charter-party contained words exempting the shipowner from liability for "accidents even though caused by negligence." In that case it appeared that in the process of discharge stevedore's men employed on board the ship recklessly used hooks which tore the bags of sugar and carelessly allowed the bags to be cut by the slings, and to burst through, striking against the hatch-coamings while being lifted out of the hold. It was held by the Court of Appeal, confirming the judgment of Phillimore, J., that these facts constituted "accidents caused by negligence." It appears. on looking at all the decisions on the point, that the words "accident" or "accidental" vary so much in meaning that they can only be construed by the light of the particular contract, the particular clauses, the particular subject, or the particular circumstances which are

before the court. The word "accidental" is, I conceive, generally employed to distinguish occurrences arising without either negligence or wilful act from occurrences arising through one or the other of those things. Sometimes it is used to distinguish an occurrence arising from negligence as distinguished from an occurrence arising from wilful acts. When we speak of a street "accident," we generally use the word in that sense. Sometimes again it may be and is properly used to distinguish an occurrence arising from some extrinsic, physically identifiable, and often violent cause from an occurrence springing from the qualities or characteristics of a particular thing, and which are often independent of negligence or wilful act. See the line of cases from *Lenton* v. *Thorley* (*sup.*) as to the meaning of the word "accident" in the Workmen's Compensation Acts. It will be noticed in the present case that in sub-head (*b*) of clause 25 the word "accident" occurs twice, and the word "mishap" once. Upon a careful consideration of the clause as applied to the facts found by the arbitrator, I have come to the conclusion that there was not in the present case an "accident" within the meaning of the clause. It is clear, of course, that sub-heads (*a*) and (*b*) have no application to the present dispute. In my view sub-clause (*c*) was not intended to cover the present circumstances. I see no evidence of an accident within the meaning of that sub-clause. I think that sub-clause (*c*) was framed *alio intuitu*, and upon a business construction of the bargain between the parties it is not, in my opinion, applicable to the facts before me. In the case of *Baily* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180) Hannen, J., in delivering the finding of the court says, at p. 185 of the report: "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which though large enough to include were not used with reference to the possibility of the particular contingency which afterwards happens." This passage was quoted with approval by Scrutton, L.J. in his cogent judgment in the Court of Appeal, in the case of the *Metropolitan Water Board* v. *Dick, Kerr, and Co.* (116 L. T. Rep. 201; (1917) 2 K. B., p. 31). In the same case in the House of Lords (117 L. T. Rep. 766; (1918) A. C. p. 138) Lord Parmoor said: "I think, however, that the language was used *alio intuitu*, and that it is not reasonable to hold that it had any reference to such a contingency, or that such a contingency was in the contemplation of the parties when framing the terms of the section. See also the judgment of Pickford, L.J. in the case of *United States Steel Company* v. *Great Western Railway* (109 L. T. Rep. 212; (1913) 3 K. B., at p. 365), and that of Bankes, L.J. in the case of *Radcliffe* v. *Compagnie Générale Transatlantique* (24 Com. Cas., p. 44).

Even if I had been of opinion that there was here an "accident," it must be observed that the accident (if any) was to the cargo and not to the ship. The ship and her machinery remained uninjured. Her efficiency was in no way impaired. Hence counsel for the owners submitted that sub-head (*c*) of clause 25 had no application, inasmuch as this sub-head related only to "accidents" to the ship, and not to mere accidents to the cargo not affecting the ship itself. I agree with this submission. If clause 25 be taken as a whole, I think it reasonably clear that it provides for a cessation of hire only where the ship itself is affected. The conspicuously printed marginal notes to the sub-clauses are as follows: "(*a*) Inefficiency, (*b*) partial inefficiency, and (*c*) period of inefficiency not to count." These marginal words represent, I think, the true effect of the sub-clauses. Sub-clause (*a*) clearly deals with complete inefficiency of the ship. Sub-clause (*b*) deals only with partial inefficiency of the ship, and the words "mishap" and "accident" in that sub-clause bear only on such matters as affect the ship's efficiency. I think that sub-clause (*c*) must also be read so as to refer to accidents to the ship, whereby a part of the cargo or bunker coal has to be discharged. This gives sub-clause (*c*) a fair and full business meaning when read in conjunction with sub-clauses (*a*) and (*b*). It gives it, moreover, a just meaning, for I fail to see why the shipowner should lose his hire by reason of the defects or misfortunes to the cargo which the Shipping Controller has compelled him to take on board. Such is my humble view of the matter.

But even if I had been in doubt, I should still have held in favour of the owners of the *Carron Park*. The rule is clearly established that once hire has begun it runs continuously in favour of the shipowner unless there be some special provision to the contrary in the charter-party: (see *Brown* v. *Turner, Brightman, and Co.* (12 Asp. Mar. Law Cas. 79; 105 L. T. Rep. 562; (1912) A. C. 12; and Scrutton on Charter-parties, 9th edit., art. 146). If a charterer wishes to escape this liability, he must be careful to make the necessary provision clear and unmistakable.

The present is a case where the ship was requisitioned by the Shipping Controller, and the charter-party before me represents conditions imposed on the shipowner rather than terms which have been mutually negotiated. The doctrine of *contra proferentem*, therefore, applies with full cogency. From any point of view the wording of clause 25 is at least ambiguous, and the Shipping Controller has failed to use words of adequate clarity and width to save him from the liability of continuous hire under the circumstances before me. If necessary I should have applied the principle in the case of *Price* v. *Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 89 L. T. Rep. 731; (1904) 1 K. B. 412), and in *Nelson Line* v. *James Nelson* (10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16) to this dispute. That principle was briefly but forcibly expressed by Lord Macnaghten in the case of *Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24; 1905, A. C. 96) where he says: "An ambiguous document is no protection." For the reason I have given I uphold the award of the arbitrator. The Shipping Controller must pay the costs of the proceedings before me.

Solicitors: *Treasury Solicitor*; *Lowless* and *Co.*

Oct. 27 *and* 28, 1920.

(Before Lord Reading, C.J., Darling and Salter, JJ.)

Owners of Steamship Crown of Leon *v.* Admiralty Commissioners. (*a*)

Requisition — Proclamation — Prerogative — Earning of freight by Admiralty—Urgent national necessity.

A steamer belonging to the claimants was requisitioned by the Admiralty in Jan. 1916 *under a Proclamation issued in Aug.* 1914, *and after a first voyage she was sent with a cargo of ore and pyrites to a firm of American munition makers whose contract provided that they should be bound to supply munitions only if the ore was sent to them at a certain rate of freight. The ship was sent at this rate of freight, which was lower than the current market rate. On the voyage the ship was severely damaged by marine risks, and, in an arbitration between the owners and the Admiralty, the arbitrators found that the owners were bound by the form of charter known as T.* 99, *which expressly threw the burden of marine risks on the owners. The arbitrators were ordered to state a case for the opinion of the court on the following questions: (a) Whether the Admiralty had the right to employ the ship on a voyage earning freight payable to the Admiralty, and whether the claimants were entitled to receive any and what extra payment and compensation in respect thereof;* (b) *whether the Admiralty were liable to compensate the owners for damage received on the voyage; and* (c) *whether marine risks should be deemed to be borne by the Admiralty or by the owners.*

Held, (1) *that the Admiralty had a right to requisition the ship under the Proclamation in the national emergency which existed in Jan.* 1916 *and to employ her on the voyage in question and the owners were not entitled to extra compensation as the fact that freight was payable to the Admiralty was not material;* (2) *that there was evidence to support the arbitrators' finding that the owners agreed to bear the marine risks; and* (3) *that consequently the Admiralty were not liable to compensate the owners for damage received on the voyage.*

Nature of prerogative right at times of national emergency considered.

Special case stated by arbitrators under an order of the court dated the 18th June 1917. This order directed that certain questions of law arising out of the requisitioning of the steamship *Crown of Leon*, and her employment on a voyage from Huelva to Philadelphia with a cargo of material for the manufacture of munitions, should be stated in the form of a special case for the opinion of the court. These questions, which were marked respectively (*a*), (*b*), (*c*), were: (*a*) Whether the Admiralty had the right under the Proclamation of the 3rd Aug. 1914 or otherwise to employ the *Crown of Leon* for the voyage from Huelva to Philadelphia with ore, freight on which was payable to the Admiralty, and whether the owners were entitled to receive any and what additional hire payment, or compensation, over and above the monthly hire, when it should be finally adjusted, in respect of the use of the vessel on the said voyage. (*b*) Whether the Admiralty were not liable for the damage sustained by the vessel in the course of the voyage, and by reason of the carriage of the cargo. (*c*) Whether marine risks should be deemed to be borne by the Admiralty or by the owners, unless the arbitrators should decide to state their award in the form of a special case. The arbitrators took a view of the facts under which they found themselves unable to formulate any definite question of law on the subject as they thought that there was an agreement upon it, but they submitted the facts and their inference therefrom.

1. The steamship *Crown of Leon* was requisitioned by the Admiralty on the 26th Jan. 1916 by virtue of His Majesty's Proclamation of the 3rd Aug. 1914, and she remained under requisition in the service of the Admiralty throughout the occurrences which were in question between the parties.

2. Before the said requisition the owners had informed the Admiralty that they were not prepared to accept the rates of hire proposed by the committee of the Admiralty Transport Arbitration Board, commonly known as the Blue Book rates, and had requested that the final settlement of the rates of hire of such of their vessels as were, or should be, requisitioned might stand over until some later date or until the termination of the war, and the Admiralty had acquiesced in the arrangement so proposed.

3. When the *Crown of Leon* was requisitioned, and before she entered upon service, the Admiralty sent to the owners a notice dated the 20th Jan. 1916, stating that it was proposed to employ her "under the conditions of the *pro forma* charter T. 99 enclosed." The form of charter enclosed was one in common use between the Admiralty and owners of requisitioned vessels. The Admiralty in forwarding this notice further stated in the letter enclosing it that it was "not proposed at this juncture to enter into a formal charter of the ship." As the question of rate of hire was to stand over, no complete charter of the vessel could in fact have been entered into at this time. Three copies of the said form T. 99 were sent by the Admiralty to the owners with a request that they would fill in the particulars of the ship and return two of the forms, and the owners on the 27th Jan. 1916, without making any objection to the said form or to the proposal to employ the vessel on the conditions thereof, filled up and returned to the Admiralty two unsigned copies thereof, the rate of hire being left blank, and stated in their letter enclosing the same that "the only information asked for in the charter is the steamer's class, which is the highest class—British Corporation—deadweight about 5600 tons, speed about nine knots on about 24 tons. As you are aware, the steamer has been requisitioned, but no charter has been signed. We point out that this steamer is a cargo liner, and not a tramp." On the same day the owners wrote to the Admiralty that the vessel had completed her repairs at Barry at six o'clock the previous morning, and that, "this being so, she comes into Admiralty service again." On the 30th Jan. 1916 the Admiralty replied, agreeing the time of readiness for service, and further stated that in accordance "with clause 4 of the charter (meaning the form of charter T. 99) hire will commence from and including such date."

4. The said form T. 99 contemplated that the vessel should remain (and she did in fact remain) under the general management of the owners, and that the master and crew should be (and they in fact were) appointed and paid by the owners throughout the period of service. The said form further provided (*inter alia*) that as regards sea risks and

(*a*) Reported by J. F. Walker, Esq., Barrister-at-Law.

war risks respectively the owners should bear the sea risks and the Admiralty the war risks.

5. The arbitrators found and determined that the said terms as regards sea and war risks were to the knowledge of the owners the usual terms for vessels requisitioned, as this vessel was requisitioned, and that they were reasonable and proper terms. No objection to the said terms as regards the said risks was made by the owners at any time prior to the occurrences hereinafter mentioned which gave rise to this claim.

6. The Admiralty made payments on account of hire to the owners at Blue Book rates throughout the service of the vessel, and the owners received such payments "to account pending final settlements of rates of hire." The said Blue Book rates provided certain monthly rates for vessels therein classed as "tramps," and certain higher monthly rates for vessels therein classed as "cargo liners." The Admiralty in the first instance included the vessel in the tramp class, but the owners claimed that she should be included in the cargo liner class, and on the 7th Feb. 1916 the Admiralty wrote to the owners agreeing to that classification and stating that "payment will therefore be made at the rates of 12*s.* 9*d.* per gross ton per month for the first two months and 12*s.* 3*d.* afterwards. If evidence of actual times on two summer and two winter voyages is furnished showing the vessel's speed to be ten knots and more, payment will be increased in accordance with the Blue Book scale for cargo liners." The rates of pay and other terms referred to in this letter were, as the owners knew, those provided in the Blue Book for cargo liners working on the terms that sea risks were borne by the owners and war risks by the Admiralty and not otherwise, and the owners received such rates on account throughout the vessel's service.

7. There was no evidence by or on behalf of the owners or otherwise that they supposed or understood that the Admiralty would be responsible for sea risks, or that they did not understand that the terms of the said *pro forma* charter, as regards sea and war risks, were intended to apply to the vessel, and the owners did in fact keep the vessel insured against sea risks at their own expense throughout her service.

8. The arbitrators found as a fact that it was understood between the parties, and, subject to the opinion of the Court, they found that it was impliedly agreed between them, that the vessel while under requisition should and would be at the risk of the owners as regards the sea risk and at the risk of the Admiralty as regards the war risk, and, in case the Court should nevertheless be of opinion that there had been a failure of agreement as to the said risks within the meaning of His Majesty's said Proclamation, the arbitrators (subject to the opinion of the Court as to their powers to do so under the directions of the said Proclamation) intended to award and arrange that the aforesaid terms were and would be terms to which the right of the owners to compensation for loss or damage occasioned by the employment of the vessel in Government service was and should be subject.

If in the opinion of the Court the question of law as to whether marine risks should be deemed to be borne by the Admiralty or by the claimants arose on the facts stated, that question, which was marked (*c*), was submitted to the court.

9. The only other questions submitted by the order of the Court to the arbitrators, with the exception of one that stood over by arrangement, were: (*a*) Whether the Admiralty had the right, under His Majesty's said Proclamation or otherwise, to employ the said vessel on a certain voyage from Huelva to Philadelphia with ore, on which freight was payable to the Admiralty, and whether the owners were entitled to receive from the Admiralty any and what additional hire, payment, or compensation over and above the said monthly hire, when it should be finally adjusted, in respect of the use of the said vessel on the said voyage.

(*b*) Whether the Admiralty were liable to compensate the said owners for the cost of repairing certain damage sustained by the said vessel on the said voyage.

10. With regard to question (*a*), the arbitrators found the following facts: The said vessel being then in the Mediterranean under requisition was ordered by the Admiralty to load, and did load, at Huelva, a cargo of ore or pyrites for Philadelphia. She loaded under the superintendence of the master employed and paid by the owners, and the said master gave directions as to the quantity of cargo to be sent on board and was responsible for the stowage thereof, but it appeared that the owners were not aware of the intention so to employ the vessel until the loading had been completed. The said vessel was employed on the said voyage by arrangement between the Admiralty and the Minister of Munitions, and the objects with which she was so employed were to supply munition makers working in America for the British Government with ore or pyrites for making munitions of war, and incidentally to place the vessel where she could load sugar homeward for the Government Sugar Commission; and the freight received by the Admiralty for the carriage of the said ore was charged and received because the contracts of the Government with the said munition makers provided for and included a rate of freight and were on the basis that the said munition makers should be able to obtain the necessary material at a freight not exceeding the rate so provided; and the vessel was employed with the object of supplying such material at such rate, which was a rate substantially lower than the current market rate at the time; and the said material could not have been supplied promptly or at the contract rate of freight by ordinary commercial tonnage. The vessel was not so employed with the object of earning freight or making commercial profit. The arbitrators found that the said use of the vessel was in the national interest in a national emergency, and was a reasonable and proper measure for preserving and defending national interests, and, subject to the opinion of the Court, that it was a legitimate use of the vessel by the Admiralty acting for the Crown and within the powers of the Admiralty, and, subject to the opinion of the Court, they were prepared to decide and award that the owners were not entitled to any extra hire, payment, or compensation in respect thereof.

11. With regard to question (*b*), the arbitrators found as follows: In the course of the said voyage the vessel encountered in the Atlantic a succession of gales and heavy weather and shipped much water on deck. During the voyage, or on survey after arrival, certain damages or defects were discovered, all on or above the upper deck. The vessel had not otherwise suffered. The owners claimed from the Admiralty in respect of such damage the sum of 1700*l.* or

thereabouts as the actual or estimated cost of repairing the same. There was a question whether some part of the damage so repaired was not due to the wasted condition of part of the upper deck and its ironwork. For the purposes of this special case the arbitrators did not think it necessary to express any opinion on this point. They found, as a fact, that so far as such damage was not due to such wasted condition, it was entirely caused by the said gales and heavy weather, and that such cause was a sea risk or peril which, subject to the opinion of the court on the question first herein submitted, the arbitrators would hold to have been at the risk of the owners or their underwriters. The arbitrators further found as a fact that no part of such damage was caused by or due to any negligence or default on the part of the Admiralty as regards the cargo loaded, or the loading or stowage thereof, and that there was not, in fact, any such negligence as alleged by the owners, and, subject as aforesaid, the arbitrators were prepared to decide and award that the Admiralty were not liable to the said owners in respect of any part of the said damage or the repair thereof.

Sir *Erle Richards*, K.C. and *C. T. Le Quesne* for the claimants.

Sir *Ernest Pollock* (S.-G.) and *G. W. Ricketts* for the Admiralty Commissioners.

Lord Reading, C.J.—This case comes before us on a special case stated by the arbitrators, who are the Board of Arbitration constituted under the Proclamation of the 3rd Aug. 1914 and subsequent notifications, and the case is stated under sect. 19 of the Arbitration Act 1889, which means that the consultative jurisdiction of this court is invoked for the purpose of giving its opinion upon points of law stated by the arbitrators. It is very desirable to bear this in mind for the reason that the facts as stated bind us if there is evidence to support them, and we can only give our judgment on the law upon the facts as found.

The owners of the steamship *Crown of Leon* received a notice from the Admiralty in Jan. 1916 requisitioning the use of the ship, the *Crown of Leon*; correspondence ensued which formed the subject of much discussion; and in the result the ship was actually used in the service of the Government. She made a voyage, and then eventually she was sent on a voyage from Huelva in Spain to Philadelphia in the United States, carrying ore and pyrites to munition makers in America who were under contract with the British Government to supply munitions. The contract in question provided that the munition makers should only be under obligation to supply if ore was carried at a certain rate of freight, that is, the contract was made on the basis that the munition makers should be able to obtain the necessary materials at a freight not exceeding the rate provided in the contract, and it is only under these circumstances that they could be called upon to perform their contract.

It appears from the figures of the arbitrators that this particular vessel was employed on a voyage from Huelva to Philadelphia with the object of supplying these materials to the munition makers at the rate of freight provided in the contract, and that rate was substantially lower than the current market rate; and then there is this further finding, that the material could not have been supplied promptly or at the contract rate of freight by ordinary commercial tonnage. Those are very important findings of fact. The position therefore was that the Government required the munitions from America; the American munition makers were not under an obligation to supply, because of the rate of freight then prevailing, and apparently also, as would seem to follow, because of the scarcity of tonnage available. The Government then made use of this ship, which they had already requisitioned and used on another voyage or voyages, to send her to America carrying this ore and pyrites necessary for munition-making, and the Government justifies it on the ground that it was necessary to supply this material promptly so that the American munition makers could make and supply that which was so necessary for us, munitions; and further, on the ground that the American munition makers could not have got, by the use of commercial tonnage, freight at the rate provided for in the contract.

The vessel then proceeded from Huelva to Philadelphia; she encountered fierce gales and was severely damaged during this voyage. The question that arises as between the owners and the Government substantially is, who is to bear the cost of the repairs? The owners say that they had not contracted to take sea risks, and that they consequently were not liable; that the Government had the use of the vessel, and the Government must pay for the sea risk. On the other hand, the Government's contention is that this requisition was made upon the terms, *inter alia*, to be found in the charter-party form T. 99, which provided that the sea risks should be borne by the owners and that the war risks should be borne by the Admiralty. Now that the T. 99 form of charter-party does so stipulate is beyond all question; but the owners contend that they are not bound by this form of charter-party; that they never had agreed to bear the sea risks; and consequently that they are entitled to claim as against the Government.

Those are the material facts upon which the questions submitted to us arise. That the vessel after she had got to America was then sent to Cuba to carry a cargo of sugar from Cuba to this country for the British Government is immaterial for this purpose, because if the use of the ship was being made properly within the powers of the Government, it is not contended before us that she could not have been used to bring home a cargo of sugar for the Government from Cuba. The real point in the case turns on this voyage from Huelva to Philadelphia. We have had the advantage of an able and carefully considered argument on behalf of the owners of the vessel, who have put before us a number of propositions on which they contend that the questions ought to be answered in their favour. In my opinion, many of these questions do not arise for our decision in this case, and I propose now to deal with the questions as put, and to answer the questions which apparently were those that the Court of Appeal (affirming a decision of the Divisional Court) ordered the arbitrators to state. The arbitrators have prefaced their statement of the case by the observation that so far as their opinion went no questions of law arose, but that really these were questions of fact on which they came to a conclusion, but nevertheless, acting on the order of the Court, they have stated the case in such a form as enables us to pronounce an opinion upon the questions of law.

The first question stated in the case, question (*c*), is whether marine risks should be deemed to be borne by the Admiralty or by the claimants. The decision upon that point turns upon whether we think there was evidence sufficient in law to support the finding of fact of the abitrators. They have heard the evidence, and they have considered the documents in the case, and they have come to a conclusion that the owners did agree to be bound by this provision in the form of charter-party T. 99. Looking at the correspondence in the case, taken in conjunction with the facts as found by the arbitrators, I come to the conclusion that there is evidence to support the finding of the arbitrators and that when once we come to that conclusion the function of this court is exhausted. It is not for us to examine the facts or to determine whether we should upon the same materials come to the same conclusion. I do not mean to throw any doubt upon their conclusion of fact; what I do mean is that it is not for us, and we ought not, to express an opinion upon the facts, if there is sufficient evidence to support the finding. There is this evidence, that in Jan. 1916 the notice came requisitioning the ship on urgent Government service under the conditions of the *pro forma* charter-party T. 99 enclosed. There is a letter sent by the Director of Transports, Sir Graeme Thomson, inclosing the requisition of the Admiralty to the owners of the steamship, and attaching to his letter three copies of the *pro forma* charter-party T. 99, which they were requested to return to the department, and there was another form enclosed which asked for certain information and which is not now material. The owners replied to that, returning the form which asked for certain information, upon which nothing turns in this case. They stated that the steamer had arrived at Barry and that they were dry-docking her, after which she would enter on Government service. That seems to show that they were not objecting to her entering on Government service, but acquiescing. Then they said, "We thank you for the memorandum T11591, this doesn't apply to any of our steamers." The fact was that the owners were contending that the class of ship into which the *Crown of Leon* came was a liner and not a tramp. The Blue Book rates payable by the Admiralty when a ship was requisitioned varied according to the class in which the ship was put; and if she was a tramp she would receive a lower rate of freight than if she was a cargo liner. There was some discussion as to whether she was a cargo liner or a tramp, and eventually the Government accepted the fact that she was a cargo liner on other facts supplied; but nothing turns on that in this case. On the 26th Jan., six days after the first letter which I have referred to, the Director of Transports wrote asking the owners to send without delay two of the three copies of the charter-party, that is T. 99, "which were sent to you on the 20th inst., completed with the necessary particulars as requested in my letter of that date." It is difficult to understand what the owners can have thought of being asked to send back two of the copies of the charter-party, and to retain the third, and to fill up certain particulars which had been asked for in this form of charter-party, unless the provisions applicable in T. 99 were to be applicable to the hiring or requisitioning by the Government. The owners did on the 27th Jan. return the two copies; they gave the information, and they said, "As you are aware the steamer has been requisitioned but no charter has been signed." That is perfectly right. It is the strongest expression relied upon by Sir Erle Richards. It only amounts to this: there has been no formal charter-party entered into; you have requisitioned the ship on terms which the Government is paying and which are to be found in documents or in the Blue Book. That is only carrying out what Sir Graeme Thomson had written seven days before, that it was not proposed at that juncture to enter into a formal charter of the ship. Then they say, "if further particulars are required, will you let us know?" and on the same day the owners again wrote to the Director of Transports that the steamer had completed her repairs at Barry, and that, that being so, she comes into Government service. Then on the 30th Jan. the Director of Transports writes to them and says, "With reference to the requisitioning of the *Crown of Leon*, I have to acquaint you that the vessel was ready for Admiralty service at 6 a.m. on the 26th Jan.," and then come these words, which to my mind are of importance, "and in accordance with clause 4 of the charter-party hire will commence from and including that date." Clause 4 of the charter-party is clause 4 of T. 99; no other charter-party had been discussed or mentioned; and clause 4 of T. 99 does say when the hire is to commence. It is the provision which stipulates the date or the period at which the hiring is to commence; and it is to my mind significant that after that date and after the 30th Jan. there is no letter from the owners demurring to this statement as to the charter-party. No objection is made by them. On the contrary, there is evidence (I will not say more) from which it may be inferred that they were acquiescing, because they did not in any way object after having this statement made to them.

That deals with all the correspondence that took place.

From the facts there is further the statement by the arbitrators: "We find and determine that the said terms as regards sea and war risks," that is the terms of requisitioned ships, "were to the knowledge of the owners the usual terms for vessels requisitioned as this vessel was requisitioned, and that they were reasonable and proper terms. No objection to the said terms as regards the said risks was made by the owners at any time prior to the occurrences hereinafter mentioned which gave rise to this claim." That is an additional finding of fact which it was open to the arbitrators to arrive at; and there is evidence there which I think any judge, if he was trying this case with a jury, would have to leave to the jury, for the jury to determine whether they inferred as a fact from the evidence to which I have just referred that the ship had been requisitioned, and that form T. 99, in so far as it stipulated that the sea risks should be borne by the owners, was a part of that agreement. When once I have come to that conclusion the question is answered that is submitted by the arbitrators; and when the arbitrators find the fact, as we know they have found, that the owners did agree that the marine risks should be borne by them, and there is evidence to support that finding, the conclusion must be on those facts that the marine risks should be borne by the claimants, the owners of the steamship, the *Crown of Leon*.

The second question, question (*a*), is of a wide character, and introduces other questions of great public importance. It is contended by the owners that, although the vessel was properly requisitioned in Jan. 1916 for the use of the Government under the Proclamation of the 3rd Aug. 1914, the use to which she was put by the Admiralty was an improper use of the vessel, and consequently an unlawful exercise of the rights which they had under the powers given to them to requisition. Incidentally, and in the course of the argument, Sir Erle Richards contended that this Proclamation went too far if it was to be construed only by reference to its operative part, and that we must have regard to the preamble in order to construe it, and that if we did have regard to the preamble, we must limit or restrict the ordinary meaning of the language used in the operative part of the Proclamation, and it was said that, unless we did so, the Proclamation in itself goes too far.

Let me deal first with the point as to the preamble, which may be dealt with quite briefly inasmuch as there is no question as to the law or the canon of construction to be applied in dealing with a Proclamation issued by the Sovereign or in dealing with regulations under it. The principle is that the preamble does not restrict or extend the operative or enacting part if the language of the operative or enacting part is not open to doubt. If there is ambiguity, then, of course, one may refer to the preamble for the purpose of throwing light upon the intention of the Legislature, if it is an enactment, or of the Sovereign, if it is a Proclamation. In this case I do not think that we are entitled to have regard to the preamble at all. I think that the language is not open to doubt. It is clear, it seems to me, beyond all question. It states in simple form the power that is to be exercised. It is a Proclamation which was issued on the 3rd Aug. 1914, that is, the day before war was declared. It was issued when it was thought that there was imminent danger of war, and it was issued in the national interests in the exercise of the duty of the Crown to protect the national interests, by making available the prerogative which rests in the Sovereign, and the Proclamation authorised the Lords Commissioners of the Admiralty, for such period of time as might be necessary, to requisition and take up for service any British ship or British vessel, as defined in the Merchant Shipping Act of 1894, within the British Isles or waters adjacent thereto; it stipulated that the owners should receive payment for the use and services rendered and compensation for loss and damage; any questions that arose should be determined by the Board of Arbitration under the Proclamation and other notifications issued by the Admiralty. Now, as I have said, I find no ambiguity at all; indeed, it cannot be argued there is any ambiguity in the language itself. What was contended by Sir Erle Richards and Mr. Le Quesne was that, if one gives the language the ordinary interpretation, the effect is so far-reaching that we ought to conclude that that never can have been the intention. I am unable to take that view; on the contrary, I think that, reading that language as it is in the Proclamation, it was intended to give the widest possible powers in view of any emergency, which was at least imminent, and in view of this, that, if war was declared, it was impossible to measure beforehand the ships which the Government would have to requisition from the subjects of the Crown. Consequently, in order to be prepared for that, this Proclamation was issued the day before the war, and as the language imports, and, as I think we must hold, was intended to give the fullest power to the Admiralty to requisition British ships in the British Isles on payment for the use and services rendered and compensation for any loss or damage.

Digressing for one moment from the question as to the preamble, it is contended that that power goes beyond the right which is vested in the Sovereign. I do not agree. No authority has been cited which would lead me to the conclusion that there was not a power in the Crown to make such a Proclamation. It is made in the national interests to protect the realm and the subjects of the realm, and, so far as I can find from the references that have been made, there is nothing which would limit it. It is said that there is a passage in Chitty's Prerogatives of the Crown which would have the effect of limiting it. That is at p. 50: "What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war either the law of nations or the law of the land by general and unlimited regulations." Those were the words apparently of Lord Erskine sitting in the Privy Council; they were used with reference to Orders in Council. They are quoted in Chitty as stating the law accurately. It is to be observed that that is not a judicial pronouncement; it was a statement that was made, I gather, in Parliamentary debates on Orders in Council; but it is quoted by the learned author as stating the law correctly. There is in that statement nothing which in the slightest degree would lead us to the conclusion in this case that this exercise of the prerogative went beyond what is right. The argument is that the avowed cause must be the emergency, and the act done is temporary, and it is suggested that it is only where there is what was called "instant and urgent necessity" that such prerogative could be invoked. "Instant" really there only means "then existing"—a then existing necessity. In this case can it be doubted that there was in fact "an existing urgent necessity?" It does not mean that at the precise moment one must be able to justify the use of the prerogative by proof that there was such a state of things that, unless the act was done by invoking the prerogative, the nation would succumb; that is far too limited a meaning. What it does mean, I think, is that there must be a national emergency — an urgent necessity—for taking extreme steps for the protection of the Realm. Now there is a finding by the arbitrators that there was a national emergency; but whether there is a finding or not, it cannot be doubted in my view that there was a national emergency in Jan. 1916 and later, when the events in question happened. If there was a national emergency, then there was a power not only to issue but to put the Proclamation in operation. It is not contended there was not power to issue it on the 3rd Aug. 1914. What is said is that when Jan. 1916 had arrived there had been ample time

to go to Parliament and get Parliamentary powers. That is not a sufficient answer. Parliament could give powers in a national emergency, of course; but it might have thought that they already existed under the Proclamation. The fact is that there was then urgent necessity in the sense of a national emergency then existing. I think there was power to issue the Proclamation and to act upon it in Jan. 1916 and at the later dates.

As soon as the interpretation is clear from the language, as I hold it is, then no question arises with regard to the preamble. I would observe that even if it did I am far from satisfied even on the preamble that the exercise of the prerogative could not have been justified, but I do not decide on that ground, because I can conceive that there are arguments to which one would have to give great consideration as to whether the preamble did apply.

Therefore the question which is submitted under (*a*), which is, "Whether the Admiralty have the right under His Majesty's said Proclamation or otherwise, to employ the said vessel on a certain voyage from Huelva to Philadelphia with ore, on which freight was payable to the Admiralty, and whether the owners are entitled to receive from the Admiralty any and what additional hire, payment, or compensation over and above the said monthly hire when it shall be finally adjusted, in respect of the use of the said vessel on the said voyage," is a question which really involves other considerations. The first answer that was made to it was the one to which I have already adverted, which is that the Government could not requisition this ship under the Proclamation in Jan. 1916 because there was no instant and urgent necessity; and further, it is said that the Government had not the power to requisition the ship because she was not required in Jan. 1916, when they requisitioned her, for transport or as an auxiliary for the convenience of the fleet or in other similar circumstances. I have already dealt with that in saying that the preamble does not really apply. The Government, therefore, have the power to requisition the ship, and did requisition her, and now comes really the substantial point in the case. Could they, the ship being requisitioned, send this vessel on this voyage from Huelva to Philadelphia? I have already stated the facts as found, and I come to the conclusion that the use of the vessel, once properly requisitioned as she was for the purpose of the voyage from Huelva in the circumstances described, was not an improper use or an unlawful exercise of the powers given under the Proclamation. I rest my judgment on this point upon the facts that I have already stated. It is sufficient in my opinion to say that, with the knowledge that munitions were so urgently required, and that they could only be obtained, or obtained in part, from munition makers in America, and that these munition makers could not supply them unless this ship had been sent, carrying ore and pyrites necessary to make these munitions, it seems to me to follow that the ship was used by the Government for the purpose of obtaining munitions at a time of national emergency, and when munitions were so vitally necessary in the interests of the realm. Now that seems to me really to dispose of (*a*), because I come to the conclusion that the Admiralty had the right to employ the vessel on the voyage from Huelva to Philadelphia with ore. I cannot think it is material, if once one comes to that conclusion, to decide whether the owners were entitled to receive any additional hire, payment, or compensation above the monthly hire because the Government apparently received something; I do not think that becomes a question which has to be determined. When once one comes to the conclusion that the Admiralty had the right to employ the vessel, then it was not an improper use of her to send her from Huelva to Philadelphia, and as a matter of law, therefore, the contention of the claimants, the owners, must fail. The mere fact that freight was payable to the Admiralty does not affect the question if the Government requisitioned the vessel properly.

That leaves only one question (*b*): Whether the Admiralty are liable to compensate the owners for the cost of repairing certain damage sustained by the said vessel on the said voyage? That really is answered by the replies given to questions (*a*) and (*c*). Once we come to the conclusion that the arbitrators are justified in finding that there was an agreement by the owners to bear the sea risks, and that the Government was making a proper use of the requisitioned vessel by sending her on a voyage from Huelva to Philadelphia, it follows that the Admiralty are not liable to compensate the owners for the cost of repairing the damage, inasmuch as that is damage done by perils of the sea which the owners have agreed to bear themselves.

That seems to me to answer all the questions submitted to us, and I have only dealt with the larger questions in so far as they are necessary because of the arguments which have been addressed to us.

Darling, J.—I am of the same opinion.

I desire to say a word only on one point. My Lord has dealt carefully and fully with each of the questions upon which the arbitrators desired to consult this court, and upon only one of them do I desire to say anything. That is upon the larger question, not so much raised by the arbitrators as raised by Sir Erle Richards in an argument which went to the root of the matter, when he said that here, Proclamation or no Proclamation, the prerogative of the Crown had been exceeded; and he contended that this user of this British ship in sending her on a voyage from Huelva in Spain to Philadelphia in America could not be justified under the prerogative. Now that depends not on this Proclamation; it depends upon the common law of England and the constitutional law of England, and the rule undoubtedly is that the King, acting of course in regard to what is called "prerogative regale et legale," should have the right on behalf of his subjects for the defence of the Realm to take property belonging to the subjects in order to defend their own interests, and compensation, of course, is to be fairly made. Nowadays it is made by reason of exact provisions, but it ought always to be made, because what is taken for the general good should be paid for by the general community. It seems to me that here there was no stretching of the prerogative, and it would be very difficult for us to judge. It is no business of this court to look carefully into all the military necessities, and to consider whether this or that manœuvre be performed, or whether the country should be defended by ships or by bayonets. That must be left, and there is ample authority for saying so, to the Executive, and this court, whoever might be sitting here, could not profess to interfere with the discretion of the military, and say "You ought not to have taken this ship and sent her from Huelva to Philadelphia with

iron ore to make munitions of war, you ought to have defended the country in a totally different way." We do not know and cannot know what were the necessities of the time; that must be left to the Executive, as has been said in several cases which the Solicitor-General cited. It was said by Sir Erle Richards, and said with a great deal of insistence, that, though one must look to instant and urgent necessity, we ought to say that there was no instant and urgent necessity here, and that, though war was going on, it was not absolutely necessary to do this or to do that, and we ought to look very carefully and meticulously to see whether the use of this particular ship was required. Of course, it is quite possible that the war would have been carried to a successful conclusion if this ship had not been taken; I do not pretend that if this ship had not been sent from Huelva to Philadelphia we should have lost the war, and if I did I do not suppose that anybody would be the least impressed by it; but I do not think that that is what it is necessary to look at.

There is authority for it in the most interesting case of *John Hampden and Ship Money* (3 State Trials, 826). John Hampden, of course, was a public hero, and ship money had a bad name, but a great many wise things were said in the course of the opinions delivered by the judges in that case on a great many things which are absolutely applicable to the state of things which existed during this war. Now I am going to quote from the argument of Sir Edward Crawley, one of the justices of the Common Pleas in the Exchequer Chamber in the great case of ship money. Although his judgment concerning ship money cannot be sustained—since it was reversed by the Battle of Naseby—yet what he says here is I think still good. He said (at p. 1083): "The moralists do make three parts of Providence. 1. 'Memoria præteritorum'; 2. 'Perspicientia præsentium'; and 3. 'Providentia futurorum.' It much concerns the King, the head of the commonwealth, to be circumspect in the prevention of public danger; conjectures and probabilities are to be regarded. Now put the case upon a probable and violent presumption; a potent enemy is prepared and ready to come. Is it not fit there should be a defence prepared instantly?" "Providence" there means providing for the defence, and he goes on to prove that you cannot know what your enemy is going to do, and you cannot tell what your own people are going to do, because if you do you tell your enemy; and what was true in the time of Charles I. is more abundantly likely to happen in the days in which we live. He goes on then to quote a very learned writer, and he says: "Comines, fol. 179, saith, 'That if the cloud be seen but afar off, the King, without the consent of the subjects, cannot tax them; but if the cloud be overhead, the King may call certain wise persons to him, and tax his subjects.'" Is that not very remarkable? "If the cloud be overhead" is exactly what happened to us: Crawley, J. or Philip de Comines might almost have foreseen Zeppelins when he wrote that. Then Crawley, J. goes on: "You say, that if the King doth move a war offensive, there's time enough to call a Parliament; if defensive, the cloud is seen long before. But oh, good sir! is this always true? Is not the cloud sometimes even over the head before descried? If you read Comines, he will tell you that in times of peace we ought to fortify." That is excellent good sense, and exactly what the Government did here; they did not wait till we had not a shell left; and people know by this time how little ammunition there was at that very critical period of the war. They did not wait until they had not a shell left before they sent the ship from Huelva to Philadelphia. It is said that in doing what they did they strained the prerogative and acted in a manner that would have justified some other John Hampden falling on Chalgrove Field. It seems to me that nobody could contend, and, if they did, it would be hardly for this Court to judge, that in doing this they strained the prerogative so as to exercise it illegally.

I only desired to say a word on this question, because some people have an impression that to use the prerogative of the Crown even for the purposes of defence of the king's subjects is to do something which ought not to be done. It seems to me that this is a case in which it was necessary to be done and was done properly.

Salter, J.—I am of the same opinion.

I desire to add a word only in reference to question (*a*), on which I think this matter mainly turns. As the original requisition by the Crown of the subject's chattels in an emergency must be justified by the emergency, so the use which the Crown makes of the subject's chattels during the requisition must always be justified by showing a state of public danger and emergency. But no one can doubt that the Crown has the right to use the requisitioned goods of the subject in any manner which grave national emergency makes necessary. I cannot doubt that these powers were fully delegated to the Admiralty by the Proclamation.

Here the arbitrators have found in effect that at a time which to the common knowledge of us all was a time of grave national peril the Government had a contract for the supply of munitions from people in the United States, and by sending this ship on this voyage they were able to supply these persons with materials for making munitions more promptly than could otherwise be done. The obvious and necessary result would be that they would get munitions in this country, or at the seat of war, more promptly than they would otherwise have got them. The arbitrators have found these facts, and that this vessel was not sent on this voyage with any object of earning money, and they state their conclusion of fact in these words: "The arbitrators find that the said use of the vessel was in the national interest, in a national emergency, and was a reasonable and proper measure for preserving and defending national interests." That is a finding of instant urgent necessity; it is a finding of fact; and I think there was evidence on which the arbitrators could so find.

I do not think that in this case it is necessary to consider whether or in what circumstances the courts should accept the opinions of the responsible officers of the Crown, as stated by them, or as shown by their acts, as conclusive evidence of emergency. That such opinions would always be cogent evidence goes without saying. On the facts to which I have referred I think that question (*a*) should be answered in the affirmative, that by virtue of the delegation of authority which was notified by the Proclamation, the Admiralty had the right to send this ship on this voyage. I am referring only to the first part of the question, that is to say, that the Admiralty had the right, and I think we might fairly add "under His Majesty's

said Proclamation to employ the said vessel on the voyage mentioned."

Questions answered.

Solicitors for the claimants, *Botterell* and *Roche*.
Solicitor for the respondents, *Treasury Solicitor*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 26, 27, *and Dec.* 2, 1919.

(Before HILL, J.)

THE LUNA. (*a*)

Tug and tow—Towage contract—Collision between tow and third vessel—Tug to blame—Indemnity due from tow.

A Dutch shipmaster signed a contract of towage containing conditions which he was unable to read or understand, though he was aware of their existence. One of these conditions cast upon the tow owners responsibility for the acts of the tug. Relying upon this condition, the tug owners claimed in third party proceedings to be indemnified by the owners of the tow for the dmaages recovered against them in an action by the owners of a third vessel which had been in collision with the tow through the sole fault of their tug.

Held, the tow owners were bound by the contract to indemnify the tug owners.

THIRD-PARTY proceedings.

The material facts are set out in his Lordship's judgment.

Ellis Cunliffe for the owners of the *Frances and Jane*.

Dunlop, K.C. and *Dumas* for the owners of the *Kingston*.

Stephens, K.C., *A. E. Nelson*, and *Aylmer Digby* for the owners of the *Luna*.

HILL, J.—In the action of the *Frances and Jane* against the *Luna* and *Kingston*, I have already held that the tug *Kingston* was alone to blame for bringing the tow *Luna* into collision with the *Frances and Jane*. The question I have now to determine arises upon the third-party notice whereby the owners of the *Kingston* claim indemnity against the owners of the *Luna* in respect of the liability to the owners of the *Frances and Jane* and the costs of the *Frances and Jane* action. The answer to this question depends on whether the owners of the *Luna* contracted with the owners of the *Kingston* in the terms of the clause which appears in print on the document which the master of the *Luna* signed. If the contract entered into embraced that clause and if the master of the *Luna* had authority to enter into that contract, then, subject to two points I will mention hereafter, it is not disputed that the owners of the *Luna* are liable to indemnify the owners of the *Kingston*.

First as to authority. I have no doubt that the master of the *Luna* had authority to enter into towage contracts, and at least apparent authority to enter into this towage contract. It is said that the clause is unreasonable. It is, and has for many years been, usual for tug owners to protect themselves by such a clause. Nor can I see any ground for saying it is unreasonable. It is all a question of price, just as bills of lading exception clauses are all a question of freight. The less the liability of the tug owner or ship owner, the lower the price. There is nothing unreasonable in a bargain which puts the work of towage on the tug and the risk of the service on the tow.

Then as to what the contract was. The document upon which the owners of the *Kingston* rely is a document signed by the master of the *Luna*. It is common ground that that document contains a contract for the towage of the *Luna*. The contention of the owners of the *Kingston* is that the whole document is the contract. The contention of the owners of the *Luna* is that only part of it, which states the towage to be performed and the prices to be paid, is the contract. If any facts beyond the fact that they both intended the document to contain that contract and that the master signed it are material, then the facts are as follows: The *Luna* was boarded by a Mr. Thompson, one of the partners of the firm which owned the *Kingston*, and he and the master, who was a Dutchman, agreed that the tug should tow the *Luna* from river to dock and from dock to sea, and agreed the price, 15*l*. Mr. Thompson wrote these terms out on the document in question, which was in the form of a debit note with the clause in question printed on it, and placed the document before the master. The master understood very little spoken English and could speak English very little, and could not read English at all. He had spent most of his time in fishing, and this was his first visit to England, except as a boy. The *Luna* was a fishing vessel which had been adapted for cargo, and was a sort of vessel new to the home trade. The master saw there was print upon the document, but did not attempt to read it and did not ask any questions about it. Mr. Thompson said nothing about it. The master signed the document. Each intended the document to contain the contract for towage. Mr. Thompson intended the whole document to be the contract. The master said he would not have signed it if he had known what the clause provided, and that he asked no questions because he believed Mr. Thompson would not do anything unjust.

Counsel for the *Luna* referred me to *Roe* v. *Naylor* (116 L. T. Rep. 542; (1917) 1 K. B. 712; 119 L. T. Rep. 359, C. A.). I think that case does not apply to the present. That was not a case in which the document relied on as the contract had been signed. If it had been, can anyone doubt that the buyer would have been bound by it? As Atkin, J. said: "If a party signs the document, he is taken to have assented to the terms contained in it." So in the ticket cases, like *Richardson, Spence, and Co.* v. *Rowntree* (7 Asp. Mar. Law Cas. 482; 70 L. T. Rep. 817; (1894) A. C. 217) and *Marriott* v. *Yeoward Brothers* (11 Asp. Mar. Law Cas. 306; 101 L. T. Rep. 394; (1909) 2 K. B. 987), depending not upon signature, but on knowledge or notice, can anyone doubt that if such a ticket is signed the passenger is bound? Here I am dealing with a document admitted to be a contract and signed by the party who says that a part of its contents is to be rejected as not forming part of the contract. There is no suggestion or ground for suggestion of any deceit. The master was not trapped into signing one thing, thinking it to be something quite different. There was no common mistake on which the contract, if it had not been performed, could be rectified. The document was signed, and signed with the intention of its being a contract. The master, in my view, is bound by the contract, whether he

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

read it or not, and therefore the owners of the *Luna*, whose agent he was, are bound too. It is suggested that the contract of indemnity did not apply because in the *Frances and Jane* action I have found, in fact, that those on board the tug were not the servants of the owners of the *Luna*. There is, in my opinion, nothing in that. If they had, in fact, been the servants of the owners of the *Luna*, then no contract of indemnity would have been required. The owners would have been liable for the acts of their servants. But the contract contemplates a case in which those on board the tug are not the servants of the tow, but are deemed to be so for the purposes of the contract between the tug owners and the tow. It is further contended that the contract does not apply to a case where the tug was engaged in towing two tows, which was the fact here, and that the clause is only applicable when the tug is towing one tow. I cannot find anything in the contract to justify that contention. The contract provided for more than one tow. I therefore find that the contract is as alleged by the owners of the *Kingston*, and that it amounts to a contract to indemnify the owners of the *Kingston* against the damages they will have to pay, and against the costs in the action of the *Frances and Jane*.

The order will be as in *The Adriatic* (3 Asp. Mar. Law. Cas. 516; 85 L. J. 12, P.)—namely, that the plaintiffs (the plaintiffs in the third-party proceedings) are entitled to be indemnified by the defendants (the owners of the *Luna*) against the damages assessed against the tug owners in the collision action and the costs payable by them to the plaintiffs in that action and also their own costs in that action; and to an order for payment to them of such damages and costs; and I give judgment for the present plaintiffs accordingly.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield*.

Solicitors for the defendants the owners of the *Luna*, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the defendants the owners of the *Kingston*, *C. J. Smith* and *Hudson*, for *Locking*, *Holdich*, and *Locking*, Hull.

Feb. 12, 13, *and* 18, 1920.

(Before HILL, J.)

THE LLANDOVERY CASTLE. (*a*)

Limitation of actions—Unconditional appearance to writ, whether waiver—Discretion—Writ in rem—*Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

Services, alleged to be salvage services, were rendered in Dec. 1916 *to a requisitioned vessel, subsequently lost in July* 1918, *by the master and crew of a tug. A writ* in rem *was issued on the 2nd April* 1919, *and service thereof was accepted by defendants' solicitors, who in the subsequent pleadings raised a defence under sect.* 8 *of the Maritime Conventions Act* 1911.

Held, that the unconditional appearance did not waive the defence under the statute.

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

SALVAGE ACTION.

The facts and arguments are fully set out in the judgment of the learned judge.

Laing, K.C. and *Lewis Noad* for the plaintiffs.

Balloch for the defendants.

HILL, J.—In this case the master and crew of the tug *William Grey* claim remuneration for salvage services alleged to have been rendered to the steamship *Llandovery Castle* in Dec. 1916. No claim is or has been made by the owners of the tug.

The right of the plaintiffs to recover is disputed on two grounds: First, that they rendered no services of a salvage character; and, secondly, that the claim is barred by sect. 8 of the Maritime Conventions Act 1911.

The *William Grey* was a steam tug fitted with salvage plant and carrying a crew of ten hands all told. She was in Government service and stationed at Dover, where she was employed in whatever work the Admiralty required of her. In Dec. 1916 the master and crew were the servants of the owners of the tug and not of the Crown. The *Llandovery Castle*, belonging to the Union-Castle Mail Steamship Company, was also in Government service. On the evening of the 6th Dec. 1916, while the *Llandovery Castle* was lying at Folkestone, on a voyage in ballast from Tilbury to Havre, fire was discovered in the stores in the lower No. 4 hold, and later in No. 5 hold. The ship's hoses were got to work, and the *Llandovery Castle* made for Dover, sending wireless messages asking for a salvage tug and a pilot. She was met by the *Lady Brassey*, one of the powerful Dover tugs in Government service, and she followed the tug towards Dover with the intention of entering Dover Harbour. Meantime, by orders of the Admiralty, the *William Grey* proceeded out shortly after midnight. She took on board her Captain Iron, who was both King's harbour-master and Admiralty salvage officer at Dover. There were a number of warships in the harbour, and Captain Iron was unwilling that the *Llandovery Castle* should enter the harbour during darkness. When the *William Grey* met the *Llandovery Castle* and the *Lady Brassey* about two miles outside the entrance, Captain Iron directed the ship to follow him, and the *William Grey*, with Captain Iron on board, led the *Llandovery Castle* to an anchorage to the westward of the Admiralty Pier. Captain Iron then boarded the *Llandovery Castle* and directed the operations while the *Lady Brassey* passed her hoses on board. Between 9 a.m. and 10 a.m. the *Llandovery Castle*, with the assistance of the *Lady Brassey*, was brought into the harbour, and by the afternoon the fire was out. The *William Grey* remained near the *Llandovery Castle* while she was at anchor near the pier and accompanied her into the harbour, and, after the *Llandovery Castle* was moored, the *William Grey* was told she was no longer required, and she got back to her berth about 9 a.m. Early in the morning she had carried a letter from Captain Iron to the admiral and returned. She had had her hoses ready in case they were needed. I have stated the whole of what the *William Grey* and her master and crew did. As far as actual assistance goes, she did nothing except that she took out Captain Iron. The guidance to the westward of the Admiralty Pier was not for the safety of the *Llandovery Castle*, but for the safety of the harbour, and involved no difficulty of any sort. The letter had nothing

to do with the safety of the *Llandovery Castle*. The *William Grey* took out Captain Iron, and went out by orders of the Admiralty, in response to the wireless message from the *Llandovery Castle*, and stood by for some seven or eight hours in case she was wanted. The *Lady Brassey* was amply sufficient to put out the fire. Except in taking out Captain Iron, the *William Grey* did nothing which on the most favourable view can be regarded as actually contributing to the safety of the *Llandovery Castle*. No doubt she went out and stood by, and it may be said that that was done at request. But where a tug is in the employ of the Admiralty, engaged to do whatever is required of her, and she is required to proceed to a ship in case she is wanted, and, in fact, does not actually contribute to the safety of the ship, I find it difficult to say that she has rendered a salvage service to the owners of the ship. If it be a salvage service, it would, in this case, be rewarded by a very small sum, and the share of the master and crew would be very small indeed. It is, however, unnecessary to decide this question, for the claim is barred unless the case is one in which I ought to extend the time, and I am clearly of opinion that there are no sufficient grounds for depriving the defendants of the protection given them by sect. 8 of the Maritime Conventions Act 1911.

The service was rendered on the 7th Dec. 1916. The *Llandovery Castle* was sunk by the enemy in July 1918. The first intimation of a claim was on the 23rd Nov. 1918, and, after correspondence between the solicitors, it was on the 18th Jan. 1919 definitely repudiated. The writ was issued on the 2nd April 1919. It was in form a writ *in rem*, and was sent by the plaintiffs' solicitors to the defendants' solicitors for acceptance. The defendants' solicitors indorsed it, "We accept service and undertake to appear for the defendants in due course." And they wrote: "We presume you are aware that the *Llandovery Castle* has been lost." Appearance was entered on the 14th April 1919. There was, of course, *no res*, and no bail was asked for or given. The statement of claim prays that the defendants be condemned in such amount of salvage as to the court shall seem fit. I mention the facts as to the writ and appearance because some argument was based upon the writ being a writ *in rem*. It is, in my opinion, immaterial whether it was *in rem* or *in personam*. The defendants might have refused to accept service of the writ *in rem*, and have refused to recognise the writ as a good writ *in personam*. They waived that objection and entered an appearance. By so doing they placed themselves in the same position as if they had been brought before the court by a writ *in personam*: (see *The Dictator*, 7 Asp. Mar. Law Cas. 175, 251; 67 L. T. Rep. 563; (1892) P. 304, 320; and *The Gemma*, 8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379; (1899) P. 285). But whether they were sued *in rem* or *in personam*, they had the right which sect. 8 gives them. It was contended that the defendants by appearing waived that right. I am unable to follow that argument. The section says—I am leaving out the irrelevant words—"No action shall be maintainable against the owners in respect of any salvage services unless proceedings are commenced within two years of the date when the services were rendered."

If owners are sued after the period of limitation has expired, how are they to raise that defence? The usual way to rely on a defence based on a statute of limitations is to plead the statute. Order XIX., r. 15, provides that: "The defendant must raise by his pleading all matters which show the action or counter-claim not to be maintainable . . . as, for instance, . . . Statute of Limitations." Sect. 8 is a statute of limitations. About that there is no doubt. If there be any doubt, see *Gregory* v. *Torquay Corporation* (105 L. T. Rep. 886; (1912) 1 K. B. 442), which deals with the Public Authorities Protection Act and the limitations contained in it. The proviso to sect. 8 enables, and, in one set of circumstances, directs, the Court to extend the period. The practice of the court has provided a simple way by which the plaintiff, or intending plaintiff, can, before he begins or proceeds with his action, apply to the court to determine whether the period shall be extended. But if the plaintiff does not so apply and issues his writ, how can the fact that the defendant appears to the writ deprive the defendant of the defence which the section gives him? Suppose the defendant should raise the defence by some form of interlocutory application, what is there to prevent him from raising it by his pleading? There is nothing. If his so doing is inconvenient to the plaintiff, the plaintiff has only himself to thank for neglecting to ask the Court to determine the matter at the first stage.

There remains the question of whether the plaintiff is entitled to an extension, or, if not, whether the Court in its discretion ought to grant an extension. The proviso to sect. 8 contains two branches. The first is discretionary and the second compulsory. The second branch of the proviso is inapplicable to the present case. The power under that—the compulsory branch—can only be exercised in order to give reasonable opportunity of arresting the ship, and, as a matter of fact, in this case there is no possibility of arresting the ship because she has been lost. On the first—the discretionary—part of the proviso, the section fixes a period of two years, and the discretion can only be used in favour of a plaintiff if there are special circumstances which create a real reason why the statutory limitation should take effect.

I am unable to find any special circumstances here. The plaintiffs were at all times stationed at Dover, and could have instructed solicitors at any time. If they were waiting for the owners of the tug to take proceedings, they could have easily ascertained the owners' intentions long before the end of two years. If they expected a reward from the Admiralty and have been disappointed in getting it, that is no reason why the owners of the *Llandovery Castle* should be deprived of the protection which sect. 8 gives them. The defendants are the Union-Castle Line, upon whom a writ *in personam* could at any time have been served. If it is said that a letter was written just before the expiration of two years, the answer is that liability was definitely repudiated on the 18th Jan. 1919, and no explanation at all is given for the further delay of over two months before the writ was issued. Moreover, I think the fact that the claim is at best a trifling one is one of the considerations which should be taken into account.

I see no reason for exercising a discretion in the plaintiffs' favour, and I refuse to do so. The action is statute-barred, and must be dismissed with costs.

Solicitors for the plaintiffs, *Pattinson* and *Brewer*. Solicitors for the defendants, *Parker, Garrett*, and *Co.*

April 14 *and May* 17, 1920.

(Before Sir HENRY DUKE, P. and HILL, J.)

THE TURID. (*a*)

Charter-party — "Always afloat" — Alongside as customary—Custom of Port of Yarmouth—Custom inconsistent with terms of charter.

A charter-party provided for a vessel to deliver timber at Yarmouth "always afloat," the cargo to be taken from alongside at the charterer's risk as customary. She could not float within 13ft. of the side of the quay, and it was accordingly necessary to erect staging between the ship and the wharf. The cargo was then carried from the ship's side across this staging and stacked 12ft. from the edge of the quay. This method of unloading follows the custom of the port.

In an action by the shipowner in the County Court to recover the cost of carrying the timber from the ship's side to the quay, and of erecting the staging over which it was carried, it was held that the custom of the port was not consistent with the terms of the charter.

Held, by the Divisional Court (Duke P. and Hill, J.), that this judgment was right. Although a custom may be admitted to show that delivery from "alongside" need not mean delivery over the ship's rail, it did not follow that the place of delivery was the place indicated by the suctom.

Judgment of the Court of Appeal in Holman *v.* Wade (Times *Newspaper, May* 11, 1877, *supplemented by further particulars from the Public Record Office*) *followed.*

APPEAL from the Yarmouth County Court.

The facts of the case appear from their Lordships' judgments.

F. D. MacKinnon, K.C. and *E. A. Harney*, K.C. for the appellants.

W. N. Raeburn, K.C. and *J. G. Trapnell* for the respondents.

The following cases were cited in argument:

Holman v. *Wade, Times*, May 11, 1877;
Metcalfe, Simpson, and Co. v. *Thompson*, 3 Asp. Mar. Law Cas. 567; 18 Times L. Rep. 706;
Northmoor Steamship Company v. *Harland and Wolff*, 1903, 2 Ir. L. Rep. K. B. 657;
Brenda Steamship Company v. *Green*, 9 Asp. Mar. Law Cas. 55; 82 L. T. Rep. 66; (1900) 1 Q. B. 518;
The Nifa, 7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56; (1892) P. 411;
Hayton v. *Irwin*, 4 Asp. Mar. Law Cas. 212; 41 L. T. Rep. 666; 5 C. P. Div. 130;
Stephens v. *Winteringham*, 3 Com. Cas. 169;
Aktieselskab Helios v. *Ekman*, 8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83;
Glasgow Navigation Company v. *Howard*, 11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172; 15 Com. Cas. 88.

Sir HENRY DUKE, P.—The appellants are timber merchants at Great Yarmouth. The respondents are the owners of the Norwegian steamship *Turid*. The appellants chartered the *Turid* to bring a cargo of timber from Soroka to Yarmouth, and the parties are at issue as to who is liable under the charter-party to pay certain expenses of the discharge of the cargo. By the charter-party it was agreed that the *Turid* should load at Soroka and proceed with the cargo to Yarmouth and deliver the same "always afloat." . . . The "cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The draught of the *Turid* was such that to be afloat at Yarmouth she could not come within about 13ft. of the quayside at which she was to discharge. The usual method of unloading for a ship so situated is to erect stagings between the ship's side and the edge of the quay, abreast of the several holds, such stagings being constructed of baulks of timber carried from the quay to the ship's side at a level of 4ft. or 5ft. below the rail with planks resting upon the baulks. The *Turid* had three holds and three stagings were erected. At each staging one gang of men carried the timber to the ship's rail and another gang received it there, carried it ashore, and stacked it at a distance of some 12ft. from the face of the quay. Stacking of timber nearer the waterside was not permitted, as free passage-way had to be kept there. The cost in question was the cost of erecting the stagings, carrying the timber across the stagings and across the 10ft. or 12ft. of quay, and stacking it.

Before the learned judge in the County Court proof was given of a custom of the Port of Yarmouth that the whole of this work should be done by, and at the cost of, the ship. It was objected, on the part of the shipowners, the plaintiffs, that the alleged custom was inconsistent with the terms of the charter-party, and the learned judge took this view, and gave judgment in their favour for the sum in dispute. The defendants appeal against this decision upon the one question of whether the alleged custom is consistent with the terms of the contract. If it is, the evidence was admissible, and as it was uncontradicted there should be judgment for the defendants.

The appellants agreed to take delivery of their timber from alongside the steamer, lying afloat, at their own risk and expense as customary. The express qualification as to custom appears to relate to the mode of taking delivery, and not to the mode of meeting risk or bearing expense. The custom of the port will govern the mode of delivery if it is consistent with the express agreement. What has to be determined is whether the claim of the appellants to have a staging erected for them between the ship and the quay and to have the timber stacked on their ground at the landward side of the 12ft. of clear frontage is consistent with their agreement to take delivery from alongside.

Although delivery alongside is in the primary meaning of the words delivery at the ship's rail, custom may undoubtedly give to the term an enlarged meaning. The shipowners may by force of custom be required to deliver into a lighter alongside or a quay alongside. The limitation put by law upon such a customary requirement is that it shall be reasonably consistent with what has been agreed. In the present case I should have thought, apart from authority, that what is demanded of the shipowners is not reasonably consistent with

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

the agreement of the parties. The quay was not alongside; the merchants' men could only come alongside by coming upon the staging. It is necessary, however, to examine some of these authorities which were cited as conclusive of the question at issue, and in particular the decision of the Court of Appeal in *Holman* v. *Wade* (*Times*, May 11, 1877), decided in 1877, and *Aktieselskab Helios* v. *Ekman* (76 L. T. Rep. 537; (1897) 2 Q. B. 83).

Holman v. *Wade* is reported only in the *Times* newspaper, but was a considered judgment upon a state of facts and a charter-party very like those in the present case. The words of the charter-party are these: "Cargo to be brought to and taken from alongside the ship at the merchants' risk and expense as customary." Owing to the form of the report in the *Times* some doubt has arisen as to the exact character of the expenses which were in dispute, and Mr. Carver, in his excellent work on "Carriage by Sea," describes them as expenses of stacking. We have examined the record which is in the Public Records Office and which puts the scope and result of the litigation beyond question.

The plaintiffs were the shipowners suing upon a charter-party for carriage of a cargo of timber from Riga to Hull, which provided that the vessel being loaded at Riga should proceed to the consignees' quay, Victoria Docks, Hull, or so near thereto as she may safely get and deliver the same always afloat for the agreed freight; "the cargo to be brought to and taken from alongside the ship at merchants' risk and expense as customary." The action was brought for breach of contract; the alleged breaches being that defendants did not and would not (*a*) take the cargo from alongside the ship at their own expense as customary within the true intent and meaning of the charter-party, and (*b*) discharge the cargo as fast as the steamer could deliver it. The averments of damage were that the plaintiffs were forced and obliged to discharge the cargo at their expense and to stack the same on the defendants' quay, whereby they incurred expenses amounting to 11*l.*, and the ship was delayed two days, with consequent loss to the plaintiffs of 60*l.*

The defendants by their defence alleged a custom at Hull for ships laden with timber to discharge their cargo upon the quay alongside, and to continue the discharge as long as there was quay space vacant for the discharge, the cargo then to be taken from alongside by the consignees. Defendants alleged further that the plaintiffs' loss of time was due to their having "at first" refused to discharge the cargo as customary, and that the subsequent discharge of the cargo had been made in the customary manner. Plaintiffs by their reply joined issue and demurred to the pleas as to custom on the ground that the alleged custom was contradictory of the charter-party. The action was tried before Mr. Justice Manisty and a City of London jury. The evidence, as stated in the *Times*, showed that at the quay in question it was necessary, in order to unload deals, to construct a stage from the quay to the ship, and as the deals were landed to stack them, and that this had involved, with regard to the cargo in question, the expenses amounting to 11*l.* which the plaintiffs claimed.

Evidence was also given of a custom at Hull that these expenses should be borne by the shipowners. The amount of the damages was agreed at 7*l.* Mr. Justice Manisty directed that judgment should be entered for the plaintiffs on the ground that the custom was inconsistent with the contract. The defendants' appeal was heard before Coleridge, C.J., Bramwell and Brett, L.JJ. Mr. Day (afterwards Day, J.) appeared for the plaintiffs, and Mr. Butt (afterwards Sir Charles Butt, P.) for the defendants; and after consideration the judgment of the court was delivered by Bramwell, L.J. on the 10th May 1877. On the ground that the contract could not be varied by custom the appeal was dismissed.

In this present case the facts and the contract are as nearly as can be alike with the facts and contract in *Holman* v. *Wade*, and the judgment in that case seems to me directly in point.

We were invited to consider some cases subsequent to *Holman* v. *Wade* which were cited by the respondents as expressions of the principle there explained. *Hayton* v. *Irwin* (41 L. T. Rep. 666; 5 C. P. Div. 130) was a claim under a charter-party for a voyage to Hamburg in respect of expense thrown on the shipowner by the charterers' refusal to take delivery at a point in the Elbe short of Hamburg. The charter-party required the ship to proceed to a safe port or as near thereto as she can safely get and deliver cargo . . . and to discharge as customary with all dispatch. The vessel could go no nearer to Hamburg than Stade without being lightened. The charterers refused to take delivery at Stade or to pay the costs of lightening the ship there, and the shipowner sued for the expenses thus thrown upon him. Defendant pleaded a custom of Hamburg whereby he was only bound to take delivery there, and the expense of lighterage for lightening the ship at Stade was payable by the plaintiff. Grove, J. allowed a demurrer to the defence, and Bramwell, Brett, and Cotton, L.JJ. affirmed his decision on the ground that the terms of this contract excluded the custom.

The case of *The Nifa* (69 L. T. Rep. 56; (1892) P. 411) was heard in this court on appeal from the County Court at Yarmouth. The shipowners sued the charterers for expenses of the same kind as the expenses here in question, caused by the same conditions at the Yarmouth quays which are described in this case—staging, carriage across the quay, and stacking. The mode of discharge was the same. The claim of the shipowners for the expenses of delivery of the cargo in excess of expense of delivery at the ship-rail was met by a plea of the custom which is alleged in this case. Upon proof of the custom the County Court judge gave judgment for the defendants. On appeal the Divisional Court in Admiralty (Sir Francis Jeune, P. and A. L. Smith, J.) reversed the judgment, on the ground that the custom was contrary to the plain meaning of the printed contract. The material provision in the charter-party was in these words: "Cargo to be supplied . . . and discharged as fast as steamer can deliver and according to the customs of the respective ports." The decision is in point here. The appellants relied before us upon the cases of *Stephens* v. *Winteringham* (3 Com. Cas. 169), *Aktieselskab Helios* v. *Ekman* (76 L. T. Rep. 537; (1897) 2 Q. B. 83), and *Glasgow Navigation Company* v. *Howard* (102 L. T. Rep. 172; 15 Com. Cas. 88).

In *Stephens* v. *Winteringham* (*sup.*) the charter-party required that the cargo should be "taken from alongside at merchant's risk and expense according

to the custom." The ship berthed alongside the quay and the space available for receipt of the cargo by the merchants was 60ft. or 70ft. distant from the ship's side; the custom of the port was that the shipowner should bear the cost of delivery at that space and of the lumping there which was necessary in order that the prompt discharge of the ship might proceed; and Bigham, J. held that the merchants' duty to receive the cargo arose only when it had been lumped at that place. In *Helios* v. *Ekman* the charter-party for carriage of a cargo of deals from Ramock to one of the usual wood docks in the River Thames provided for the deals to be "brought to and taken from alongside the ship at merchant's risk and expense." At the trial before Collins, J. evidence was received of a custom of the Port of London for delivery into lighters alongside, the ship bearing the cost of putting the timber into the lighter. The learned judge held that the custom was not inconsistent with the contract, and gave effect to it by his judgment, and upon appeal to the Court of Appeal, before Lord Esher, M.R., A. L. Smith and Chitty, L.JJ., the judgment was affirmed. The decisions in *Holman* v. *Wade* and *The Nifa* were cited, and Mr. Joseph Walton, who argued for the respondents, appears to have accepted the principle on which they proceed. Lord Esher, M.R. in his judgment pointed out that the consignee, in fact, took delivery alongside. He said: "It is part of the operation of taking delivery of the cargo that the consignee or merchant should provide barges and take them alongside in such a position that the timber can be delivered from the ship into the barge. . . . The custom found is . . . that in the case of long lengths of timber the shipowner alone has to perform the operation of delivery into the barges, which, if there were no custom, would have to be performed by both parties together. . . . The question is whether the custom . . . is contrary to the terms of the charter-party. . . . I think not. It simply explains what delivery of the cargo to the consignee alongside is and how it is to be effected—namely, by the act of the shipowner alone instead of the joint act of both parties."

In *Glasgow Navigation Company* v. *Howard* (*sup.*), Hamilton, J. had before him another dispute over the custom which was dealt with in the case of *Helios* v. *Ekman*, before Collins, J. A question had arisen as to whether the customary duty of delivery of the timber into the barges by the ship included stowage in the barges, which question was not determined. Before Hamilton, J. this question was tried out upon a great body of evidence, and decided in favour of the charterers. The arguments and the judgment show it to have been assumed by both parties that if the custom included stowage in the barges the charterers were entitled to succeed, and the judgment proceeds upon that footing.

Our attention was further called to the Irish case of *Northmoor Steamship Company* v. *Harland and Wolff* (1903, 2 Ir. Rep. 657), in which the late Palles, C.B. examined the authorities to which I have referred, other than *Glasgow Navigation Company* v. *Howard* (*sup.*). That case was decided later. The observations of the learned Chief Baron are not directly in point here; but any opinion of so great a master of the common law commands attentive consideration, and I respectfully concur in the view taken by the Chief Baron with regard to the effect of the judgments in *Holman* v. *Wade* (*sup.*) and *The Nifa* (*sup.*), and the mode in which the decision in *Stephens* v. *Winteringham* can be reconciled with them.

Mr. MacKinnon argued on behalf of the appellants that once a customary condition is introduced into the contract which gets rid of the obligation of the merchant to take delivery of the cargo at the ship rail, the question whether a particular place is alongside is to be determined by custom. I cannot entirely accept this proposition, and I do not think it follows naturally from the judgment of the Court of Appeal in the case of *Helios* v. *Ekman* (*sup.*), or necessarily from the judgment of Bigham, J. in *Stephens* v. *Winteringham* (*sup.*). The barge in *Helios* v. *Ekman* (*sup.*) was literally "alongside." The quay in the case before Bigham, J. was alongside, if it can be regarded as an entirety. Whether the place of delivery selected by the charterer, 60ft. from the ship, was a place of delivery alongside is another matter. If so, it was alongside—because in part and in whole the quay was alongside. But to say that premises like those in the present case, which are separated from the ship's side by 13ft. of waterway and a breadth of quay space not available for receipt of goods, are alongside the ship by force of custom seems to me to make custom contradictory of fact.

I think the custom relied upon is not reasonably consistent with the agreement of the parties, and that the appeal should be dismissed.

HILL, J.—The relevant terms of the charter-party are as follows: "To proceed to Great Yarmouth as ordered, or so near thereunto as she may safely get, and deliver the same always afloat"; and "the cargo to be . . . taken from alongside the steamer at charterers' risk and expense as customary."

The ship was ordered to discharge at a portion of the quay occupied by the charterers. "Always afloat," she was able to get within a distance of about 13ft. from quay to rail. She there discharged. The method of discharge was that a staging was slung from ship's side to quay abreast of each of the three holds, and the stevedore's men, working in two gangs, carried the timber from the ship's deck and holds across the staging and on to the quay, and stacked it on the quay, leaving a space of 10ft. or 12ft. between the edge of the quay and the outer edge of the stacks; one gang brought out the timber and carried it to the ship's rail; the other received it on the staging and carried it to the place of stacking on the quay and there stacked it. The space of 10ft. or 12ft. was necessarily left, as cargo was not permitted to obstruct a passage-way along the quay edge. It was admitted that discharge into lighters was not practicable, and that the only practical method of discharge was that which was adopted.

The contention of the charterers was that, by the custom of the Port of Yarmouth, the whole of this work was done by and at the expense of the shipowner. The contention of the shipowners was that the custom was inconsistent with the express terms of the charter-party, and that their obligation was to deliver at the ship's side—*i.e.*, that the work of the first gang was ship's work, but the work of the second gang, including the erection of the stagings, was charterers' work. The amount in dispute is the difference between the cost of the whole of the work and the rate for delivery at the ship's rail. The custom proved, and not disputed,

was as follows: "It is the custom to erect a wooden stage between the ship and the quay, and for stevedores to be employed by the shipbrokers to carry the cargo for the shipowners from the ship's rail over the wooden staging and to put it down 10ft. or 12ft. from the edge of the quay." This was all done at the cost and expense of the shipowners.

The question is whether that custom is so inconsistent with the express terms of the charter-party that it cannot be read into it. The custom is not inconsistent with the words "deliver the same always afloat," because the ship, being always afloat, could deliver in the customary manner. Is the custom inconsistent with the words "cargo to be taken from alongside the steamer at charterers' risk and expense as customary"? That means that the cargo is to be taken from alongside in the customary manner. It connotes a corresponding obligation on the ship to deliver the cargo alongside in the customary manner. From the point when and where the cargo is delivered alongside in the customary manner, it is to be at charterers' risk and expense. Up to that point it is to be at the ship's risk and expense. The question is: Does the custom proved explain "alongside," or does it contradict "alongside"? *Primâ facie*, "alongside" means along the side of the ship, and if the contract is for delivery alongside, and nothing else, and there is no custom, the operation of discharge is a joint one, the ship delivering and merchant receiving the timber as it passed over the ship's side. But by custom delivery alongside may be at a point beyond the ship's rail, and custom may involve an obligation upon the ship to deposit the cargo at some place alongside, and put that work upon the shipowner alone, and such a custom is not inconsistent with "alongside." In *Helios* v. *Ekman* the custom put the obligation on the shipowner to deposit the timber in the lighters which lay alongside the ship. In like manner, if the custom be that the shipowner deposits the cargo on the quay at the side of the ship, there would, in my opinion, be no inconsistency with the obligation to deliver "alongside." And, in such a case, some extension must necessarily be given to "alongside"—it cannot mean a mathematical line immediately along the side of the ship; the cargo in being deposited on the quay must cover some space, and in practice would hardly ever be placed on the very edge of the quay.

Speaking for myself, I should be prepared to hold that the question whether a spot which is not immediately along the side of the ship is "alongside" or not ought to be determined by the answer to the question whether it could reasonably be said to be "along" the side of the ship, and that a custom which was not unreasonable in that respect did not contradict the word "alongside." And I should, in the present case, be prepared to say that the place of deposit was reasonably along the side of the ship, notwithstanding that the ship was not close up to the quay nor the deposit on the very edge of the quay. I should, therefore, not be prepared to say that the custom was inconsistent with the express terms of the charter-party, and I should decide as I believe Bigham, J. decided in *Stephens* v. *Winteringham* (*sup.*). But now that the record in *Holman* v. *Wade* (*sup.*) has been examined, I am unable to distinguish it and feel bound to follow it. If the custom in *Holman* v. *Wade* (*sup.*), where the ship was against the quay, was inadmissible as inconsistent with the express terms, it is *a fortiori* inadmissible here. In *Holman* v. *Wade* (*sup.*) the jury found the alleged custom proved. The alleged custom as pleaded was: "It is the customary and required mode of discharge of the Victoria Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof"; and it was pleaded that "accordingly it was the duty of the plaintiffs to have delivered the said cargo on the quay alongside the *Volga*." The words of the charter-party were, in the material parts, identical with the words of the charter-party in the present case. The Court of Appeal upheld Manisty, J. in rejecting the custom as inconsistent with the express words.

I follow the Court of Appeal in *Holman* v. *Wade* (*sup.*), and, in so doing, I also follow the decision of this court in *The Nifa* (*sup.*), though I think the reasoning of the judges in *The Nifa* (*sup.*) is different, and such as I do not express my agreement with. I find it very difficult to reconcile *Stephens* v. *Winteringham* (*sup.*) with *Holman* v. *Wade* (*sup.*). In *Northmoor Steamship Company* v. *Harland and Wolfe* (*sup.*) the cargo was to be taken from alongside "always within reach of the ship's tackles," and is clearly distinguishable.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Trinder*, *Capron*, and *Co.*

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

Thursday, June 12, 1920.

(Before Sir HENRY DUKE, P. and HILL, J., sitting with Elder Brethren.)

THE CHELSTON. (*a*)

British master's certificate—Suspension of certificate—Wreck Commissioner's Court—Canadian procedure—Shipping Casualties and Appeals and Rehearing Rules 1907, *rr.* 22, 3, 12—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 470—*Canada Shipping Act* 1908 (17 *&* 18 *Edw.* 7, *c.* 65), *s.* 36.

The certificate of a British master was suspended by a Wreck Commissions Court sitting at Montreal.

The master appealed on the ground (inter alia) *that the procedure under the Canada Shipping Act* 1908, *s.* 36, *was not consistent with the rights to which a British master is entitled under the Merchant Shipping Act* 1894, *s.* 470, *sub-s.* 4, *and the Shipping Casualties and Appeals and Rehearing Rules* 1907, *rr.* 3 *and* 12.

Held, that the rights of British shipmasters in a Canadian Wreck Commissioner's Court are to be determined by considering whether the Canadian statutes diminish the rights assured to them by British legislation. The safeguards provided for the interests of shipmasters by the Merchant Shipping Act and the rules made thereunder are in no way diminished by sect. 36 *of the Canada Shipping Act* 1908. *But as in this case the Wreck Commissioner's Court had not complied with the provisions*

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

of sect. 36, the decision must be quashed and the master's certificate restored to him.

APPEAL against the decision of the Wreck Commissioner's Court held at Montreal.

The master of the steamer *Chelston* was coming down the St. Lawrence with a cargo of timber in difficult weather, under conditions with which he was not familiar, and under sailing orders which put a considerable burden upon him. Enough allowance was not made in the navigation for the set of the current and the direction of the wind. The *Chelston* in consequence stranded and became a loss.

The sitting of the Wreck Commissioner's Court was expedited and held late at night to enable the master to sail by a certain boat. Findings were later promulgated adverse to the master, upon which an order was made suspending his certificate for three months. The master appealed.

The Shipping Casualties and Appeals and Rehearing Rules 1907 provide :—

Under rule 3 :

When an investigation has been ordered, the Board of Trade may cause a notice, to be called a notice of investigation, to be served upon the owner, master, and officers of the ship. The notice shall contain a statement of the questions which, on the information then in possession of the Board of Trade, they intend to raise on the hearing of the investigation.

Under rule 12 :

After the questions for the opinion of the court have been stated, the court shall proceed to hear the parties to the investigation upon and determine the questions so stated.

Sect. 470, sub-sect. 4, of the Merchant Shipping Act 1894 provides :

A certificate shall not be cancelled or suspended by a court [holding a formal investigation into a shipping casualty] unless a copy of the report or a statement of the case on which the investigation or inquiry has been ordered has been furnished before the commencement of the investigation or inquiry to the holder of the certificate.

Sect. 36 of Canada Shipping Act 1908 provides :

3. A certificate shall not be cancelled or suspended under this sub-section unless the holder of the certificate has had an opportunity of making a defence.

G. P. Langton for the appellant.

G. A. H. Branson for the Board of Trade.

Sir HENRY DUKE, P.—This is an appeal by a master mariner holding a master's certificate issued by the Board of Trade against the determination of the Wreck Commissioner's Court at Montreal whereby the appellant's certificate was suspended for three months.

The appeal in the form in which it has been presented raises questions of principle which might have far-reaching consequences. In particular there is a challenge of the power of the Legislature of the Dominion of Canada to make amendments of the merchant shipping practice in England and Canada made under the Merchant Shipping Act of 1894 so far as those amendments affect the certificates of British shipmasters. There is also raised a question of considerable gravity as to whether the rules which govern procedure in Canada under the Canada Shipping Acts provide sufficiently for the protection of a person implicated by charges before a Wreck Commissioner's Court.

The master of the *Chelston* was coming down the St. Lawrence with a cargo of timber. He was confronted with difficult weather, and he was navigating under conditions with which he was not familiar, and under sailing orders which no doubt put a considerable burden upon him. The current was changeable, and the set of the current at the point where the disaster occurred was liable to be affected by the direction of the wind, and it seems that on this occasion it was so affected. The true cause of the loss of the *Chelston* appears to have been that the master or navigating officer did not make sufficient allowance for the set of the current in the weather that prevailed. At the time when the vessel was supposed to be several miles to the southward of the island upon which she struck in fact she was heading directly for it. The loss of the vessel took place on the 12th Sept. 1919 by reason of her stranding on St. Paul's Island, Nova Scotia.

There were communications between the ship's agents and the Board of Trade authorities in Canada with reference to the loss of the ship. The master was desirous of taking his passage from Montreal at a particular time, and the sitting of the Wreck Commissioner's Court was fixed with reference to that time. It was fixed for the 9th Oct. 1919. Owing to the exigencies of the master's position, the inquiry was held late in the evening, and it was continued until nearly midnight, because the master wished to avail himself of the passage he had booked in a ship sailing the following day. The master and chief officer were examined for something like three and a half hours. The master had counsel with him, who asked some questions, and after the examination there was an adjournment for the purpose of the Wreck Commissioner stating at the adjourned date what were the findings of the court. Subsequently findings were promulgated which found the master guilty of an error of judgment, and also that when the master had found that the ship had run her distance his duty was to stop and sound, which he failed to do. Upon these two findings an order was made suspending the master's certificate for three months.

It is not necessary to say anything with regard to the terms of the findings. If the findings had been those of a British Wreck Commissioner it might have been desirable to express an opinion as to the express terms of the decision, and as to the consequences which might follow from those terms. But in the view which we take of the case, it is not necessary to make any such expression of opinion.

The master first of all appeals on the substantial ground that he did not have due notice of the charges upon which, by the findings, his certificate was dealt with. There is the further ground that, as alleged, the Canadian procedure did not satisfy the requirements of British law with regard to this master's certificate, and therefore was ineffective to warrant a finding which prejudiced his certificate.

Thirdly, he complains that part of the finding —as to what was shown by the ship's log—was not in accordance with the evidence. I say nothing as to this last matter, though it is a tempting subject ; but it is not necessary to consider it.

Two substantial questions have to be considered here. Having regard to the view we take upon the first question, the second as to the conformity of the Canadian statute and the Canadian rules with

the requirements of the British legislation as it affects British masters' certificates, becomes really an immaterial question. But it has been raised, and it is desirable, I think, to express an opinion upon it, although it is not a ground upon which we have come to the conclusion at which we have arrived. In my view, the rules made by the Lord Chancellor are rules governing the procedure in British Commissioners' Courts. The rights of the master in the Canadian Court are to be ascertained by considering whether the provisions of the Canadian enactment diminish in any way the safeguards for the master's interests given him by the British legislation. In my opinion they do not. The Canadian legislation amply protects the rights of shipmasters, and I hope the judgment we propose to give in this case will make it clear that that is so.

This case will merely be an instance of the efficacy of the provisions of the Canadian statute for the protection of a shipmaster who comes within the Canadian jurisdiction. Besides being a matter of general interest, it is of the highest interest in this country as well as in Canada that it should be recognised that justice is administered in the Dominion of Canada, as it is here in the United Kingdom, with proper regard to the elementary principles which have governed the administration of justice among civilised peoples for all times. The Canadian statute of 1908 (Canada Shipping Act 1908) by provisions in sect. 36 substitutes certain words for the provisions in the British statute of 1894, which are ample for the protection of shipmasters. The provision introduced by amendment is in these terms: "The certificate shall not be cancelled or suspended unless the owner of the certificate has had an opportunity of making a defence."

I say nothing about foreign systems of law, but I think with regard to our own, and with regard to the law which prevails throughout the British Empire, there is recognition of the elementary principle of justice inherent in our law, and, I believe, in that of Canada, that there must be a hearing and there must be a charge preferred before a penalty can be inflicted. The provisions of the Merchant Shipping Act—the particular provisions which direct that this or that step shall be taken—are merely modes of securing for the persons affected the benefit of that principle of our jurisprudence. The provisions of the rules framed by the Lord Chancellor are provisions with the same object and it seems to me that the interests of shipmasters are more effectively protected rather than less by being embodied in that provision in sect. 36 of the Canadian Act of 1908, instead of being limited by specific directions in rules. It makes it easier to administer jurisdiction if one has specific directions in rules which show how the interest of the suitor is protected, but if the matter be at large, and one has to do justice, then it is sufficient to say, in a case of this kind, that the interest of the suitor, in this case the appellant, shall not be prejudiced unless he has had an opportunity of making a defence.

Being satisfied that the effect of the Canadian Legislature and the effect of the Canadian rules is as I have said, what the court has to ascertain is whether the British shipmaster here had the opportunity of making his defence. In my judgment he had not. I think that, owing to the dispatch which was used, owing to the exceptional nature of the transaction—the sitting of the court being fixed at an exceptional hour and hurry being used—those who conducted these proceedings lost sight of the requirements of sect. 36 of the Canadian Act of 1908, and lost sight of the fact that a Court cannot visit a man with a penalty until it has first informed him what is the matter in respect of which he is brought to judgment.

Here there was a searching inquiry conducted by skilled persons with great care and they exposed by a number of questions a great variety of topics on which it would have been quite competent to representatives of the Board of Trade, or any other complainant, to have submitted to the court that the master was in default on one or other of that great variety of topics, but that step never was taken. The investigation was completed by the evidence of the master and the chief officer, and there the matter was left. It may be that it would have been easier for the Canadian Wreck Commissioner if he had had the guidance of a set of rules like that contained in the Lord Chancellor's rules in this country, but that is entirely a matter for the Canadian administration. Those who administer the jurisdiction of Canada are perfectly competent to say whether rules should be laid down to secure definite objects, or whether those objects should be left to be secured by general principles of law. Rules are not laid down in this case. It is left at large as to what means shall be taken to secure that the holder of the certificate has an opportunity of making a defence.

In the present case, owing to the exceptional circumstances, the necessity of formulating charges was overlooked. No charges were ever formulated, and the first notice the master had of the charges it was proposed to make against him was in the findings of the court by which he was found guilty of certain of them. It seems to me that the decision of the Canadian court must be quashed, and that the master's certificate must be restored free from any suspension. The successful appellant must have the costs of the appeal

HILL, J.—I agree.

Appeal allowed.

Solicitors: *Ince, Colt, Ince,* and *Roscoe,* for *David Wright Smith* of Glasgow; *Solicitor for the Board of Trade.*

June 22 *and* 25, 1920.

(Before HILL, J.)

THE MORGANA. (*a*)

Salvage—Ship belonging to His Majesty and specially equipped with salvage plant—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 577 (1)—*Merchant Shipping* (*Salvage*) *Act* 1916 (6 *&* 7 *Geo.* 5, *c.* 41), *s.* 1.

The Admiralty, owners of a ship fitted with a wireless installation, a powerful searchlight, grappling ropes, and other salvage gear, and specially constructed for laying and repairing submarine telegraph cables, claimed salvage in respect of her services.

Held, that the ship was not "specially equipped with salvage plant" within the meaning of the Merchant Shipping Salvage Act 1916, *s.* 1, *and that the*

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

claim of the Admiralty was, therefore, barred by sect. 557 (1) *of the Merchant Shipping Act* 1894.

ACTION for salvage remuneration in respect of services rendered.

Between the 13th March and the 16th March salvage services were rendered by five vessels, including the Admiralty's cable ship *Monarch* to the steamship *Morgana*. The claims by the four other vessels and by the commander and crew of the *Monarch* were upheld by the judge. A claim was also made by the Lords Commissioners of the Admiralty in respect of the services of the *Monarch*.

The facts and statutes relevant to the latter claim are fully set out in the judgment.

Butler Aspinall, K.C. and *Balloch* for the *Monarch*.

D. Stephens, K.C. and *I. H. Stranger* for the defendant.

HILL, J., after dealing with the other claims, said:—

Last of all comes the writ originally issued on behalf of the officers and crew of his Majesty's cable steamship *Monarch*, and by a very late amendment a claim by the Lords Commissioners of the Admiralty was added, they claiming in respect of the services of the *Monarch* as an instrument of salvage. That amendment was made on the 10th June 1920, and the defence has not been amended in time for this trial, but it was intimated that the right of the Admiralty to sue in respect of the services of the *Monarch* as an instrument of salvage would be put in issue, and I have to determine that matter.

The *Monarch* was a cable ship, and in response to a wireless message she proceeded to the *Morgana*, reaching that vessel on the afternoon of the 15th March. She was then unable to make fast because the weather was bad. She subsequently made fast and assisted the *Lacerta* in towing off from the land for some four hours, and then she stood by until the following morning when the *Sea Monarch* came up. She then left to see about her own work. As I have said, I do not think the true view is that she saved the *Morgana* from immediate risk of going on to the rocks. There was nothing critical at that time, but she did assist the *Lacerta* in getting the ship further away from the coast.

Then arises a question, not an easy question, with reference to the claim of the Lords Commissioners of the Admiralty. The *Monarch* belongs to the Admiralty, and is in fact in the employment of the Post Office. She is described in this way: "She is fitted with a wireless installation, a powerful searchlight, grappling ropes and other salvage gear, and was specially constructed for laying and repairing submarine telegraph cables."

Apart from the Merchant Shipping (Salvage) Act 1916 (6 & 7 Geo. 5, c. 41) no claim could be made for her as an instrument of salvage, because she would come within sect. 557 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), which provides that where any salvage services are rendered by any ship belonging to her Majesty no claim shall be allowed, with the proviso, of course, that the master and crew can claim with the consent of the Admiralty. Here the master and crew do claim with the consent of the Admiralty. Then the Act of 1916 was passed and it is in these terms: "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 *Monarch* was not a tug. Was she "a ship specially equipped with salvage plant"? A list of her equipment has been put in, and it is said, not that that plant was put on board her for the purpose of rendering salvage services, but that it was specially put on board her and was the sort of plant which was very useful in salvage services. There can be no dispute that a good deal of the equipment must be useful in rendering salvage, but in my view it is no more true to say that it is specially useful in rendering salvage services than are powerful hawsers or powerful engines. But, assuming that the various articles described in this case come within the words "salvage plant," I have still got to find, before I can bring the *Monarch* within the Act of 1916, that she is a ship "specially equipped" with such salvage plant.

What do the words "specially equipped with salvage plant" mean? It seems to me that they must mean equipped with salvage plant in a way or of a kind that such a ship would not be equipped with but for the purposes of rendering salvage assistance if it became necessary.

The whole of the plant on board this ship is there not for the purpose of rendering salvage services, but because it is essential for the ordinary working of the ship as a cable ship, and it is especially for that purpose. Therefore, it seems to me that she is not "specially equipped" with anything; she is equipped with all that is necessary for carrying on her own work. Some of that equipment is useful for salvage, but I do not think that that brings the *Monarch* within the Act of 1916.

I have never been able to understand why any particular ships should be excepted from the general rule—why if the Admiralty can make claims in respect of salvage services by tugs they should not be able to claim in respect of salvage services by men-of-war. They are all ships maintained at the public expense, and if it is fair to claim in respect of one it is only fair to claim in respect of the other. But as I cannot see any real principle at the bottom of the Act of 1916, I have to give effect to what appears to me to be the meaning of the exact words.

I doubt very much whether the equipment here was "salvage plant," and I am satisfied that the *Monarch* was not "specially equipped with salvage plant." Therefore, I find that she does not come within the Act of 1916. Accordingly, I can only reward the master and crew of the *Monarch*, and it is on that basis that I make my award in her case.

I allot to the commander of the *Monarch* 75*l*., and to the crew 225*l*. I should add, in case the matter goes further, that but for my view as to the claim of the Admiralty being barred, I should have awarded 600*l*. in respect of the *Monarch* as a salving instrument.

Solicitors: *Godfrey, Warr*, and *Co.*; *Botterell* and *Roche*, agents for *Hearfield* and *Lambert*, Hull.

Judicial Committee of the Privy Council.

Nov. 5 *and Dec.* 7, 1920.

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

THE CAIRNSMORE AND THE GUNDA. (*a*)

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

Prize Court—Goods in Crown custody—Insurance by Marshal—Release of goods—Owners' liability for premiums.

The Admiralty Marshal insured against fire, aircraft, and bombardment goods which had been seized as prize. The respondents were neutral owners of goods laden on two vessels which were captured. Subsequently, the release of the goods was ordered, but they remained in the marshal's custody for some time as the owners were unable to obtain shipment for them. The Marshal claimed a proportion of the premiums from the cargo owners as expenses chargeable against them.

Held, that the proportion of the insurance premiums could not be recovered as part of the expenses of detention by the Marshal on delivery of the goods.

Decision of Sir Henry Duke, P., reported (1920) *P.* 209), *affirmed.*

APPEAL by the Crown from a judgment of the Prize Court (England) reported (1920) P. 209).

The Marshal claimed from the respondents a proportion of the premiums under which the goods in question had been covered while in his custody as prize as expenses incidental to their retention under circumstances fully set out in the judgment of their Lordships. The President (Sir Henry Duke) rejected the claim.

Sir *Gordon Hewart* (A.-G.) and *T. Mathew* for the Crown.

Sir *H. Erle Richards*, K.C. and *Darby* for the respondents.

The following cases were referred to:

The Franciska, 10 Moo. P. C. 73; 2 Eng. P. C. 416;
The William, 6 C. Rob. 316;
The Ostsee, 9 Moo. P. C. 150;
The Dusseldorf, 14 Asp. Mar. Law Cas. 478; 15 Asp. Mar. Law Cas. 84; 123 L. T. Rep. 732; (1920) A. C. 1034;
The Südmark (*No.* 2), 14 Asp. Mar. Law Cas. 201; 118 L. T. Rep. 383; (1918) A. C. 475;
The Catharine and Anna, 1801, 4 C. Rob. 39; 1 Eng. P. C. 336.

The considered opinion of their Lordships was delivered by

Lord WRENBURY.—This is the appeal of the Procurator-General from an order of the President, Sir Henry Duke, by which he pronounced the cargo owners not to be liable for the premiums or policies of insurance effected by the Marshal against fire, aircraft, and bombardment. The claimants, Messrs. Ballins Sonner and Co., of Copenhagen, were the owners of 1425 tons of quebracho logs laden on the *Cairnsmore* and 2400 tons of quebracho logs laden on the *Gunda* which were seized as prize in July and Aug. 1915, and were discharged and stored on open ground in the Albert Dock, Leith. The Crown claimed condemnation, but on the 21st and 24th July 1916, Sir Samuel Evans ordered the goods to be released. Nevertheless, the greater part of the *Cairnsmore* shipment and the whole of the *Gunda* shipment remained stored at Leith until after the 31st July 1919. This was due to the fact that the Danish owners were unable to get shipment for them. Ultimately all the goods were sold and removed.

At the outbreak of war the Admiralty Marshal had effected a general cover by way of insurance against fire of goods which might from time to time be placed in his custody as prize. Further, on the 23rd May 1918, he gave notice by advertisement and by notice posted to solicitors practising in the Prize Court including the solicitors for the claimants in this case that, in addition to the cover already effected against fire, goods in his custody as prize would from that date be insured against aircraft risk and at certain places against bombardment risk. The goods in question in this case were brought under the covers thus effected. The question to be determined is whether a proportion of the premiums, amounting in the aggregate to 910*l.* 4*s.*, is payable by the cargo owners to the Marshal on delivery of the goods as expenses chargeable by the Marshal against the owners. The learned President held that it is not.

The duties and liabilities of the Marshal as executive officer of the Crown in respect of goods placed in his custody under a claim of prize must arise either by statute or apart from statute. Sect. 31 of the Naval Prize Act 1864, which relates to goods, refers back to sect. 16, which relates to ships. The latter is a section which provides for delivery to the Marshal and for retention by the Marshal in his custody subject to the order of the Court. The statute defines no special statutory duties or liabilities in the matter. The duties and liabilities of the Marshal are those which the law imposes upon one who has the custody of the goods of another against the will of that other. His duty is to exercise all due care and diligence in the safe custody of the goods. This is not necessarily limited to such care and diligence as he would exercise if the goods were his own: (*The William*, 6 Ch. Rob. 316). He might be content if the goods were his own to use less care than he owes when they belong to another. He must exercise all due care and diligence, and will be allowed the expenses attending the possession, care, and custody of the property, and those expenses will be treated as a charge upon the property itself: (*The Franciska, sup.*; *The Dusseldorf, sup.*). But captors in cases of *bonâ fide* possession are not answerable for incidents not arising from any misconduct on their part: (*The Franciska, sup.*, p. 430). This is equally or even *à fortiori* true of the Marshal. The liability of the Marshal, therefore, in respect of fire or like risk is a liability only for his own negligence. The duty of the Marshal to use all due care and diligence does not involve a duty owing to the owner of the goods to insure them while in his custody. It may be quite right and prudent that he should insure the goods to cover his own liability, say, for the negligence of his agents, but there is no authority to insure for the benefit of the owner of the goods if they are lost without negligence on the part of the Marshal. The owner may already have covered the risk by an insurance effected on his own behalf. If so,

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

why should he pay a second premium to insure them again? The owner being, say, a foreign neutral, may prefer to insure them in his own country, where he has perhaps more confidence in the insurance office, or where he will pay a less premium. Or he may prefer to be his own insurer—or, in other words, to accept a risk which he thinks is not likely to result in a loss rather than pay a premium which is, in any case, money out of pocket. If the owner has not insured elsewhere, and the goods are lost, and the Marshal has effected an insurance which covers the risk, the owner may no doubt have the benefit of it, and can only have the benefit of it if he pays the premium. But it does not follow that he is bound to pay the premium and take the benefit.

The point is not without authority. In *The Catherine and Anna* (*sup.*) an order had been made to restore a ship on payment of the captor's expenses. The captor had insured the ship against fire. Sir William Scott held that the costs of insurance were not to be allowed as captor's expenses, meaning "expenses that are necessarily incurred by the act of capture." Sir William Scott there said: "Captors are generally bound for two things—for safe and fair custody, and if the property is lost or destroyed for want of that safe and fair custody, they are responsible for the loss. For these two things every captor is answerable; but if an accident, or mere casualty, happens, against which no fair exertions of human diligence could protect, it must fall on the party to whom the property is ultimately adjudged. If to secure himself against the negligence of his own agents, or to secure his own responsibility, the captor chooses to make insurance, I understand the practice of the registrar and merchants has been not to allow it in their report, and I am not prepared to say, upon any principle which occurs to me, that such a disallowance is wrong. . . . The claimant is not bound to look further, not to contribute to the expense which the captor, for his own security, may choose to incur."

In that case the claimants had in fact previously effected an insurance themselves, but their Lordships do not find in this fact anything to affect the principle of the decision.

In *The Südmark* (*No.* 2) (*sup.*, at p. 484), Lord Parker of Waddington, in delivering the judgment of this board, said: "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."

There is in their Lordships' opinion not sufficient evidence that in this case the cargo owners, during the currency of the risk, assented to the Marshal insuring the goods on their behalf, in which case, of course, they might have been liable for the reasonable cost of such an insurance.

Their Lordships are of opinion that the President was right in holding that the premiums cannot be claimed as expenses to be recouped to the Marshal on delivery of the goods.

There is a subsidiary point in the present case which is of no general importance. On the 16th March 1918, the solicitors for the claimants wrote to the Marshal that their clients were remitting them a sum "to pay all the charges of detention. . . ." On the 18th March 1918, the Marshal replied acknowledging receipt of the letter of 16th March "advising me that you shortly expect a remittance to cover the charges of detention, insurance, &c." The word "insurance" is not found in the letter of the 16th March. On the 7th Nov. the claimants' solicitors wrote to the Marshal asking "what the cost of insurance amounts to." In Feb. 1919 the purchasers of the goods were prepared to take delivery, but the Marshal refused to direct the collector of customs at Leith to give delivery until the solicitors had given their personal undertaking to pay all the Marshal's charges including the cost of insurance. On the 26th Feb. 1919, the solicitors gave the undertaking. This related to a first parcel of goods. On the 29th July 1919, they gave a similar undertaking as to the second parcel. Their Lordships do not find that these facts in any way affect the question to be decided. There was no consideration and no admission or acceptance of liability in the matter. The claimants' solicitors very sensibly gave their personal undertaking to pay without which they could not get delivery, leaving the rights of the parties unaffected.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for the Crown, *Treasury Solicitor.*

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

Oct. 29, *Nov.* 1, *and Dec.* 16, 1920.

(Present: The Right Hons. Lords CAVE, DUNEDIN, MOULTON, and PHILLIMORE.)

THE SHIP MARLBOROUGH HILL *v.* ALEX. COWAN AND SONS LIMITED AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Ship—Court of Admiralty—Failure to deliver goods—Bills of lading—"Received for shipment"—Indorsees of the bills of lading—Several indorsees join in one writ—Arrest of ship—Procedure—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 6—*Colonial Courts of Admiralty Act* 1890 (53 *& 54 Vict. c.* 77), *s.* 2, *sub-s.* 2.

A document which acknowledges that goods have been received for shipment by a named vessel, or by some vessel belonging to named shipowners, does not on that ground fail to be a bill of lading within the meaning of the Bills of Lading Act 1855 (18 *& 19 Vict. c.* 111).

The sailing ship M. H. *loaded at New York a cargo of general merchandise for carriage to Sydney. F. E. and Co. of New York as agents for the charterers received for shipment certain packages consigned to, among other persons, in Sydney, the various respondents. To each consignor there was issued a document which acknowledged the receipt of the goods "for shipment by the sailing ship* M. H. *or by some other ship owned or operated by" certain lines of vessels, to be transported to*

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

Sydney and there delivered to shipper's order. The document contained references to itself as a "bill of lading" and was signed F. E. and Co. "for the master." The goods, not being delivered upon the arrival of the M. H. *at Sydney, the respondents, who were each indorsees of one of the documents, issued a writ* in rem *against the ship, claiming severally to recover damages in an action for non-delivery of goods under bills of lading, and the ship was arrested. The appellants thereupon took out a summons to set aside the writ and by order a special case was stated for the opinion of the full court to have decided* (1) *whether the Supreme Court in its Admiralty Jurisdiction had jurisdiction to hear the action, and* (2) *whether the plaintiffs were properly joined.*

Held, that the documents were bills of lading within the meaning of sect. 6 *of the Admiralty Court Act* 1861; *and that the joinder of plaintiffs, an obviously convenient course in the present case, depended upon rule* 29 *of the Supreme Court (Admiralty Jurisdiction), and, that being a matter of procedure, their Lordships were not disposed to differ from the decision of the Supreme Court, and the case should proceed to trial. Accordingly the appeal would be dismissed.*

APPEAL from a judgment of the Supreme Court of New South Wales (Admiralty Jurisdiction) upon a case stated.

In Nov. 1918, the *Marlborough Hill* loaded at New York on behalf of the British Government, the charterers, a cargo of general merchandise for carriage to Sydney. Funch, Edye, and Co. of New York, as agents for the charterers, received for shipment certain packages consigned to, among other persons in Sydney, the various respondents. The goods not being delivered upon the arrival of the *Marlborough Hill* at Sydney the respondents issued a writ *in rem.* against the ship for non-delivery of the goods under bills of lading in the Supreme Court (Admiralty Jurisdiction), claiming by the indorsement on the writ "as consignees or indorsees of bills of lading." Upon affidavits filed by the respondents the ship was arrested.

The appellants took out a summons to set aside the writ and, by order, a special case was stated for the opinion of the full court.

The special case raised two questions (1) whether the Supreme Court in its Admiralty jurisdiction had jurisdiction in the case, and (2) whether the plaintiffs were properly joined. The full court answered both questions in the affirmative, adding as to (1) that it would be necessary in order to succeed for each plaintiff to prove that the goods in respect of which he claimed were shipped on board the *Marlborough Hill.*

The document issued to each consignor acknowledged the receipt of the goods "for shipment by the sailing ship *Marlborough Hill* or by some other ship owned or operated by" certain lines of vessels to be transported to Sydney and there delivered to shipper's order, and the document contained references to itself as a "bill of lading," and was signed by Funch, Edye, and Co. "for the master." The question with regard to the jurisdiction conferred under the Admiralty Court Act 1861 (24 Vict. c. 10), s. 6, and the Colonial Courts of Admiralty Act 1890 (53 & 54 Vict. c. 27), s. 2 (2), depended in part upon whether the document given to the shippers was, or was not, a "bill of lading" for the purposes of the former Act. On the question whether the plaintiffs were properly joined, reference was made to rules 29 and 155 of the Supreme Court of New South Wales (Admiralty Jurisdiction) Rules.

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

MacKinnon, K.C. and *Sinclair Johnston* for the respondents.

The considered opinion of their Lordships was delivered by

Lord PHILLIMORE.—In the month of June 1919, the Finnish sailing ship *Marlborough Hill* arrived at Sydney on a voyage from New York, and on the 12th June a writ *in rem* at the instance of some twenty plaintiffs, the present respondents, was issued against the ship, in an action for non-delivery of goods under bills of lading. The writ was indorsed as follows: "The plaintiffs claim as consignees and indorsees of bills of lading for non-delivery of goods agreed to be carried by the said ship *Marlborough Hill*, and delivered to the plaintiffs respectively at Sydney, or agreed to be shipped within a reasonable time by some other vessel of the same line, and delivered to the plaintiffs respectively in Sydney, and for the loss and value of the goods undelivered as aforesaid, and the plaintiffs claim the sum of 1515*l.* for the loss aforesaid and for costs."

There followed particulars of the several claims, the largest being for 334*l.*, and the smallest for 3*l.* 16*s.* Affidavits were sworn separately by each of the plaintiffs on or about the 12th June. They were all in similar form and averred that in Nov. 1918, bills of lading were signed on behalf of the master by a firm of agents for the carriage of certain cargo from New York to Sydney to be delivered to the holders of the bills of lading; that the plaintiffs were indorsees of the bills of lading; that "the said goods were either lost during the said voyage or were not shipped either by the said vessel or by any other vessel within a reasonable time, and were not delivered to the plaintiff as agreed"; with further necessary formal statements to support process. Thereupon a warrant was issued to arrest the ship, and she was held to bail, and the necessary bail bond having been entered into, the ship was released. It is presumed that an appearance must have been entered on behalf of the owner of the ship, at or before the time when the bail bond was given; but the actual form of the appearance is not upon the record, and their Lordships have no information whether it was an absolute appearance or an appearance under protest. The rules in the Admiralty Jurisdiction of the Supreme Court of New South Wales make no specific provision for an appearance under protest. But by rule 155: "In all cases not provided for by these rules the practice of the court in its common law jurisdiction shall be followed, or in cases therein unprovided for the practice of the Admiralty Division of the High Court of Justice of England shall be followed." And the usual mode of raising an objection to the jurisdiction in Admiralty cases is by appearing under protest.

However this may be, on the 17th June a summons was taken out on behalf of the owner of the ship to set aside the writ and all proceedings thereupon, on the ground that the claims of the various plaintiffs in respect of which the writ had been issued were separate and distinct claims, and

could not legally be joined together in one action. In support of this application, an affidavit was filed sworn by one Frank Linton. The terms of this affidavit will be discussed later. The application was heard by Owen, J. in chambers on two occasions. On the second occasion, a further point was taken on behalf of the shipowner to the effect that no such action would lie in Admiralty even if brought by each plaintiff separately, or, alternatively, that some of the claims were outside the jurisdiction. The judge allowed this further point to be raised, and then had the whole matter stated in the form of a special case for decision by the full court. The questions submitted for the opinion of the court were two: "(1) Has the Supreme Court of New South Wales in its Admiralty jurisdiction under the circumstances set out herein any jurisdiction to hear and determine this action? (2) Are the plaintiffs properly joined in this action?"

After argument the full court ordered: "That the said questions of law should be answered as follows: (1) 'The Supreme Court of New South Wales in its Admiralty jurisdiction has jurisdiction to hear and determine this action, but it is necessary in order to succeed there that each plaintiff should prove that the goods in respect of which he claims were shipped on board the *Marlborough Hill*. (2) Yes."

It is from this decision that the ship owner has appealed to the King in Council.

An extract from the bill of lading was annexed to the special case, but their Lordships have had the full document submitted to them.

Admiralty jurisdiction is conferred upon the Supreme Court of New South Wales by the Colonial Courts of Admiralty Act of 1890, which in substance provides that the jurisdiction of a Colonial Court of Admiralty shall be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, and that the Colonial Court may exercise such jurisdiction in the manner, and to as full an extent as the High Court in England. The Admiralty jurisdiction of the High Court in England, with a consequent right to try actions in this class either *in rem* or *in personam*, arises from sect. 6 of the Admiralty Court Act 1861, whereby it is provided that: "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. . . ."

By a provision of the Colonial Courts of Admiralty Act, the words "domiciled in England or Wales" must mean in this case "domiciled in New South Wales," which the owner of this ship was not.

The first point taken on behalf of the appellant is that this purports to be a claim by the assignee of a bill of lading, and that the shipping instrument on which reliance is placed is not a bill of lading; and this point requires some careful consideration. The document is not in the old form of a bill of lading. The old form starts with a statement or acknowledgment that the goods have been shipped. It runs "shipped on board," &c. But this document runs "received in apparent good order and condition from . . . for shipment." The old form is precise that the goods have been shipped on board the particular vessel, though the conditions of the bill of lading may proceed afterwards to permit of transhipment. This document runs to the effect that the goods have been received for shipment by the sailing vessel called the *Marlborough Hill*, or by some other vessel owned or operated by the Commonwealth and Dominion Line Limited, Cunard Line, Australasian Service; and the first term which is expressed to be mutually agreed is to the effect that the ship owner may substitute or tranship the whole or any portion of the goods by any other prior or subsequent vessel at the original port of shipment, or at any other place. The contract, therefore, is not one by which the shipment on the particular vessel proceeded against is admitted, nor one whereby the shipowner or his agent or the master contracts to carry and deliver by that ship. It is one whereby the agents for the master put their signature to the contract, admit the receipt for shipment and contract to carry and deliver, primarily by the named ship, *Marlborough Hill*, but with power to substitute any other vessel owned and operated by the specified line, or possibly under the first condition by any other ship whatsoever. But the contract does contain the further obligation that, subject to the excepted conditions and perils, either the named ship or the substituted ship shall duly and safely carry and deliver.

It is a matter of commercial notoriety, and their Lordships have been furnished with several instances of it, that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form "received for shipment" instead of "shipped on board," and further with the alternative contract to carry or procure some other vessel (possibly with some limitations as to the choice of the other vessel) to carry, instead of the original ship. It is contended, however, that such shipping instruments, whatever they may be called in commerce or by men of business, are nevertheless not bills of lading within the Bills of Lading Act of 1855, and it is said, therefore, not bills of lading within the meaning of the Admiralty Court Act 1861.

Their Lordships are not disposed to take so narrow a view of a commercial document. To take the first objection first. There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his store-house awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail. The two forms of a bill of lading may well stand, as their Lordships understand that they stand, together. The older is still in the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas "received for shipment" is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.

Then as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it con-

venient to enter into and accept. The liberty to tranship is ancient and well-established, and does not derogate from the nature of a bill of lading; and if the contract begin when the goods are received on the wharf, substitution does not differ in principle from transhipment.

If this document is a bill of lading, it is a negotiable instrument. Money can be advanced upon it, and business can be done in the way in which maritime commerce has been carried on for at least half a century, throughout the civilised world. Both parties have agreed to call this a bill of lading; both, by its terms have entered into obligations and acquired rights such as are proper to a bill of lading. All the other incidents in its very detailed language are such as are proper to such a document. The goods are marked and numbered as stated in the margin, and are to be delivered to the order of the shipper or his assignees, on payment of freight and charges. There are the usual, now in modern times very detailed, provisions and excepted perils. There are provisions for the payment of general average; that the shipper is to be liable to the ship owner for damage owing to his having shipped dangerous goods; and that he shall pay all expenses for reconditioning and gathering of loose cargo. The ship owner is to have a lien on the goods, not only for freight, but for fines, damages, costs and expenses which may be incurred by any defect in insufficient marking or description of contents. It is called a bill of lading many times in the course of the fifteen provisions, and particularly in the last, where it is provided that the shipment, being from New York, shall be subject to all the provisions of certain statutes of the United States, and specially to the well-known Harter Act. The list closes as follows: "In accepting this bill of lading, the shipper, owner and consignee of the goods, and holder of the bill of lading, agrees to be bound by all its stipulations, exceptions and conditions, whether written, stamped or printed, as fully as if they were all signed by the shipper, owner, consignee or holder, any local customs or privileges to the contrary notwithstanding. If required by the shipowner, one signed bill of lading, duly endorsed, must be surrendered on delivery of the goods." And then the document ends in the time-honoured form. "In Witness whereof the Master or agent of said vessel has signed three bills of lading, all of this tenor and date, of which if one is accomplished, the others shall be void."

No doubt it appears from the margin that it is the form in use by the Commonwealth and Dominion Line Limited, Cunard Line, Australasian Service, trading from New York to Australia and New Zealand, with Funch, Edye and Co. Incorporated, as the American agents; and it may be said that it is not signed by the master, but by that firm as agents for the master. It is, however, well known that in general ships the master does not usually sign. The bills of lading are signed in the agents' office by the agents. It should perhaps be added that it is evidently contemplated by the document that the shipper will assign his rights and that the assignee or holder of the bill of lading will present the document at the port of delivery, and that his receipt and not that of the shipper, will be the discharge to the ship owner.

Their Lordships conclude that it is a bill of lading within the meaning of the Admiralty Court Act 1861.

It is next contended on behalf of the appellant, that at any rate no writ *in rem* could be issued against the ship *Marlborough Hill*, in respect of any goods, except those which were actually shipped on board, which is no doubt the view which the Supreme Court has taken, as is shown by answer No. 1—an answer from which there is no cross-appeal—and that this being so there is no averment, and, at any rate, no proof that any of the goods in question were shipped on board this particular vessel. The language of the endorsement of the writ has already been given, and both it and the affidavits to lead the warrant are not precise and positive that any goods were actually shipped on board the *Marlborough Hill*.

As regards the affidavits, their Lordships have not to consider whether they were sufficient in form to support a warrant for arrest, or whether upon such affidavits the proper officer ought to have allowed the warrant to go. The summons was not a summons to set aside the warrant or to release the ship without bail, but to set aside the writ and all further proceedings. Nor was the summons originally taken out on this ground.

Turning to the endorsement on the writ and accepting for this purpose the position that there would be no right *in rem*, except in respect of goods actually shipped on board the particular ship, the endorsement is no doubt open to some objection for uncertainty. But it is not usual to take the extreme course of setting aside a writ for a defect in the endorsement, unless indeed it appears that there is substance behind the objection. And if the several documents which were before the full court are closely scrutinised, it would appear that the fact that some at least of the goods were shipped was not brought into controversy. The judge's notes on the argument before him in chambers were made an exhibit to the special case, and it should be observed that when application was made for leave to take the second point, the way in which it was brought before the judge was that the counsel for the defendant, using the language of the note, "wished to object that no such action would lie in Admiralty even if brought by each plaintiff separately, or" (and this is to be noted) "some of the claims are outside the jurisdiction of the court."

Mr. Linton's affidavit states that he is informed by the master, and believes, that separate and distinct bills of lading or shipping receipts were issued for the several goods of the several plaintiffs. This is correct. He proceeds to state that all the goods in respect of which the plaintiffs are claiming were received for shipment under the terms of these bills of lading or shipping receipts, which appears to be an admission that at any rate all the goods were received for shipment. He does not proceed to say that any of them, still less that some of them, were not shipped on board the *Marlborough Hill*. In the reasons for the judgment of the full court, it appears that the first objection was that none of the goods had been carried into the port of Sydney; a verbal objection to the terms of the statute, which was got over by Dr. Lushington in very early days in the case of the *Danzig* (9 L. T. Rep. 236; Br. & Lush. 102; 32 L. J. 164, Adm.), a decision which has not since been questioned and which counsel for the appellants did not question now. The second objection was that there was no evidence that the goods were in fact ever shipped on board the *Marlborough Hill*. On this the full court observed that "in our opinion that objection to the jurisdiction fails, and cannot be given effect to at the present stage," and again, "the plaintiffs do not admit

that their goods were not so shipped. At the most their affidavit states that they are uncertain whether they would be able at the trial to prove that fact—a fact which is, as we think, essential to their success."

In their Lordships' opinion the full court dealt with this point in the proper manner. This was not the kind of objection which would warrant a summary dismissal of the action at this early stage, and by this form of procedure, an unusual one, especially if there was no appearance under protest. When the action proceeds, the statement of claim must make the proper averments, and at the trial they must be proved, or the plaintiffs will fail. The defendants have the advantage that they have an expression of opinion by the full court, and possibly it should be considered as a decision of the full court, from which there has been no appeal, that the case will fail except as to goods actually shipped on board the *Marlborough Hill*. In other words, the opinion or decision of the full court is that the contract in a bill of lading whatever obligation it imposes upon the ship owner in an action *in personam*, cannot be considered as giving a right *in rem* except for such goods as were actually shipped on board the *res*. From the course this case has taken, this point does not come before their Lordships for decision, and therefore they do not decide upon it; but they desire it to be understood that they have formed no opinion contrary to the view taken by the full court. It is enough to say that for the reasons given by the full court, their Lordships think that it was right to allow the action to proceed, unless the second objection, which they are about to deal with, is fatal to it.

The second objection is that each plaintiff ought to have sued separately. On this point authorities upon the construction of the rules of the Supreme Court of Judicature in England were cited. Their Lordships, on the whole, think that these are not applicable. The matter is covered, so far as the court in question is concerned, either by rule 29: "Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants," or by rule 155, already quoted. It might no doubt be that with regard to the new subjects of jurisdiction conferred upon the High Court of Admiralty by the Act of 1861, a different practice should prevail. But, at any rate, with regard to the subjects of the older Admiralty jurisdiction such an objection as that now raised was unheard of. In an action for collision claims by ship owner, and if the ship were lost, by cargo owner, by master and crew, who had lost their clothes and effects, by representatives of seamen drowned claiming for goods and effects of the deceased, were always joined in one action. In cases of salvage the owners, master and crew of the salving vessel were always joined. In cases of wages, all the seamen joined in one action, though some of them were taken on board at the commencement of the voyage and stayed to the end, while others may have been shipped or discharged at intermediate ports. If separate actions had been started, the court would have at once consolidated them, and probably punished those who had brought separate actions by making them pay the costs up to consolidation. More than this, if two or more vessels were engaged in salvage, even though at different periods, and of a different nature, it was not unusual to join them in one action. In the case cited in argument in the court below, the *Marechal Suchet* (11 Asp. Mar. Law Cas. 553; 74 L. T. Rep. 789; (1896) P. 233), the propriety of this course was expressly confirmed, and the argument from the general rules of the Supreme Court of Judicature was put aside.

The procedure *in rem* has some different incidents from those appropriate to an ordinary action *inter partes*, and their Lordships think it open to them to consider the general question of convenience in such actions, treating them as being of a special nature.

If each of these twenty or more parties had been obliged to issue a separate writ, and to apply, as would be the consequence for separate warrants, several of them for sums under £10, the costs would be enormous; and it is for the interest of shipowners that joinder of plaintiffs in such cases should be encouraged.

Admiralty jurisdiction originated in the civil law, and never lost all touch and connection with it. Its procedure was malleable and adaptable. The ordinary procedure in such a case as the present would be that if the plaintiffs obtained a primary judgment their several claims would be referred to the registrar who would deal with each separately, and on his report the court would deal with the costs. Their Lordships, while thinking it unnecessary that they should give an express construction of the words in rule 29, are not disposed to interfere with the decision of the Supreme Court, on what they regard as a question of procedure.

Upon the whole their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

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

Solicitors for the respondents, *Snow, Fox, Higginson, and Thompson.*

Nov. 1 *and Dec.* 16, 1920.

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

THE BERNISSE AND THE ELVE. (*a*)

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

Prize Court—Damages against the Crown—Right of search—Misconstruction of Orders in Council by naval officers—Diversion of ships in danger area—Order in Council of the 16th Feb. 1917.

Two Dutch vessels trading between French colonial territory and Holland were stopped by a British cruiser just outside the area declared by Germany to be a prohibited area in which any neutral vessel would be liable to be sunk by German submarines. The vessels had all the requisite documents of clearance from the French port, including an "acquit à caution"—a document permitting the export of the cargo—but had not got the "green clearances" which were given to vessels that had called at a British port. The naval officer ordered that the vessels should proceed to Kirkwall to be searched, and they were being taken there when they were torpedoed by a German submarine.

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

In a suit for damages by the owners the Prize Court held that as there was no ground for detaining the vessels or reasonable ground for thinking that they might prove subject to detention the Crown was liable.

Held, dismissing the appeal, that the Order in Council of the 16th Feb. 1917 *did not require a vessel which had started from a British or Allied port to call at a British port for a clearance certificate. In the absence of anything connected with the ship or cargo which could give rise to suspicion that they might be liable to condemnation, the captors, whose action in this case was prompted by doubts as to the meaning of the Order in Council, not as to the character of the ship or her cargo, were liable in damages and costs.*

Judgments of Lord Stowell in The Oostzee (1855, 9 *Moo. P. C.* 150) *and in* The Luna (1815, 2 *Dods.* 48) *considered.*

APPEAL from a judgment of the President (Lord Sterndale) of the Prize Court (England) reported 14 Asp. Mar. Law Cas. 525; 122 L. T. Rep. 286; (1920) P. 1).

The steamships *Bernisse* and *Elve* were owned by a Dutch firm, respondents to the appeal, who chartered them to a Dutch company (also respondents) for the carriage of cargoes of ground nuts from Rufisque, a port in the French colony of Senegal, to Rotterdam. The trade was carried on by the charterers with the consent of the French Government subject to certain safeguards as to the ultimate destination of the cargoes, each of which was accompanied by a document called an "acquit à caution," issued by the French port authorities. The ships were stopped on the 20th May 1917 in the course of the voyage by H.M.S. *Patia*, an auxiliary cruiser. The naval officer was shown the French document above mentioned, but finding that neither ship had a "green clearance" such as was issued to ships after examination at a British or Allied port under the Order of Council of the 16th Feb. 1917 (known as the second reprisal Order) he ordered them to proceed to Kirkwall. This involved taking a course more dangerous to attacks from German submarines than they otherwise would have done. While proceeding to Kirkwall they were attacked by a German submarine, with the result that the *Elve* was sunk and the *Bernisse* badly damaged. The latter ship was towed into Kirkwall, but was afterwards repaired and allowed to proceed to Rotterdam.

Actions which were brought by the respondents, the owners of the ships and the owners of the cargoes, against the Procurator-General were consolidated, and the President gave judgment in the case of the *Elve* for restitution in value, and in the case of the *Bernisse* for the payment of damages.

The Procurator appealed.

Sir *Gordon Hewart* (A.-G.) and *Bruce Thomas* for the appellant.

Sir *Erle Richards*, K.C. and *Bisschop* for the respondents.

The considered opinion of their Lordships was delivered by

Sir ARTHUR CHANNELL.—This is an appeal by the Procurator-General from a decree of Lord Sterndale dated the 25th July 1919 in a consolidated action brought by the respondents, the owners of the steamship *Elve* and of the steamship *Bernisse* and of their cargoes, whereby the learned President decreed on the claim in respect of the steamship *Elve* restitution in value, and gave damages in respect of the steamship *Bernisse*, which had already been released but in a damaged condition.

The steamships were owned by P. A. Van Es and Co., a Dutch firm at Rotterdam, and were chartered to a Dutch company in business at Delft for the carriage of cargoes of ground nuts from the Port of Rufisque, in the French colony of Senegal, to Rotterdam. The Dutch company had factories at various places in Holland, where the ground nuts were dealt with and oil was extracted from them. This importation had commenced before the war. It was for a time stopped on the outbreak of war, but the object of it having been explained to and looked into by the French Government, it was permitted to proceed under agreed conditions and guarantees. Each consignment of ground nuts was to be accompanied by a document called an "acquit à caution," issued by the French colonial authorities at the port of loading and which was to be deposited on arrival in Holland with a representative of the French customs authorities at the port of discharge whose duty it was to take precautions to secure that the ground nuts were used at the factories and that the products did not go to an enemy destination.

On the 20th May 1917 the two steamships sailing in company with cargoes of ground nuts in bulk were proceeding on the voyage from Rufisque to Rotterdam by the route then considered the safest, round the north of Scotland, and on that day they were stopped by H.M.S. *Patia*, an auxiliary cruiser, at a point situate in latitude 62° 4′ N., and longitude 15° 10′ W. This spot is in the North Atlantic, approximately west of the Orkneys, and is outside the zone within which the Germans had announced their intention of sinking all neutral vessels. At the time the vessels were so stopped the Order in Council of the 16th Feb. 1917 was in force, and was being acted on by H.M. cruisers, and as it is necessary on this appeal to consider the words of that order, it is well to set out the operative part:

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.

It had become the practice to give to any vessel which started from a British port on a voyage to a port affording access to enemy territory or which when on such a voyage wherever commenced had,

in order to comply with the Order in Council, called at a British port for the examination of her cargo, a clearance on a green card, which became known as a green clearance. When the two steamers were stopped, they were boarded by an officer from H.M.S. *Patia*, who made the usual inquiries, and was told the port from which the vessels had come, and that to which they were bound, and was shown her French documents, including the "acquit à caution." The officer asked if they had a "green clearance." and was, of course, told that they had not. He ascertained that the cargo was in bulk, and in his evidence at the trial he gave a decided opinion that it would have been impossible to examine the ships at sea in order to find out whether there was anything hidden under the cargo. He stated, however, that if there had been a green clearance, or in other words, if the cargoes had been examined at a British port, he would have been satisfied. Being in doubt what to do, he reported the facts by signal to the captain of the *Patia*, and the captain, being also puzzled, reported them by wireless to the admiral in command of the cruiser squadron, who directed that the vessels should be sent to Kirkwall. They were accordingly ordered to go there, and an officer and three men were put on each steamer to see that they went. The captains remonstrated on the ground that they would have to go through the danger zone, but they were told that it did not make much difference, as there were German submarines about outside the zone as well as within it, and that they sank vessels wherever they met them, so that ships were nearly as likely to be torpedoed outside the zone as in. On this point the learned President, although he did not think it material, found that there was greater danger on the route the ships were directed to go than on that which they had intended to take, and their Lordships would be not inclined, and indeed have not been asked to differ from the learned President on this point. The vessels did when within the zone encounter a German submarine, which fired on them without previous warning, and sank the *Elve* by one torpedo, and seriously damaged the *Bernisse* with another. Fortunately a British cruiser appeared, which took on board the crews of the vessels, who had taken to their boats, and towed the *Bernisse* in her damaged condition into Kirkwall. The *Bernisse* was temporarily repaired, and ultimately was allowed to proceed on her voyage to Rotterdam, and it is in evidence that her cargo was never examined, although in the course of the repairs it probably became evident that there was no contraband on board. On these facts the learned President has held that there was no ground in fact for detaining the vessels and sending them into Kirkwall, and further that there was no such reasonable ground for thinking that there was as to relieve the Crown from paying the damages arising from sending them in, and it is on the latter point that the appeal has been brought.

It is necessary first to consider the construction of the Order in Council. It has been held by this Board that the Order is binding on neutrals (*The Stigstad*, 13 Asp. Mar. Law Cas. 388; 120 L. T. Rep. 106; (1919) A. C. 270; see also *The Leonora*, 14 Asp. Mar. Law Cas. 500; 121 L. T. Rep. 527; (1919) A. C. 974) and the Order expressly directs that vessels which come within the first clause shall be brought in for examination. The Order is not very happily worded, but these vessels having started from an Allied port do not come within the Order at all, unless the words "without calling at" imposed on a vessel the obligation for a subsequent call even although her cargo has been duly examined and passed at the British or the Allied port from which she started. This is an impossible construction. Having regard to the fact that the object of requiring a call is to ensure that there shall be an opportunity of examining the cargo, it seems clear that "calling at" must include "having been at" a British or Allied port when the port was the original port of departure on the voyage; and as regards the want of a green clearance, that would only be given at a British port, and it really is quite clear that throughout the order an Allied port is put on the same footing as a British port. The President so held, and their Lordships agree with him.

As there was in this case no ground whatever proved on which either ships or cargo could have been condemned as prize, any more than any ground for detaining them under the Order in Council, the question remaining is merely that of reasonable ground for the action taken. To show such ground the Crown rely on two points. First they say that the detention was a legitimate exercise of the right of search. In this war it has been agreed that search at sea has been practically impossible, and sending in to port for search has been almost universal. In this case further there was evidence that the search at sea for contraband hidden under the ground nuts would have been impossible. The President, however, has disposed of this point by saying that even if the officers might have suspected that something contraband was hidden under the ground nuts, in fact they did not do so and have never said that they did. They really only sent the vessels in because there was no green clearance. This seems a sufficient answer, and it is unnecessary to go further, but counsel for the respondents do further argue that even for a search reasonable ground of suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable. In strictness this is of course correct, but so little suspicion is required to justify a search that their Lordships are not prepared to say that if a boarding officer were to state that finding a cargo to be in bulk he thought something might be hidden under it, and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages. That case must be considered if it should arise. Here it does not appear to arise.

The second point on which the Crown rely is really the only one which gives rise to any difficulty. It is that there was a *bonâ fide* doubt on the part of the officers who gave the order for detention as to the true construction of the Order in Council. The question as to what is sufficient to relieve a captor from paying damages in respect of a capture which is afterwards decided to be in fact wrongful was very fully considered in the case of *The Oostzee* (1855, 9 Moo. P.C. 150). It was there held that to exempt captors from costs and damages there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize. That case arose during the Crimean War, and the cases down to that date were fully dealt with. The only case which at all supports the contention put forward by the Crown in the present case is

The Luna (1810, Edw. 190). There a neutral vessel proceeding to St. Sebastian, in Spain, which had at the time been for two years in the occupation of the French, was seized for alleged breach of blockade by British captors who were in *bonâ fide* doubt whether or not an Order in Council of the 26th April 1809, declaring a blockade of "ports and places under the government of France" extended to San Sebastian so temporarily in French occupation. Sir William Scott held that it did not so extend, and decreed simple restitution, and he not only refused the claimants costs and damages, but gave the captors their expenses. In giving judgment he said: "It is impossible for the Court to throw out of its consideration that when these Orders in Council are issued it is the duty of the officers of His Majesty's Navy to carry them into effect, and although they may be of a nature to require a great deal of attentive consideration, gentlemen of the Navy are called upon to act with promptitude and to construe them as well as they can under the circumstances of cases suddenly arising. With every wish, therefore, to make the greatest allowance for the difficulties which are at present imposed on the commerce of the world, I cannot in this instance refuse the captors their expenses, but in no future case arising on the same state of circumstances will the Court grant that indulgence."

In *The Actæon* (1815, 2 Dods. 48), five years later, Sir William Scott, without referring to his former decision in *The Luna*, which does not appear to have been quoted to him, laid down what seems to be a different rule. He says at p. 52: "Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I have before observed, that he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own Government, but still the person to whom the property belongs must not be a sufferer."

These cases are reviewed at length in *The Oostzee* (*sup.*), and it is said in the judgment that in *The Luna* Lord Stowell must have felt that he was going to the very verge of the law. The headnote to the report of *The Oostzee* in Moore's Report states as part of the decision and not as a dictum that an honest mistake occasioned by an act of government will not relieve captors from liability to compensate a neutral; but it should be noted that towards the end of the judgment delivered by Lord Kingsdown he points out that in the case then before the Board there was no point of law. In strictness, therefore, what was said as to the insufficiency of a mistake in point of law might be considered as *obiter*. Their Lordships, however, consider that the judgment in *The Oostzee* must be looked at as a whole, and that it really does decide the point stated in the headnote. It is not necessary to say that in order to relieve the captors from paying damages the neutral owner must be in some way in default; it may be only his misfortune; but there must be something "connected with the ship or cargo" in order to give rise to the suspicion which will relieve. Here the doubt which certainly was honestly entertained was not a doubt as to anything so connected, but merely a doubt as to the meaning of an Order in Council issued by the British Government. If the decision in *The Luna* proceeded entirely on the ground stated in the judgment as reported, it is contrary not only to *The Oostzee* but to the judgment of Lord Stowell himself in *The Actæon*, and it cannot now be followed. It may well be that in addition to the point stated in the judgment in *The Luna* as reported, and which is, as Lord Stowell truly said, a point which ought not to be left out of consideration, there were also in the facts of that case circumstances connected with the ship which were in Lord Stowell's mind. It is clear on the face of the report that the whole judgment is not reported. Even if San Sebastian was not in strictness a blockaded port under the Order in Council, nevertheless a ship going there was obviously taking goods to the enemy who were in actual occupation of it, and on that or some other ground, in addition to what appears in the judgment, the decision may have been justified. It has, however, been treated as a decision that the facts referred to in the judgment as matters to be taken into consideration would in themselves be sufficient, and so understood it is contrary to at least one decision binding on this Board. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for the appellant, *Treasury Solicitor.*

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

June 8, 10, 11, 14, 15, *and Dec.* 17, 1920.

(Present: Lords SUMNER and PARMOOR, Sir ARTHUR CHANNELL, and Sir HENRY DUKE.)

THE KRONPRINSESSAN MARGARETA; THE PARANA; AND OTHER SHIPS. (*a*)

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

Prize Court—Contraband—Doctrine of infection—Transfer of ownership in transitu.

The law of prize contains two settled rules, one which refuses to recognise transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods; and the other (known as the rule of infection) which condemns as if contraband any goods which, though not condemnable in themselves, belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband.

It is strictly with owners that these rules deal.

The rule of infection does not rest on the personal culpability or complicity of the owner of the goods. "Infection" is not a quality of the goods themselves, but is an incident of the owner's position when the seizure is made and the captor's right arises.

The rule as to infection has not been abrogated by the Declaration of Paris.

The Declaration of London Order in Council (No. 2) dated Oct. 29, 1914, *was revoked by the Declaration of London Order in Council dated March* 30, 1916.

CONSOLIDATED appeals arising out of suits for condemnation of cargoes as prize.

In respect of two of the appeals the appellants appealed from a judgment of Sir Samuel Evans, P. dated the 19th March 1917 and reported 14 Asp. Mar. Law Cas. 31, 301; 116 L. T. Rep. 508;

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

(1917) P. 114. In the case of the *Parana* the appeal was from a similar decision pronounced by Lord Sterndale while president of the court on the 29th May 1919 and reported (1919) P. 249. The other cases are unreported.

The question on which each appeal turned was the validity of the doctrine of "infection," particularly where there had been, according to municipal law, a change of ownership after shipment. The grounds for the decisions below will be found set out in the two reported decisions above referred to.

Sir *H. Erle Richards*, K.C., *R. A. Wright*, K.C., *Balloch*, and Sir *Robert Aske* for the appellants.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), *Stuart Bevan*, K.C., *Wylie*, *Clement Davies*, and *Hubert Hull* for the Crown.

The following cases were referred to:

The Danckebaar Africaan, 1 C. Rob. 107;
The Vrow Margaretha, 1 C. Rob. 336; 1 Eng. P. C. 149;
The Staadt Emblen, 1 C. Rob. 26; 1 Eng. P. C. 37;
The United States, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 19; (1917) P. 30;
The Peterhoff, 1866, 5 Wall. 28;
The Hsiping, 2 Russ. & Jap. P. C. 140;
The Pehping, 2 Russ. & Jap. P. C. 164;
The Bawtry, 2 Russ. & Jap. P. C. 270;
The Lydia, 2 Russ. & Jap. P. C. 367;
The Alwina, 13 Asp. Mar. Law Cas. 311; 114 L. T. Rep. 707; (1916) P. 131;
The Odessa, 13 Asp. Mar. Law Cas. 27; 114 L. T. Rep. 10; (1916) A. C. 145;
The Daksa, 13 Asp. Mar. Law Cas. 591; 116 L. T. Rep. 364; (1917) A. C. 386;
The Hamborn, 14 Asp. Mar. Law Cas. 204, 461; 121 L. T. Rep. 463; (1919) A. C. 993;
The Parchim, 14 Asp. Mar. Law Cas. 196; 117 L. T. Rep. 738; (1918) A. C. 157.

The considered opinion of their Lordships was delivered by

LORD SUMNER.—These appeals are brought to test the validity of the doctrine of "infection" and its applicability to the conditions and forms of overseas commerce at the present time, and their Lordships think it right to deal with them accordingly, although, as will appear, they, or at any rate some of them, might have been disposed of on narrower grounds. They relate to four ships, the *Hilding*, the *Parana*, the *Rena*, and the *Kronprinsessan Margareta*, and to five voyages, there being two of the ship last named.

The claimants are neutrals, who acquired the titles on which they rely in the ordinary way of trade. The goods condemned were coffee and hog products which are in themselves conditional contraband, and they were carried in neutral bottoms under the protection of neutral flags and were shipped from and deliverable at ports in neutral countries. None of them was shown to have had an ulterior enemy destination, nor was it shown that any of the claimants themselves were privy to the ulterior destination of any of the cargo carried in the same vessels, but in each case there was other cargo, which was in itself conditional contraband and was found to have an ulterior enemy destination, and it is by this that the goods in question have been held to be infected.

The case of the *Hilding* is mainly one of fact, and will be stated later. In the case of the *Parana*, neutral shippers, acting through agents, shipped sundry parcels of coffee belonging to them, of which one had an ulterior enemy destination, as the president found and as the appellants now accept, and others were consigned to the appellants, Messrs. Lundgren and Rollven, in pursuance of contracts of sale and purchase made before the date of the bills of lading. The terms of the sale were c. and f. Stockholm, reimbursement by confirmed sight credit on a Swedish bank. The draft in respect of one shipment, that made at Santos, was met by the bank in Sweden before seizure; the draft drawn in respect of the other shipment, that made at Rio, was met after seizure. Both dates were long after the ship sailed from Santos and Rio respectively.

In the case of the *Rena*, Diebold and Co., a German firm trading in Brazil, had shipped sundry parcels of coffee, of which one, nominally consigned to Swedish consignees, but claimed on behalf of a Dutch firm, the Commanditaire Vennootschap Heybroek and Co., as purchasers, was held by the President to have belonged to Diebold and Co. at the time of the seizure and to have had an ulterior enemy destination at that time given by Heybroek and Co., and was accordingly condemned. The present appellants, while not admitting these facts, to which indeed they appear not to have been privy, were not in a position to contest the President's findings and condemnation. This may have been their misfortune, but it cannot affect the case. They are a firm of Mattsson Peterzens and Co., consignees named in the bill of lading of another portion of the coffee pursuant to a contract of purchase and sale dated before the shipment, the terms of which were cost and freight Gothenburg, payment at sight on a Swedish bank, who confirmed the credit by telegram to Santos. The Swedish bank met this draft before the seizure but after the ship had sailed. This parcel of coffee was not shown to have had any ulterior enemy destination; on the contrary, it was admitted to have been in itself the subject of a legitimate transaction.

In the case of the second voyage of the *Kronprinsessan Margareta*, the claimants and appellants are Messrs. Bergman and Bergstrand. Coffee was shipped by Diebold and Co., under a bill of lading dated the 8th May 1916, consigned to Messrs Dahlen and Wahlstedt. This parcel had, in fact, an ulterior enemy destination and the President condemned it as contraband, but it is contended that it was not liable to condemnation, and therefore not capable of infecting other goods in the same ship, as the Order in Council of the 29th Oct. 1914, respecting immunity from condemnation of conditional contraband, consigned to a named consignee at a neutral port of discharge, was still in force and applied to it. There is, therefore, here a question whether this immunity had or had not been revoked before the 15th June 1916, the date of seizure. The appellants, Messrs. Bergman and Bergstrand, bought other parcels of coffee from Diebold and Co., under contracts effected before shipment, and were the consignees named in the bill of lading. Their coffee was only destined for Sweden. The terms of these contracts provided for payment by sight reimbursement credit on a Swedish bank, but the draft was not met until after the date of the seizure.

The remaining case, that of the first voyage of the *Kronprinsessan Margareta*, is rather more complicated. There are four claimants and appellants—Messrs. Engwall, Berg and Hallgren, Levander and Ofverstrom—all neutrals importing for neutral consumption only. An enemy firm, Goldtree, Liebes and Co., in Brazil, made shipments of coffee, of which, in addition to the parcels claimed as above, one was condemned by the President as having an ulterior enemy destination and as being the property of the shippers at the date of seizure. The appellants all bought their parcels under contracts made after shipment, except Levander. The terms of his contract were f.o.b. Acajutla, payment 90 per cent. against bill of lading and balance on delivery, but he, like the other appellants, did not take up the bill of lading and make any payment until after the date of the seizure. In all these cases the appellants were innocent and ignorant of the enemy destination of the infecting parcel.

It will be convenient to consider the nature of the rules impugned and the reasoning and authority on which they rest before dealing with the particular circumstances of the cases under appeal, especially as the application of these rules is complicated by the fact that the purported transfers of ownership have all been effected by transfers of documents representing the goods while afloat and by the fact that, in so far as the position of enemy transferors has to be considered, the appellants further invoke the Declaration of Paris.

For about one hundred and fifty years at least the law of prize has contained two settled rules, one which refuses to recognise transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods, and the other, which condemns, as if contraband, any goods which, though not condemnable in themselves, belong or are deemed to belong when captured, to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband. It is strictly with owners that these rules deal, and although an owner is normally the person who has and exercises control over goods which belong to him, there is no warrant for saying that either rule refers to anything but ownership. It is not the case that a neutral, who could not otherwise establish such ownership as the law will recognise, is entitled to be treated as if he had done so, because he can show that he has by personal contract acquired a right to control the goods in certain events, nor is it the case that enemy ownership of goods, so associated with contraband as to become liable to confiscation, may be disregarded if the enemy ownership does not happen to be made active by the exercise of actual control, or if the enemy owner's contractual position has made him indifferent to the fate of his goods. Upon the authorities it is also clear that the above-mentioned refusal to recognise transfers does not apply when both transferor and transferee are neutral, apart from special circumstances affecting them, and that the common ownership, which involves goods, not in themselves contraband, in the condemnation of other goods which are condemned as contraband, is common ownership which subsists at the time of the seizure and has not previously been determined.

Their Lordships are fully aware that some Continental jurists have criticised the rule of infection adversely, and that Continental Prize Courts have not always accepted it, though it has long been adopted in the United States and more recently in Japan. They are, however, bound by the decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish. They would observe that, valuable as the opinions of learned and distinguished writers must always be as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists. The history of this rule is obscure. A reference to some of the proclamations in Rymer's Fœdera suggests that it may have had its origin in the practice followed by the executive during the seventeenth century in successive wars, and the theories on which writers like Zouch, Bynkershoek and Heineccius appear to proceed, seem rather to have been an effort to find in their erudition some *ex post facto* warrant for an accepted rule than an historical statement of the reasons which actually guided those who laid it down. Sir William Scott found it well settled, and if he appears to take some credit to the courts for mitigating the harshness of an older time, this points rather to the substitution of legal doctrines for executive practice than to the exercise of any assumed dispensing power by Courts of Prize.

That the so-called doctrine of infection does not really rest, in spite of many passages which suggest it, on the personal culpability or complicity of the owner of the goods is shown by the fact that, if it were so, excusable ignorance would be an answer, and for this there is no authority. The term is as old as the Treaty of Utrecht, but the doctrine is perhaps unfortunately named. From the figure which describes the goods as contaminated when seized, the mind passes to the analogy of a physical taint, which runs through the entire cargo in consequence of its being in one bottom, and begins on shipment or at least on sailing. Hence, "once infected always infected," is assumed to be the rule, and a buyer would get a tainted parcel, even though he became owner before seizure, and was recognised as such. This is inconsistent with the view that the rule is a penal rule, as it certainly has been said to be, but it is argued that the penal effect is only accidental and that the real foundation is the belligerent's right of capture, which may arise as soon as the ship gets out to sea. "Infection" has then attached to all the goods afloat in one common ownership, and to purge it by a subsequent transaction and transfer of ownership on land would be to defeat an accrued belligerent right.

This reasoning is answered as soon as it is appreciated that "infection"—that is, the liability of a particular owner to a derivative condemnation of his goods—is not a quality of the goods themselves, but is an incident of the owner's position when the seizure is made and the captor's right arises. This consideration operates in two ways. It fixes the critical moment as the time of seizure and makes liability to condemnation depend on the facts as they are then found to be; but it also establishes that by those facts the claimant must stand or fall. His liability is not in the nature of punishment, nor does it involve *mens rea*. It does not depend on his having formed or having abandoned an intention to send the goods in question to an ulterior enemy destination. The

destination of the goods is a matter of fact, by whomsoever it is given, and, when transit to that destination is in progress, this may make the goods themselves absolute contraband. When once it is found that, at the time of the seizure, the same person was owner of goods on board and embarked in the same transaction or transit, of which the ulterior destination involved their condemnation, and of goods bound for a neutral port without any ulterior destination, neither the captor nor the court is called on to investigate his mercantile operations as to these other parcels—an inquiry complex and remote, in which the claimant has all the information and the captor all the disadvantage—but these goods also are involved in the condemnation.

Neutrals, however, must be taken to accept the consequences of the belligerent's legitimate exercise of all his recognised rights. If cargo has in fact such an ulterior destination as makes it liable to condemnation, that consequence follows independently of the actual owner's knowledge, intention or interest, for *res perit domino*. It is accordingly beside the mark to say that the appellants were innocent parties themselves; that they never interposed in the war; that, so far as they knew, all the goods with which they were concerned had a final neutral destination; that if their buyers had arranged otherwise it was unknown to them and unsuspected; that guilty shippers escape because they have been paid, and guilty sub-purchasers because the goods have been intercepted and they are not liable to pay, and that thus the penalty falls for the offence of others on the shoulders of the party who of all is the most innocent.

It has been contended that control and not ownership is the real test, so that either control, divorced from ownership, when vested in a neutral will avert condemnation, or bare ownership in an enemy, if devoid of control, will be so innocuous as to neutralise any infection. It may be doubted if this point really arises. None of the appellants here had control, as distinguished from a contractual right to obtain control on taking up the documents and thereby becoming owner, and, unless in the cases of the *Rena* and the *Parana* the intention was to retain, if anything, only a lien by way of security and not the general property, none of the transferors were anything less than owners, who had contracted to give control and ownership as well, upon the due taking up of the documents.

In any case, however, there is a fallacy in the argument. In cases like *The Hamborn* (*sup.*) control is looked to instead of the mere *persona*, in which, according to municipal law, the ownership resides, because under the rules there applicable enemy character is the question and civil property is not. The rules now applicable adopt the test of ownership and not that of enemy character. They may be criticised or impugned on other grounds, but if they are recognised and the question is merely as to their application, they must be accepted as they stand.

It is objected that the rule "infects" goods, which are in themselves free from all objection, by reason of what has been done with other goods, over which the claimants had no control, and which in some cases received their enemy destination from consignees whose design was unknown even to the enemy shipper. The rule neither penalises nor deters the enemy shipper, especially if it is applied in cases where he has been fully paid. It only operates to pass what belongs to an innocent neutral into the pockets of the captors.

Though this kind of deterrent is not always of direct and obvious efficacy, few modes of deterring contraband trade are more effectual than to establish a rule, known by and applicable to all, that the inclusion by a shipper among his other shipments by the same vessel of one parcel having in fact an ulterior enemy destination may lead to the condemnation of the whole. On the other hand, the adoption of the date of the seizure is a great protection to the innocent neutral. Just as the general rule is that a ship is not open to proceedings merely for having carried contraband on a past voyage, so goods are liable to infection not because they formerly belonged to an owner of contraband, but because they are found to do so when the captor's inchoate title by seizure begins. If the common ownership existing before the seizure had then come to an end by means which are valid in prize, this liability does not arise; if it continues till after the seizure a new and neutral owner, acquiring ownership only after seizure, though nothing forbids his acquiring title from a belligerent, can have no better right as against the legitimate captor than to stand in the shoes of the owner, from whom he derives title, as they were when the goods were seized, and he, by reason of his common ownership of both classes of goods, would have forfeited them all. At the time of the seizure the subsequent transferee has acquired no right to object, and, the goods having been legitimately brought into court for condemnation, a claimant on a title not completed until after seizure must obtain them, if at all, only by the aid of the court and only on the terms of accepting the law there administered as binding upon him.

The rule against recognising transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned or its utility impugned for the purposes of a judicial determination. Its application assumes that the circumstances of the shipment, and the dealings with the shipping documents and otherwise, are not such as to make the shipment itself an actual delivery of the goods to the transferee through his agent the carrier. It assumes also that a documentary transfer has taken place in good faith by a real and not a sham transaction, and that in pursuance of that transfer rights have been acquired by the transferee, which in other courts not bound by such a rule would be valid and enforceable. With sham transactions Courts of Prize would deal in another fashion; with incomplete transactions insufficient to transfer rights, no court would deal at all. The expression "mere paper transaction," sometimes used, does not imply that something unreal or ineffectual in itself is under discussion. It serves to draw attention to the fact that the transaction is unaccompanied by any dealing with the goods themselves, such as by its overt or notorious character would serve to inform the captor as to the subject which he seizes and the nature of the right if any, which he may be entitled to acquire in consequence. The history and the theory of the rule, neither of which is now very clear, are too inconclusive to add weight to the rule itself or throw light on its true application. It appears to have been regarded as a particular example of a wider principle, that the national character of movables cannot be changed while they are at sea by any independent

dealings or occurrences. Thus, in the *Negotie en Zeevaart*, decided on appeal in 1782, the question was whether a ship, which went to sea a Dutch ship, had ceased to bear that national character when she was taken because the Dutch colony of Demerara, from which she sailed, had before her capture become British by capitulation to the British Crown. It was held that she had not. This was followed in *The Danckebaar Africaan* (1 C. Rob. 107), where the question was whether the capitulation of the Cape of Good Hope which had taken place after the ship sailed but before her capture, and had made British subjects of the Dutch owners, had not also entitled them to claim their ship on arrival at the Cape as prize on the ground that there had been in fact a capture of British property. So strict was the rule even then that the claimants, though British subjects themselves at the time of the capture, could not be heard to assert that title against the presumptions arising when the ship sailed. Shortly afterwards it was accepted in *The Vrouw Margareta* (1 C. Rob. 336) that there was no recorded instance of a claim being sustained for goods purchased of an enemy in transit in time of war, for the practice of the Prize Court to look only to the time of shipment was already invariable.

It has been contended that this is a rule applied for the purpose of determining the status of goods, and that it is only so applicable; that it decides whether goods have enemy or neutral character, but not whether they, being neutral and in themselves innocent, can be condemned as having been infected by other cargo which is contraband. No authority has been cited for this proposition.

Whether the foundation of the rule be taken to be the tendency of documentary transfers to encourage evasion and fraud, so as to defeat a belligerent's rights in one way, or the tendency of changes of ownership in transit to make the right of seizure at sea precarious, and so to defeat in another way the correlative belligerent right—namely, the right to obtain a condemnation—the reasoning is equally applicable to such cases of exercise of belligerent rights as those now in question. Its application in either case involves the proposition that the goods claimed belong in the eye of the law either to an enemy or to another neutral, and such prior owner being a person unable to claim the goods owing to their destination or their association according to the established law relating to contraband, the captor's claim to condemnation succeeds.

It was urged that if this rule originated in a question of the national character under which the ship and goods sailed, it would have no application except to cases where the national character—*i.e.*, enemy character—was the ground upon which condemnation was or could be prayed. There is a confusion here. What can it matter whether the form of the decree is that there is a condemnation because the goods are proved to be enemy property in fact, or because the goods are deemed to be enemy property in law? The condemnation must equally be decreed, and the determination that the goods are enemy property according to the laws of property generally, or according to the particular laws by which in a Court of Prize the question of enemy property is to be tested, is equally an application of rules of law which bind the Court. To proceed a step further, if the determination is that the goods are enemy property, and such as would enjoy the protection of a neutral flag, were it not for the fact that, being contraband, they lie outside of that protection, the result is the same—namely, that a forfeiture of goods, which the court is bound to regard as being still enemy goods, follows under the circumstances of the case. The rule, stated in 1799, as being a settled rule, is still logically as much part of the process by which the liability of goods shipped by enemy merchants is to be determined as if the case had arisen before 1856, or as if the issue, enemy goods or neutral, arose directly, as it did in *The Odessa* (*sup.*), and the rule was applicable that ownership and not lien or pledge forms the test which guides the Court.

An attempt was made to use this Board's decision in *The Baltica* (11 Moo. 141), by which their Lordships are bound, as a further ground for excluding the application to these cases of any rule which denies recognition to titles obtained through a documentary transfer made while the goods are at sea. It is true that in that case Mr. Pemberton Leigh, delivering the judgment of the Board, states that there are two possible foundations for the rule—the one that documentary transfers lend themselves to fraud and concealment, and the other that they tend to defeat the belligerent's right of seizure, and then describes the former as the "true" view. It was not, however, any part of the question then to be decided to settle the foundation of the rule, since its mere existence sufficed for the determination of the case, and in the circumstances of that case and the contemporaneous case of *The Ariel* (5 W. R. 427) the danger of collusive transfers was the one which was most clearly to be apprehended. Their Lordships do not regard this judgment as declaring the view that these transfers tend to defeat a belligerent's rights to be a false view. Indeed, it is plain that in *The Daksa* (*sup.*) this Board was of a contrary opinion. The two views are not really inconsistent. A collusive transfer, the truth of which the court has no means of penetrating, does defeat the belligerent's rights. On the other hand, the transaction may be genuine, as in the *Baltica* it was, yet not be recognised. It cannot be doubted that the reason was not that the Court was afraid of being deceived or felt itself incapable of ascertaining the truth, but that, if it were deceived or left in doubt, it would be unable to do justice to the belligerent captor's claim. It is, therefore, no answer to say that there was no collusion about the present transfers. They fall within a rule, which recognises no personal or particular exceptions, and if the goods were liable to be forfeited, assuming them to be rightly stamped with enemy character when seized, an admission of a documentary transfer to a neutral would defeat the captor's rights.

As these rules are undoubtedly well established, the appellants have been principally constrained to impugn their application to the facts of the present appeals. The circumstance that they do not appear to have been applied together in the same case before is merely accidental, and if the result seems to wear an artificial appearance that is an accident also. The same may be said of the observation that in the old cases the infecting parcel has been shipped direct to the enemy by the common owner himself, and that infection in consequence of an ulterior enemy destination is new. This is merely a consequence of the development of the doctrine of continuous voyage.

Two further arguments are chiefly relied on. The first, that the rule as to infection has been virtually abrogated by the Declaration of Paris; the second, that the rule as to transfers of goods while at sea and without delivery is inconsistent with modern mercantile practice, and therefore ought no longer to be followed. Their Lordships will, of course, pay every possible regard to such an instrument as the Declaration of Paris, but it is necessary to point out exactly what, in this connection, its provisions were. A neutral flag protects enemy goods from capture as enemy goods; in a neutral bottom enemy goods are placed on the same footing as neutral goods. The Declaration, however, is not a charter of immunity in all circumstances for enemy goods under a neutral flag, nor does it protect goods simply as being enemy goods, which, if neutral, would have been liable to condemnation. The Declaration says nothing about the criteria by which the enemy or neutral character of goods is to be determined; it says nothing about the doctrine of "infection"; it says nothing about admissibility or rules of evidence; it says nothing of the rights of a belligerent to repress traffic in contraband of war, or of the modes by which Courts of Prize give effect to and protect those rights. It is said that the grounds on which so-called "paper transfers" of property at sea are disregarded have no application in the present case, for the goods, even in the cases where they were enemy property when shipped, were covered by the neutral flag, and not even potentially capable of being made good prize, and have since been transferred in good faith and in the ordinary way of trade. The answer is simple. They were capable of being made good prize, even though they were enemy goods in a neutral bottom, for if they were contraband, or were "infected" by contraband, being in a common ownership with contraband when seized, nothing in the Declaration of Paris either expressly or impliedly protected them.

It is then said that, if so, "infection" has no application, for this principle is a punitive principle and, as a neutral is entitled to trade in contraband at his peril, there is nothing for which to punish. He has not intervened in the war or sided with one party against the other, and he has carried on his own neutral trade in his own and a legitimate way. He is really being penalised in an abortive attempt to punish an enemy, who escapes the penalty. Accordingly, the maxim *cessante ratione legis cessat ipsa lex* applies equally as in the case of the doctrine discussed above. If the rule against recognition of transfers of goods at sea ceases to apply, because these goods cannot be good prize even if enemy-owned so that the reason of the rule is gone, equally, when the goods are proved to be neutral property, the doctrine of infection ceases to apply, for that was laid down in order to punish, and this trade is now admitted to be innocent though hazardous. Again the answer is simple.

Penalty and punishment in this connection are in a further respect unsuitable terms—namely, that they might seem to question a neutral's right to ship or to buy contraband at his peril. Neither belligerents nor Courts of Prize exercise a general correctional jurisdiction over the high seas. The ownership of contraband goods, though often spoken of as if it were a guilty departure from the neutral duty of impartiality, is now well recognised as being in itself no transgression of the limits of a neutral's duty, but merely the exercise of a hazardous right, in the course of which he may come into conflict with the rights of the belligerent and be worsted.

The language about "innocent" and "guilty" goods, about the "offence" of carrying contraband and about taking contraband goods "*in delicto*" and imposing a "penalty" accordingly, was effective and apt in the connection in which it was used, but that connection involved a decision, not as to the rationale of the doctrine of infection, but only as to its application in particular cases. The decisions do not preclude their Lordships from recognising that it is not the function of Courts of Prize to be censors of trade generally during war; that, if neutrals have the right to carry contraband, belligerents have the correlative and predominant right to prevent it; and that the doctrine of infection was established and still stands as an effectual deterrent, the need and justification for which have by no means passed away.

As to the changes in mercantile practice, it has already been indicated in *The Odessa* (*sup.*) that trade machinery, which is the growth and creation of years of peace, cannot supersede the settled law of prize. In time of war the remedy is for neutrals to change their practice and buy before shipment, and, if they pay after shipment and before they get the goods, they must take their risk of infection. In the long intervals of peace between war and war, commerce flourishes and commercial practices and modes of business change and develop while the law of prize is in abeyance, but merchants have no power to alter or affect this law, nor have Prize Courts any discretion or authority to abrogate settled and binding rules on the ground that their application is inconvenient to or inconsistent with the smooth and regular working of modern commerce. Nor is it the case that, when the rules now under discussion first grew up, either the use of documents as symbols of goods afloat in connection with passing the property or the practice of loading general ships with an aggregate of parcels, intended to be distributed among sundry consignees, was unfamiliar or unknown. In any case, and although Prize Courts will always be mindful of the just rights of neutrals, it is certain that none would be greater sufferers than neutral merchants if it were once admitted that in Prize Courts fixed principles could be disregarded and settled law could be set aside in hard cases, for cases may be hard to belligerents as well as to neutrals. The President, Lord Sterndale, made some observations in his judgment in the case of *The Rena* which show how much he was impressed with the argument that a combination of these two rules, leading to the consequence of condemnation in the present cases, is harsh and impolitic, but it is plain that if mere considerations of particular hardship prevailed to alter the application of the law, the whole uniformity of the system administered by Prize Courts would be impaired. It is plain also that, if a claimant's ignorance could be relied on as an answer to the captor's rights, nothing would be easier than to defeat those rights in almost every case. Strictly speaking, a neutral is not in a position to complain of being penalised by the doctrine of infection, when his transferor and the common owner of his parcel and of the contraband parcel is an enemy, for, if the court cannot recognise

his title, he fails because he is not the owner, not because he is subject to a general doctrine of infection. It is otherwise when he takes from a neutral, but here again, if he is not owner at the time of seizure, he fails because he has no right to complain of the seizure or to defeat the rights which the captors derive from it, and if, nevertheless, he has paid his money, he loses it because, before doing so, he failed to ascertain the facts as to the goods and to make sure that the documents taken up would avail him to obtain delivery.

The result of these considerations is that, subject to the exceptional points which follow, the appellants were rightly held to be affected by the doctrines impugned and their claims were properly dismissed. It remains to consider three special cases, in two of which it is contended that the appellants became owners before the commencement of the voyage, whilst in the third reliance is placed on the terms of the Declaration of London Order in Council, dated the 29th Oct. 1914. It is convenient to take this last case first.

In the case of *The Kronprinsessin Margareta's* second voyage, two firms, Dahlen and Wahlsteldt and Bergman and Bergstrand, each claim portions of her cargo. Dahlen and Wahlstedt admitted that their parcel had an ulterior enemy destination, but claimed that the Order in Council of the 29th Oct. 1914, applied to it, and, in accordance with the language of art. 35 of the Declaration of London, waived the Crown's right to ask for its condemnation. The question is whether that Order in Council, so far as it would affect this parcel, had been revoked prior to the seizure on the 15th June 1916—that is to say, by the Order in Council of the 30th March 1916—and this is a question of construction.

In general, when the Crown exercises such power as it has to affect the rights of neutrals by Order in Council the terms of that order, to be effectual, must be unambiguous and clear. In the *Kronprinsessin Victoria* (14 Asp. Mar. Law. Cas. 391; 120 L. T. Rep. 75; (1919) A. C. 261), their Lordships have so held. In the present case the neutral rights affected are such as subsist by virtue of a prior Order in Council, intimating an intention to waive a portion of the full belligerent rights of the Crown for the time being, but this circumstance does not affect the construction of the order under discussion. The Declaration of London Order No. 2 had announced that the Crown would observe certain articles of the Declaration of London, of which that now material was art. 35. No doubt that was a concession to neutral interests, and Dahlen and Wahlstedt's transaction would fall within the terms of the article.

The Order in Council of the 30th March 1916, after reciting that doubts have arisen as to the Declaration of London Order No. 2, says in art. 1 " the provisions of the Declaration of London Order in Council No. 2 1914, shall not be deemed to limit nor to have limited in any way the right of His Majesty to capture goods on the ground that they are conditional contraband, nor to affect or to have affected the liability of conditional contraband " to be captured under circumstances such as those of the present case; in other words, that for the future His Majesty no longer assents to any limitation on his full belligerent rights in the matter in question, the terms of the Declaration of London Order No. 2 notwithstanding. In what respect are these words wanting in clearness, and how do they fall short of an unambiguous withdrawal of any prior waiver of the Crown rights as affecting certain neutral shipments? They are more than a mere warning that the Crown can, by revocation of prior waivers, return to the exercise of its full belligerent rights unimpaired, nor was there any occasion for such a declaration.

Attention is first drawn to the words " shall not be deemed . . . to have limited " those rights. As these words refer to the past and to the consequences of transactions which have already occurred, they are clearly severable from the other words of the sentence, which refer to the future. Even if they are ineffectual, for an Order in Council cannot give to a prior order any other validity or effect than that which its terms, truly construed, possessed according to law, they do not diminish the full effect of the other words as to matters within the undoubted competence of His Majesty in Council, nor do they cloud or obscure their meaning. Their Lordships think it needless and inexpedient to surmise with what object these words relating to past occurrences were inserted. The formula, now so common, which declares something to be deemed to have been what it really was not, is sometimes no doubt convenient, but the limits of its utility are soon reached, and they may have been exceeded here. This their Lordships have not to consider. It is enough that the obscurity of the words in the past tense, such as it is, does not touch those in the future.

The next point is that the order of the 30th March 1916 itself in art. 2 virtually makes a reference to art. 35 of the Declaration of London as modified by art. 1 (iii.) of the order of the 29th Oct. 1914 which is only consistent with the continuance of that article in force, and by art. 5 expressly revokes any recognition of art. 19 of the Declaration of London, thereby showing that the intention is to name articles no longer recognised and not further or otherwise to withdraw the Declaration of London Order No. 2. Their Lordships can only observe that, the question being one of clearness or ambiguity, the clearness is on the side of art. 1 of the order of the 30th March 1916, and that art. 2 is not clear enough to preserve what the words used *de futuro* in art. 1 have clearly renounced. The effect of art. 2 is not a point that they need further pursue. As to art. 5 there may be more ways than one of being clear, but the use of general terms in art. 1 is not ambiguous merely because the use of particular terms is adopted in art. 5, nor does the first expression fail to be clear merely because, following the model of the second, it might have been clearer.

The last contention is that the express revocation of the Declaration of London No. 2 Order in terms and *in toto* by the Maritime Rights Order in Council of the 7th July 1916 is in itself a ground for construing the order of the 30th March 1916, wherever possible, as being something less than a revocation, and it is said that the order of July 1916 recognises that some part of the order of Oct. 1914 then still subsisted. In the *Kronprinsessin Victoria* (*sup.*) their Lordships observed that its whole tenor, 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, and such was doubtless the view which those who framed that order in fact entertained. In

the case of an Order in Council, however, the same weight does not attach to the view of the existing law adopted by its authors as attaches to the language of the Legislature when amending existing law, and in that case their Lordships had not to consider the order of the 30th March 1916 at all, and decided nothing about it. Doubts had arisen and continued to arise as to the effect of these Orders in Council and it might well be thought right *ex abundanti cautela* to declare in July 1916 finally and in the most general terms the revocation of an order, which had already been cancelled, not indeed in such downright language yet with sufficient clearness.

Accordingly the claim of Dahlen and Wahlstedt fails, and it is admitted that the claim of Bergman and Bergstrand is covered by the same considerations, for the shipper of the two parcels was the same person and an enemy—and no title having been acquired by Bergman and Bergstrand before the commencement of the voyage (subject to what is hereafter said upon the effect of a confirmed credit on the transaction) the enemy destination, which made Dahlen and Wahlstedt's parcel of conditional contraband liable to be condemned would also infect the parcel claimed by Bergman and Bergstrand and warrant its condemnation also as the property in it was, at the time of seizure, in the same owner as the property in the contraband parcel.

The peculiar conditions produced by the war have led to two new features in transatlantic commerce, not necessarily connected, but, as it happens, both present in these appeals. One is that all the insurances are effected in Europe by the consignees: the other that the consignor stipulates for a confirmed Bank credit, against which he draws. The first appears to have been due to the difficulty of covering the war risks in America; the second doubtless arose from the fact that commerce has been carried on in new channels and not always with persons of unimpeachable personal repute, and it had the additional advantage of minimising the inconvenience to the seller of sharp fluctuations in the rates of exchange. The question now raised is whether, under circumstances which include especially these two practices, an intention can be inferred to pass the property in cargo before the voyage commences, independently alike of payment for the property or delivery of documents. If it can, the neutral buyer, becoming owner from the neutral seller and shipper before the beginning of the transit to which the doctrine of infection applies, escapes from the risk of it. Further, in the two cases when the sellers and shippers were the enemy firm of Diebold and Co., the transaction of purchase would be complete before the point of time at which the rule against documentary transfer of goods afloat begins to apply. These points arise in the cases of *The Parana*, *The Rena*, and *The Kronprinsessan Margareta*, on her later voyage, but, as the facts are similar in all three, the argument was presented mainly on those of *The Parana*.

In the case of *The Parana* the terms stipulated on behalf of Urban and Co., the neutral sellers and shippers, were "cost and freight Gothenburg . . . reimbursement A-S on Malareprovinsernas Bank, Stockholm." The buyers applied to this bank to open a credit available to the sellers and to confirm to the latter the fact of their having done so, and they deposited a sum of money to make the credit effective. The bank did cable confirmation of this credit in the following terms: "Confirmed credit opened Kroners 100,000 account Lundgren Rollven against 2000 bags coffee shipment *Parana*." The shippers thereupon took bills of lading making the coffee deliverable to the consignees' order and sent them with an invoice and a sight draft for its amount, through collecting agents of their own, to be presented together to the bank in Sweden. The appellants contend that the effect of this transaction was that the property in the coffee passed from the sellers to the consignees before the commencement of the voyage and that infection has accordingly no application to their case.

The passing of property being a question of intention is ultimately a question of fact. There is no evidence of the intention of these parties beyond the inferences to be drawn from their situation and interests and from the mercantile operations which they conducted. What law they supposed would govern their transaction is not shown nor is any evidence given of the provisions of any foreign law, and, for the reasons given in *The Parchim* (*sup.*), the law to be applied must under these circumstances be that of England so far as the matter is one of law at all. That law has attached definite presumptions as to intention to definite courses of procedure and modes of expressing and dealing with common mercantile instruments.

If the shippers had insured the goods and had attached the policy to the draft, and if they had taken the bills of lading to their own order, no question could have arisen. Again, if in pursuance of the contract the consignees had insured for the benefit, as between buyer and seller, of whom it might concern, there would have been little doubt possible. Their Lordships will assume, because the argument appeared to assume on all hands, that the insurance effected in Europe was for the consignees' benefit only, though they are by no means satisfied that it was so, and that none was effected by or for the consignor. The importance, which always attaches to the incidence of insurance in international commerce, makes this a significant point.

Again, importance attaches to the fact that the shippers, having loaded the coffee on a general ship—a bailment to the carrier—took the bills of lading to the consignees' order. Without the consignees' indorsement they could not thereafter demand delivery *ex* ship as a matter of course, though without delivery of the bills of lading to the consignees they in their turn would not obtain delivery in the ordinary way of business. The 2000 bags bought by Lundgren and Rollven appear to have been part of a total quantity of 4000 bags shipped by Urban and Co. These bags were lettered and numbered in different ways, probably according to the place of origin and quality of the coffee, and, unless the other 2000 bags of similar coffee were nevertheless numbered and marked in a wholly dissimilar way of which there is no evidence, it would seem from the specification sent forward that specific bags were not appropriated to the contract of Lundgren and Rollven. Their contract was to be satisfied out of the bulk on discharge, and until some bags were then appropriated to the holders of their bills of lading, it could not be predicated of any particular bag that it was one of those deliverable to the

order of Lundgren and Rollven. In the case of *The Rena* and *The Kronprinsessan Margareta*, however, it does not appear that there was any other cargo on board shipped by the same firm and forming a bulk of which the parcels in question were only an undivided part.

There seems no doubt that business of this kind was such as the Malareprovinsernas Bank was always ready to do for a respectable customer whose credit was good or who put it in funds for the purpose. The customer applying formally to the bank for the credit was in each case the buyer. There are some expressions in the letters of the sellers' agents in the case of the *Parana*, which suggest that they had made some arrangements on the seller's behalf with this bank prior to the completion of the agreement of sale, so as to ensure an available credit ready to be operated upon, but no such arrangement is forthcoming or is proved, nor is there any suggestion of it in the other cases, and it does not appear that anything more passed between the bank and the consignors than a cabled statement to the effect that "as requested we inform you that Lundgren and Rollven have opened a credit with us, out of which a draft with bills of lading can be met." Their Lordships are unable to infer that, by English law at any rate, any enforceable obligation arose between the consignors and this bank. There was no contract of guarantee. The Santos cargo certainly, and the Rio cargo in all probability also, was shipped before the credit was confirmed, for in the latter case the bill of lading and the confirmation of the credit are on the same day. No letter of credit was issued; no case of estoppel has been made, and indeed the facts stated by the bank were true; no request for shipment or consignment to the appellants was made by the bank; no promise to meet the draft as an obligation *de futuro* arose on any consideration moving from the consignors to the bank. Their Lordships do not doubt that in the ordinary course this bank—an institution against which nothing has been said or suggested—would scrupulously apply Messrs. Lundgren and Rollven's funds in their hands to meeting the consignors' draft, duly presented. Whether the bank could have resisted, if their customers had claimed to withdraw their funds before presentation of any draft, does not appear, but there is no need to suppose on either side any possibility of such a course being attempted. In the case of the *Kronprinsessan Margareta* the form of application to the bank provided for the irrevocability of the credit up to a certain time, and for this a blank was left but it is noticeable that Messrs. Bergman and Bergstrand did not fill up the blank. It is enough to say that no obligation on the bank to meet the draft, which the drawers of it could have enforced, is shown to have arisen. Not merely was there no payment of the consignors on shipment of the goods, there was not even material for a novation. In spite of the confirmation of the credit they were and remained unpaid vendors till a much later date.

Now two things are quite plain. The consignors did not propose at any time to rely for payment on the mere personal credit of the consignees, and they carefully kept the bills of lading in their own agents' hands until the draft was met: (see *Moakes* v. *Nicholson* (12 L. T. Rep. 573; 19 C. B. N. S. 290). But for the absence of a policy of insurance they strictly pursued the same course of dealing with the documents, as if there had been a c.f. and i. sale.

In these circumstances what can be inferred as to the passing of the general property? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention? The appellants, Messrs. Lundgren and Rollven, have to show that it passed to them and passed, too, before the beginning of the voyage. If it did, then the consignors no longer owned the goods and had nothing to show against them except a draft of their own, which could not be enforced, and a bill of lading, which would not entitle them to delivery of the goods, though its retention might seriously inconvenience the new owners, the consignees. Rights to stop *in transitu* or to exercise an unpaid vendors' lien need hardly be discussed, for, on a question of intention in fact as to which there is a good deal of evidence, it would be artificial to assume that the consignors' minds were actually determined to the contrary by consideration of legal remedies, of which it is not shown that they had any knowledge, let the legal presumption be what it will. It is said that, as a matter of business, the confirmed credit relieved the consignors of all further concern in the goods, for they could have no doubt that they would be paid by the bank in any event and that the failure to insure is proof positive of this. It may be so, though their Lordships do not desire to express any opinion as to the rights of the parties if the coffee were known to be already lost at the time of the presentation of the draft, but it seems clear that the consignors desired to retain an interest in the goods, otherwise why should they retain the bills of lading in their agents' hands? It is said that this only points to an intention to reserve a special property as security, but the omission to insure would be equally significant in this case, and there is no reason why, as a matter of actual intent, a special and not the general property should have been reserved. The case might be very different if the bills of lading had been forwarded to Lundgren and Rollven direct (*Ex parte Banner*; *Re Tappenbeck*, 34 L. T. Rep. 199; L. Rep. 2 Ch. Div. 278). As it is, *Shepherd* v. *Harrison* (24 L. T. Rep. 857; L. Rep. 5 H. L. 116), would surely apply, if on presentation of the bills of lading with the draft there had been a retention of the first without payment of the second. There may be explanations of the shipper's election to be his own insurer of the coffee till the sight draft should be met, but, however this may be, there is nothing to outweigh the significance of a dealing with the documents so nearly identical with that in an ordinary transaction c.f. and i.

No authority was forthcoming, which proved to be completely in point. Cases, in which it has been held that taking the bill of lading in the shipper's own name negatives any unconditional appropriation to the buyer by the delivery of the goods on shipboard and indicates one conditional on the documents being taken up, can throw only an indirect light on the question here involved. Certainly no case was found, in which it was held that taking the bill of lading in the buyer's name, while withholding delivery of it until presentation and taking up of the documents, would not be, as an appropriation, equally conditional. Much reliance was placed on *The Parchim* (*sup.*) a case not only decided on very special facts, but on facts so different from those arising in the present appeal as not in any way to rule it. That case did not in any degree substitute the incidence of the risk for the passing of the general property as the test to be applied.

There the sellers of the entire cargo of a named ship took the bills of lading to their own order, but it was held that the presumption of an intention to retain the property till something was done by the buyer after shipment was rebutted by the special circumstances of the case. The contract was unusual. It was on cost and freight terms, but was by no means similar to that now under discussion. With the exception of the form of the bills of lading, which itself was determined by the sellers' agent without either particular instructions or actual knowledge of the terms of the contract, everything pointed to the intention that the property should pass to the buyer on shipment, though he was only to have possession of the cargo and of the bills of lading representing it, on subsequently paying the price. Special significance was attached to the fact that, on shipment or at least on notification of it, the cargo was to be at the buyer's risk and he had to pay, lost or not lost. Meantime the documents were held by a bank *in medio*, neither to be transferred to the buyers without payment, nor to be placed at the sellers' disposal, unless and until the buyers failed to take them up. Incidentally it may be observed that, although the loading was only completed after the outbreak of war, the interval was short, the shipment was made in pursuance of a contract entered into before the war, and no point was taken on behalf of the captors, even if any arose, as to the passing of property afloat during the war from an enemy seller to a neutral buyer by delivery of documents. The case does not purport to lay down any general rule, that a particular mode of dealing with a bill of lading must, whenever it occurs and in whatever circumstances, always prove a particular intention. It is not an authority for the contention, that if the bill of lading is taken in the buyer's name this necessarily proves that the goods shipped are appropriated to the contract, and delivered to the captain as the buyer's bailee, with a consequent inference of the passing of the property to the buyer on shipment.

In the present case it appears to their Lordships that the retention by the seller of the bill of lading was inconsistent with an intention to pass the property. They think that it was "clearly intended by the consignor to preserve his title to the goods until he did a further act by transferring the bill of lading." The special circumstance of the existence of a confirmed banker's credit in this case is only indirectly relevant. It no doubt enhances the likelihood that the bills of lading will eventually be taken up and the goods be paid for, and so diminishes the importance to the seller of being still able to say that the goods are his, but it is not direct evidence of intention; it is only a reason why a particular intention is more likely to have been formed in such a case than in others. The intention has still to be inferred, principally from what was done and from the communications made with reference to it, and these point to an intention not to pass the property till the drafts were paid, and it is really rather a reason for intending to get the documents presented and taken up as soon as possible, than for an intention not to retain the ownership even until that could be effected. If the seller was paid or was holder of an enforcible contract from a bank for payment, the sooner he passed the property the better, for he was uninsured, but if he was neither he gained nothing by passing the property away. It was not onerous property.

In one respect the appeal succeeds. Of the two shipments by the *Parana*, the draft for the 1000 bags shipped at Santos was met by the Swedish bank a fortnight before the ship was seized. Thereupon the appellants Lundgren and Rollven became the owners, and there was not any common ownership of this parcel with an infecting parcel at the time of the seizure to justify the condemnation of this 1000 bags. The decree appealed against in this case will, therefore, be varied by ordering the release of this parcel, but as this success is very partial, their Lordships think that it should not affect the costs. As to the other parcel, Lundgren and Rollven fail because the goods at the date of seizure were in the same ownership, namely that of Urban and Co., as the contraband parcel intended for Hyllen and Kock, which was condemned, and are infected, the Declaration of Paris notwithstanding. Mattsson, Peterzens and Co. fail for the same reasons. They too acquired title only after seizure and, at the time of the seizure, the goods were liable to condemnation. Bergman and Bergstrand fail because Dahlen and Wahlstedt's parcel, not being protected by the Order in Council, infected the rest of Diebold's coffee, and they cannot claim recognition of an ownership which was not acquired by payment till after seizure, and then was only effected by documentary transfer of goods afloat. The claims of Engwall, Berg and Hallgren, Levander, and Ofverstrom must be dismissed, for their ownership only arises by documentary transfer of the goods while afloat, which was only effected after seizure, and the goods, when seized, belonged to the owners of a parcel of conditional contraband in the same ship, which had an ulterior enemy destination.

The appeal in the case of the *Hilding* may be dealt with shortly. It relates to 200 cases of fatbacks and 100 of clear bellies in their nature conditional contraband, and covered by bills of lading making them deliverable to Paulsen and Co., as consignees. The 200 cases of fatbacks were the balance of a larger parcel, some of which Paulsen and Co. had appropriated to Weimann and Co., and some to Henrik Lucas as sub-purchasers under contracts previously made. That the goods had an ulterior enemy destination was not disputed before their Lordships, but they were shipped by neutrals on a neutral ship plying between neutral ports and were seized while the Declaration of London Order No. 2 of the 29th Oct. 1914 was in force. The appellants, Paulsen and Co., claimed to have bought and paid for the goods and to have become invested with the property in them before seizure. There were on board the *Hilding* also the other cases, which E. L. Weimann and Co. and Henrik Lucas purported to have purchased from Paulsen and Co., and the claims to these were put in by Weimann and Co. and Lucas and not by Messrs. Paulsen. To these no claimant appeared at the hearing, and the president, Sir Samuel Evans, being satisfied that they had an ulterior enemy destination condemned them. He further held that at the time of seizure the property in this parcel had not passed out of Paulsen and Co., and concluded that its condemnation in any case involved the condemnation on the gound of infection of the parcel of goods now claimed by Paulsen and Co., even assuming that they had proved the ownership to be in themselves. The President further, though his exact finding is somewhat uncertain, does not appear to have been satisfied that Paulsen and Co

ever acquired the property in any of the goods above mentioned.

It is impossible for their Lordships to review the decision of the President that the goods claimed in the name of Weimann and Co. and of their sub-purchasers were to be condemned. The statistical case made by the Crown was sufficient, unless answered, to prove the destination in Hamburg and no one appeared to answer it in support of the claim. Paulsen and Co. found it necessary to elect whether they should say that as to this parcel they were owners no longer, or that they were owners still. They chose the former course and made no claim; they cannot now be heard to make the claim, which they would have made before the President, if they had chosen the latter.

Again, in proving their case before him they set up that they had sold to Weimann and Co. and had been paid before seizure, but before the Prize Court they never gave the date of the payment, which in the usual mercantile course, applicable to this transaction, was the crucial matter. Their Lordships could not allow them to mend their hand and endeavour to supply this deficiency on the appeal. Nor are the inferences satisfactory, which were drawn from certain intercepted messages referring to some customer as having "taken up" some "documents," that remained unidentified. They find it impossible, therefore, to say that the President was wrong in finding that the ownership in the Weimann parcel had not passed from Paulsen and Co. before seizure.

Paulsen and Co. were in fact the persons to whom the goods were consigned in name and in the bill of lading. Were they, however, consignees having actual control, or were they merely intermediaries introduced as the creatures of others? The President does not expressly find either, but it is clear that he found the entire position of Paulsen and Co. to be ambiguous and unsatisfactory. On consideration of the evidence their Lordships also are not satisfied that Paulsen and Co. really controlled either the goods or their destination. The burden of proof was on them, and it is only by inference that the President's judgment is suggested to find anything in their favour. It never does so in terms: it expresses doubt as to the passing of the property from Crossman and Sielcken, the shippers, at all. There is ground for thinking that not Paulsen and Co., but some other party provided the funds required and that they were only intermediaries acting as they might be directed. It cannot be said that they have discharged the burden of proof in fact, and accordingly there is no sufficient ground for arriving on appeal at a finding of fact in their favour at which the late President could not bring himself to arrive.

This makes it unnecessary to decide the point which was raised, that the naming of the consignee in the bill of lading to which the Order in Council of the 29th Oct. 1914, refers, only avails to protect contraband goods from condemnation as contraband and cannot be extended to the further waiver by the Crown of its right to claim the condemnation on the ground of infection by goods in the same bottom and in the same ownership with goods which are contraband. Accordingly Messrs. Paulsen and Co.'s appeal fails.

Their Lordships will humbly advise His Majesty that the order appealed from in the case of the *Parana* ought to be varied by discharging so much of the decree as condemns the 1000 bags shipped at Santos and by directing their release or payment of their appraised value to the parties who claimed them, without costs, but that otherwise all these appeals should be dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*; *Thomas Cooper* and *Co.*

Solicitor for the Crown, *Treasury Solicitor.*

Jan. 27, 28, *and March* 16, 1921.

(Present: Lords SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE FALK AND OTHER SHIPS. (*a*)

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

Prize Court—Seizure of contraband goods—Evidence of reasonable suspicion—Detention and refusal to release—Disclosure of documents—Discontinuance of proceedings—Licence required to remove goods—Interest on proceeds.

It is not a general rule that whenever the Crown has had the benefit of goods seized the claimant is entitled to interest if the goods are released to him.

In 1915 *tanning materials belonging to the appellants, a Swedish firm, were seized on board certain vessels on their way from America to Sweden as absolute contraband with an enemy destination. The matter was eventually settled and the Procurator discontinued his proceedings in* 1919.

The appellants claimed damages for the capture and detention of the goods and for the inaction of the Procurator-General after the appellants had disclosed their documents to him and had satisfied his requisitions.

Held, that as there were reasonable grounds for the original seizure, and subsequent proceedings, and as there had been no delay for indirect objects or from mere neglect and there were materials proper to be examined judicially, the Procurator-General was not liable to the appellants for damages for the seizure and detention.

A decree for the release of goods does not warrant actual ability to remove them from the realm, and the Procurator-General is not liable for a loss on the goods owing to a statutory restriction upon their export.

Judgment of the Prize Court affirmed.

APPEAL from a decree of Sir Henry Duke, P., rejecting a claim by the appellants, a Swedish company, to recover against the Procurator-General damages and costs in respect of the seizure and detention of a quantity of tanning materials shipped from the United States in the *Falk* and seven other neutral vessels, and consigned to Swedish ports.

MacKinnon, K.C. and *Spence* for the appellants.

Sir *Gordon Hewart* (A.-G.) and *T. Mathew* for the Procurator-General.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—In Nov. 1915 the claimants, old-established dealers in hides and tanning materials in Sweden, bought for the purposes of their trade 500 tons of quebracho extract and 1000 tons of chestnut extract from James Meyer,

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

of Copenhagen, which Meyer in his turn bought from Schmoll Fils et Compagnie, of Paris, Basle, and New York.

The goods began to come forward almost at once, and eight vessels with parcels of them on board were brought into British ports between the end of that month and the early part of the following May. In due course writs were issued against them as having an ulterior enemy destination in Hamburg. They had been conditional contraband since the 11th March 1915, and became absolute contraband before the seizure. In the cases of the first five vessels to be detained and of the last but one, the shippers named in the bills of lading were Schmoll Fils et Compagnie, and in the other two the National Export and Import Company, both of New York. In the cases of the first and second the consignee named in the bills of lading was Otto Zell, a forwarding agent at Gothenburg. The claimants themselves were named as consignees in the other cases and they duly appeared and claimed the goods in all.

An assiduous and intelligent agent was then employed, who made it his business to procure all documents relating to the matter and to put them at the disposal of the Procurator-General in numerous bundles and portfolios, and the Procurator-General devoted the Christmas holidays of 1916 to their perusal. Assuming them to have been the same as those again submitted shortly before the trial, they filled thirty-four volumes; even those printed in the record, though but a small part of the whole, occupy 450 printed pages.

Accordingly the Procurator-General decided to try to settle the case. At this time neither quebracho extract nor chestnut extract could be exported from the United Kingdom except by special licence, by virtue of a proclamation dated the 3rd Feb. 1915, and of an Order in Council dated the 18th March 1915, issued under the Customs and Inland Revenue Acts of 1879, the Customs (Exportation Prohibition) Act of 1914 and other statutes. He informed the claimants' solicitors of these facts, of which they presumably were and certainly might have been already aware, and offered that the War Office should purchase the goods at the duly authorised price and that the proceedings for condemnation should be discontinued. The claimants insisted on their right to damages and stipulated that both the sale and the discontinuance should be without prejudice to their claims. This was agreed to in letters dated the 26th April and 1st Oct. 1917, and the Procurator-General discontinued his proceedings by leave on the 28th July 1919. Thereafter the suit continued for the claimants' benefit only; they were the actors and the parties to take the conduct of it and to press it on. When their claims came to trial they failed. The President decided that, as regards both the original seizure and the subsequent proceedings, what had been done was done on reasonable grounds and was therefore excusable. Hence this appeal.

There can be no doubt that the appellants have suffered a loss which is regrettable and large. Some four years elapsed between the seizure and the judgment. Their costs have been heavy and they allege that they have had to pay interest to Meyer, their vendor. Above all, the difference between the price which they obtained in England, and that obtainable if they had sold the goods in Sweden, as they meant to do, was on so large a quantity very great.

Their Lordships, however, do not wish it to be supposed that in their apprehension of the matter these large sums could in any case have been chargeable against the Procurator-General. Strictly speaking, only liability is in issue now. If that could be established, it would be for the registrar and merchants to assess the damages payable for proceedings taken without sufficient grounds, which deprived the claimants of the possession and control of their goods. So much, however, has been said of the commissions and omissions of the Procurator-General, as the occasion, if not the cause, of this great loss, that their Lordships think it would be misleading to pass over in silence the contention which has been raised.

No doubt the effect of sending the vessels in for further inquiry was to bring this cargo within the ambit of the prohibition of export of tanning materials, but it does not follow that all the claimants' loss thereby can be thrown on the captors. The same misfortune would have fallen on them if the vessels had come into a British port of refuge and had there discharged the goods. Further, under a proper licence export would have been permitted, but the claimants never applied for that licence or ascertained whether it could have been obtained or not. So far they are presumably the authors of their own injury. Besides, the measure of damage, applicable to conversion or detinue of their goods or to failure to deliver them under a contract of sale in an action brought in a municipal court, may be no guide in a claim against captors, without proof of special circumstances. As for loss of interest the claimants' relations with Meyer are remote matters and it was in any case for them to take steps to minimise this and other losses. They seem to have done nothing.

The authorities may be referred to briefly. The foundation of the right, variously expressed in different cases, may be said to be the existence of reasonable suspicion, it may be of illegitimate traffic, it may be of enemy character, it may be of illegal action or service or what not, but there must be such suspicion as warrants inquiry into the facts and adjudication upon them by a properly constituted court: (see the judgment of Story, J. in *The George*, 1815, 1 Mason, 24, quoted with approval in *The Ostsee*, 9 Moo. 150). Even slight grounds of suspicion may suffice. In *The Elizabeth* (1809, 1 Acton, 10) the reason given by the Lords of Appeal for condemning the captors in costs was that there appeared to be scarcely any ground for detaining the vessel. The Judicial Committee's judgment in *The Baron Stjernblad* (14 Asp. Mar. Law Cas. 178; 117 L. T. Rep. 743; (1918) A. C. 173) develops the matter. In a case where it has become apparent by statistical evidence or otherwise that a considerable proportion of the collective imports into a neighbouring neutral country of a particular commodity, which is in its nature contraband, does in fact proceed by a continuous transit into the enemy territory, any particular importer of such goods belongs to a class of importers some of whom at any rate must be obviously engaged in contraband trade. Suspicion then attaches to all, and the question is one of the existence of reasonable suspicion, not of the possession of proof attaching that suspicion to a particular member of the class.

The suspicion, for example, attaches to the particular goods by reason of the circumstance connected with the class of goods generally that it is in its nature contraband. Those who seize on the grounds of reasonable suspicion are entitled to the benefit of such evidence as other officers of the Crown may possess as to ulterior destination, and are not limited by the information, or the lack of it, to be found in the ship s papers themselves. Neither at the actual time of seizure nor in the conduct of the proceedings is the officer responsible called upon to constitute himself judge or justified in doing so. The decision, if grounds for seizure existed, must in general rest with the court, and the court is also peculiarly the tribunal to determine any questions of suggested delay in the proceedings. The judgment in *The Ostsee* (9 Moo. 150) is the standard authority on all these matters. It points out that the ship (and equally the cargo) "may be involved with little or no fault on her part in such suspicions as to make it the right or even the duty of a belligerent to seize her"; nor is it possible to lay down by any exact definition what the circumstances are that will justify capture or excuse it if no condemnation follows. Even if the circumstances known by the captor at the time of the first detention are not so founded in fact as to serve as an excuse, he may still avail himself for this purpose of other grounds subsequently brought to his knowledge, as he could have done if he had proceeded and obtained condemnation. "It is not necessary," says Sir W. Scott in *The Juffrow Maria Schroeder* (3 C. Rob. 152), "that the captor should have assigned any cause at the time of capture; he takes at his peril and on his own responsibility," and from this it must follow that after-acquired knowledge is available for the one purpose or for the other. It is a fallacy to suppose that suspicion can only be reasonable in so far as there are facts before the mind of the person who suspects, and that accordingly no facts learnt subsequently are available to excuse a seizure. The present is not a case of arbitrary or capricious arrest, ventured on the hazard that a case for conviction may ultimately turn up. Nor can it be said of it that there were no "circumstances connected with the ship or cargo affording reasonable ground for belief that one or both or some part of the cargo might prove upon further inquiry to be lawful prize: (*The Ostsee*, 9 Moo. at p. 162.)

The liability of the Procurator-General, if any, has been rightly presented under two heads: the first, liability for the original seizure; the second, liability in respect of the course taken in the legal proceedings. Somewhat different considerations no doubt arise in the two cases. The original seizure takes place before the particular circumstances have been inquired into; the suit is prosecuted after materials have been collected and time has been allowed for their examination. The element of mere suspicion, so prominent when first the prize is brought in, diminishes as investigation proceeds and proof takes its place. The prospect of the discovery of substantial evidence is one that can be weighed by those in charge of the case for the Crown. It follows, in their Lordships' opinion, that a point must ultimately be reached, at which, without purporting to act as a judge, the Procurator-General should decide for himself whether to go on or not. This obligation is all the more important because of the change of practice, necessitated by changed circumstances, which authorises the collection of material at large and its presentation by both sides instead of deciding the question of release or detention, in the first instance, only on evidence coming from the ship.

It was not contended at the bar that the liability under the first head was to be considered simply as at the time when the vessels were first diverted, or simply upon the information then present to the minds of the actual officers who ordered the diversion. Counsel recognised that, under the conditions imposed by modern warfare during the late war, the question should be considered in the light of the information available to the Procurator-General and his assistants at the time when the effective decision was taken to detain the goods for the purpose of condemnation in prize, that is, substantially, at the dates of the writs. At the trial evidence was given, in the usual form of information obtained and communications intercepted, with regard to the parties connected or apparently connected with these shipments. It is true that it was given in affidavits recently sworn, which did not in all cases specify the dates at which particular events relied upon had first become known to the authorities concerned. The President, however, gave attention to these points, for he discarded some matters on the ground that they were after-acquired information and assumed that others only were available at the critical time, and, as the claimants do not appear to have pressed that the Procurator-General should be more specific in the matter of dates, the objection has little weight now.

It appears, then, that when the several proceedings were begun the following matters were available for consideration. The goods were contraband goods of a kind often and largely sent on a continuous transit from the United States through Sweden to Germany, where they were scarce and dear. They were going to Gothenburg, a place of import for goods intended for Swedish consumption, but convenient also and often used for this ulterior trade. The National Export and Import Company of New York had been concerned in it, and so had Otto Zell, who furthermore was a forwarding agent for others, and in fact had no interest in the claimants' goods, and an intercepted message had given ground for expecting large quantities of quebracho extract to be sent shortly from Schmoll Fils et Compagnie to Scandinavian ports for account of James Meyer, though it was not yet known, or is not shown to have been known at the time in question, that Meyer was the claimants' vendor in respect of these very consignments.

Under these circumstances their Lordships are of opinion that they cannot question the President's conclusion as to the existence of sufficient grounds for the detention. Although in the long run condemnation could not be hoped for, still, when the goods were placed in prize there was probable cause for a judicial inquiry with a view to their condemnation. It is not a case like *The Ostsee* (*sup.*), where the detention, though honestly made, was made on a ground which in fact had no existence. Nor is it such a case as is there mentioned as possible of a seizure "where not only is the ship in no fault, but she is not by any act of her own open to any fair ground of suspicion." In such cases (and the proposition applies equally to goods) the belligerent may seize at his peril and take the

chance of something appearing on investigation to justify the capture, but failure is visited with the liability to pay damages and costs. Nor was the case merely one of goods going to a geographical neighbour of Germany or of goods going to a port whence they could easily be sent on. Of all the goods, in their nature contraband, which went to that port, some, perhaps many, parcels certainly had Germany as their ultimate destination, and large profits awaited any neutral consignees who sent them there. As for the goods themselves, some came from and some went to persons known to be engaged in the trade. Their Lordships cannot doubt that, as regards all their consignments, the claimants were rightly brought into court to explain where they were really going to.

As the second part of their case the appellants claim damages for the action or the inaction of the Procurator-General after they had disclosed their documents to him and had satisfied his requisitions. They say that it then became his duty to obtain the prompt and effective release of the cargo, and, if necessary, to apply for and to procure a licence to export it. They even aver, as a ground for claiming all damages consequent upon the detention of the goods, that if the prohibition so stood in the way of the fullest benefit being derived from a decree of release, the Prize Court was bound to restore the position in their favour by requiring the Procurator-General to pay compensation, because another, and the appropriate, department had failed to exercise its discretion in the manner desired.

Their Lordships think that in principle these contentions fail. The greater the mass of transactions to be inquired into, the more astute the schemes of contraband traders, the more enlarged the available sources of information and the means of making it subserve the discovery of truth, the more is it necessary that the Procurator-General should have all proper opportunity of preparing the case for submission to the court, free from the insistent pressure of a liability in damages and costs, so long as he has not been guilty of delay for indirect objects or from mere neglect, and has materials which are proper to be examined judicially. It is not suggested against the Procurator-General that he protracted the proceedings in bad faith or maliciously, or in fact at all. His good faith is indeed conspicuous throughout. When he offered a settlement, the claimants, under advice, entertained it without protest and shortly accepted it. They reserved their existing claims, but they made no allegation of any fresh ground of complaint. The Procurator-General is not a judge; neither to the Crown, to the court, nor to the claimants does he owe any duty to decide questions, which are for the court, nor is he entitled to proceed only when he has a personal conviction upon the question in suit. His duty is to act reasonably. Even where the paucity of the evidence for condemnation or the abundance of the evidence in reply would lead the Procurator-General, as a reasonable man, to abandon any further attempt to obtain a condemnation, there is no authority for saying that the ship or cargo will be detained thereafter at his expense in damages, and that the application for release is merely a protective step for him to take in self-defence. It is equally a step which the claimant can take and ought to take to mitigate his damages. As to this the Procurator-General duly applied for a discontinuance of his own part of the proceedings. Before he did so the claimants had made no application to the court, so far as the record shows, to accelerate their course, and after that discontinuance they were themselves *domini litis*. He was under no obligation towards them to apply for an export licence, and, if none was forthcoming, he came under no liability in consequence. Instead of applying for a licence themselves, as they were free to do, the appellants preferred to sell the goods to the War Office and to take their chance of obtaining damages on some ground at the trial.

A passage in the judgment of Sir Samuel Evans in *The Kron Prinz Gustav Adolf* (2 Br. & Col. P. C. 418) is relied on as laying down a rule that the Procurator-General must within a reasonable time after getting full information into his hands decide whether he has a case for condemnation or not, so that if he has none he may apply for the release of the *res*, and that, if he fails to do so, he proceeds or delays to discontinue at his personal risk as to damages. The point does not seem to have been argued; the proposition intended to be laid down is by no means clearly expressed, and it has been doubted whether anything more was intended than to give interest in the particular case to mitigate exceptional hardship: (*The Dirigo*, 14 Asp. Mar. Law Cas. 467; 121 L. T. Rep. 477; (1919) P. at p. 227). Their Lordships agree with the view expressed by Lord Sterndale in that case that, if the decision in question purported to lay down a general rule that "whenever the Crown had the benefit of the money they ought to pay interest to the claimant when an order of release was made," the decision so far cannot be supported.

It may be that there are cases so plain that to keep them up is patently unreasonable and some mulct, probably in costs, should be the consequence of undue tenacity. Deliberate procrastination or a scheme for delay would, of course, be a wholly different matter. Where, however, there is a real question of law, a conflict of testimony or a genuine doubt as to the inference to be drawn from ascertained facts, the Procurator-General is not to be visited with costs or damages merely on the ground that he submits it to the judgment of the court, instead of taking the decision into his own hands. He is entitled to have genuine doubts cleared up by the claimant to the satisfaction of the court. The duty of a neutral claimant to explain what is doubtful or obscure in his conduct or position for the enlightenment and decision of the court has been laid down in *The Louisiana* (14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 261, at p. 464): "In the Prize Court a 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 his 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."

It would be inconsistent to hold that the Procurator-General is bound to forestall that decision, or permitted to seek it in a genuinely doubtful case only at his own personal risk.

The settlement, into which the appellants entered even though made without prejudice and accompanied by a reservation of their rights as to damages, took place before, or at any rate no later than, the earliest date at which it can be said that the Procurator-General ought to have concluded that he had no case to go upon, and it is from this settlement and sale that nearly all the damages incurred by the appellants have arisen. Further, it put them in no better position than they would have been in if they had received the goods themselves under a decree for their release instead of receiving the proceeds of their sale to the War Office. A decree for release does not warrant actual ability to remove the goods from the realm. This might be impossible for want of bunker coals or of labour or of repairs, and yet it could not be said that the redress given by the Prize Court was made inefficacious by reason of something of which that court ought to take notice. As is assumed in *The Dusseldorf* (14 Asp. Mar. Law Cas. 478; 15 Asp. Mar. Law. Cas. 84; (1920) A. C. 1034), release means release out of the custody of the marshal in this country, where the goods are, and it is for the owner of them to arrange to remove or dispose of them as he can. The Court of Prize cannot give itself a more extensive jurisdiction in cases where the neutral is unable to remove his property out of the realm, or award damages against the Procurator-General for consequences arising from matters to which he is a stranger, merely because he and the officers of the customs are alike in the service of the Crown. As a matter of fact, in this case the prohibition on export was duly made under statutory authority, and the question of granting a licence to export was not raised, but had it been otherwise the claimants should have sought their remedy, if any, against the officials actually concerned, in the ordinary courts of the country. An imaginary case was put of sovereign power being used to thwart neutral claimants, to stultify the Prize Court and to defeat the benefit of adjudication in prize, by an executive prohibition of the export of any and every subject matter released. Their Lordships cannot entertain so far-fetched a case. Should it ever arise the courts of the country concerned will be most fitted to pass upon it. The jurisdiction of the Court of Prize is to condemn or to release, not to override the executive after release has taken place. It is bound by the statutes of this country, in which it sits, and cannot interfere with acts done under Proclamations or Orders in Council validly issued by virtue of those statutes. If this is so, it cannot do indirectly what it has no power to do directly, and give damages against the Crown in prize because it had no power to give to the successful claimants permission to export.

Their Lordships are accordingly of opinion that neither in respect of the original detention of their goods nor of his subsequent conduct in the proceedings in prize can the Procurator-General be made liable in damages or costs, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants, *Bull* and *Bull*.
Solicitor for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 14 *and* 17, 1921.

(Before Lord STERNDALE, M.R., WARRINGTON and SCRUTTON, L.JJ.)

THE TURID. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Charter-party — Expense of unloading timber — "Cargo to be taken from alongside at charterers' expense as customary"—Custom of port of Yarmouth—Custom inconsistent with term of charter-party.

By a charter-party of the 1st Oct. 1914 *it was agreed between the plaintiffs, the owners, and the defendants, the charterers, that the steamship* T. *should load a cargo of timber at Soroka for carriage to Yarmouth and deliver there "as ordered, or so near thereunto as she may safely get, always afloat"; and that the cargo should be "taken from alongside the steamer at charterers' risk and expense as customary." The* T. *was ordered to discharge at a part of the quay occupied by the charterers, to which she was always afloat unable to get nearer than about* 13*ft., and the cargo was there discharged by stagings slung from the ship's side to the quay, the stevedore's men working in two gangs, one carrying the timber to the ship's rail and the other carrying it ashore. It was proved that there was a custom of the port of Yarmouth that the whole of this work should be done by and at the cost of the ship. The shipowners objected that the alleged custom was inconsistent with the terms of the charter-party, and sued the charterers to recover the costs of discharge over and above the rate for delivery at the ship's rail.*

Held, that the case was indistinguishable from Holman *v.* Wade (*Times, May* 11, 1877) *and that the court were bound by that case to hold that the custom was inconsistent with the charter-party; and that the shipowners were entitled to recover from the charterers the costs of discharge over and above the rate for delivery at the ship's rail.*

Decision of the Divisional Court (15 *Asp. Mar. Law Cas.* 155; 122 *L. T. Rep.* 587) *affirmed.*

APPEAL by the defendants, the charterers, from a decision of the Divisional Court (Duke, P. and Hill, J.) who followed the decision of the Court of Appeal in *Holman* v. *Wade* (*sup.*).

The facts appear sufficiently from the headnote.

MacKinnon, K.C. and *Harney*, K.C. for the appellants.

Raeburn, K.C. and *J. G. Trapnell* for the respondents.

Lord STERNDALE, M.R.—This is an appeal from a judgment of the Divisional Court, sitting in Admiralty, in favour of the shipowners in respect of a claim for certain expenses incurred in discharging the steamship *Turid*. She went to Soroka under a charter by which she was to load a cargo of timber, and being so loaded, to proceed to Great Yarmouth as ordered, or as near thereunto as she could safely get, and deliver the same afloat. The charter also provided that the cargo was "to be brought to and taken from alongside the steamer

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

at charterers' risk and expense as customary." The facts, after the ship arrived at Yarmouth, as stated by the learned President, were as follow: "The draught of the *Turid* was such that to be afloat at Yarmouth she could not come within about 13ft. of the quayside at which she was to discharge. The usual method of unloading for a ship so situated is to erect stagings between the ship's side and the edge of the quay, abreast of the several holds, such stagings being constructed of baulks of timber carried from the quay to the ship's side at a level of 4ft. or 5ft. below the rail. with planks resting upon the baulks. The *Turid* had three holds, and three stagings were erected. At each staging one gang of men carried the timber to the ship's rail, and another gang received it there, carried it ashore, and stacked it at a distance of some 12ft. from the face of the quay. Stacking of timber nearer the water side was not permitted, as free passage way had to be kept there. The cost in question was the cost of erecting the stagings, carrying the timber across the stagings, and across the 10ft. or 12ft. of quay, and stacking it. Before the learned judge in the County Court proof was given of a custom of the port of Yarmouth that the whole of this work should be done by, and at the cost of, the ship. It was objected, on the part of the shipowners, the plaintiffs, that the alleged custom was inconsistent with the terms of the charter-party, and the learned judge took this view and gave judgment in their favour for the sum in dispute."

In my opinion, this case is governed by the decision in *Holman* v. *Wade* (*Times*, May 11, 1877), and that being so, I do not think it necessary or indeed advisable, to express any opinion of my own as to what my decision might have been if I had not thought the case to be governed by *Holman* v. *Wade* (*Times*, May 11, 1887). The two learned judges in he Divisional Court differed with regard to that matter, the President being of opinion that the custom was inconsistent with the charter, while Hill, J. was of opinion that he would have held that it was not inconsistent if he had not been bound by *Holman* v. *Wade* (*sup.*). There is a great deal to be said on both sides, and I do not think it necessary or right to express any opinion upon it.

Holman v. *Wade* (*sup.*) is only reported in an unsatisfactory manner, that is to say, it is only reported as a piece of news in a newspaper. Counsel for the appellants referred to it as an ancient case which had been disinterred from the rest where it had lain so long. It surprised me to find after that that it was decided in 1877, a date well within the recollection of, at any rate, one member of the bench. It is reported in *The Times* newspaper only; why, I do not know, and I think it is very unsatisfactory to find oneself bound by a case not fully reported, and as to which we have not full and proper knowledge. But the case has been referred to and dealt with in various other cases. I do not think any opinion has been expressed with regard to it in the Court of Appeal here, although it came before the Court of Appeal in Ireland, but it has been cited from time to time in courts of first instance. It has been followed in a case to which I shall refer directly, and so far as I know, no disapproval of it has ever been expressed. The difficulty about it is to ascertain exactly what it did decide. It was a case at Hull, where the shipowners were claiming for the expense of discharging in circumstances very similar to those of this case. In answer to that claim, the defendants set up a custom which is pleaded in the defence as follows: "It is the customary and recognised mode of discharge of the Victoria Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside, and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof." The custom is rather curiously expressed, but I think what it means is that when the cargo has been discharged upon the quay, and not until then, it has been discharged alongside, and that the consignees taking it from there are taking it from alongside. It rather appears as though the custom which had been put to the jury was not exactly the custom in the terms there pleaded, because in the associate's certificate this appears: "The jury found that according to the terms of the charter-party (apart from the question of usage or custom) the cargo was not to be taken by the shipowner from the ship's rail by means of a stage, supplied by him, to the quay, and there stacked by and at the risk and expense of the shipowner: that was to be done by and at the risk of and expense of the merchants." I rather infer that that was the custom that had been put to the jury, and if so it is not exactly in the terms of the defence. The jury also found "that the alleged usage or custom is proved to their satisfaction." On that Manisty, J. entered judgment for the plaintiffs on the ground that the custom was inconsistent with the terms of the charter-party, and his decision was affirmed by the Court of Appeal.

Holman v. *Wade* (*sup.*) has been cited as a decision upon the question whether a custom to stack could be a good custom. That, I suppose, means stacking after complete delivery had taken place, and it was attempted to distinguish this case on that ground. I do not think it is distinguishable on that ground for two reasons: One is that the expense which was sued for in the action, a small sum, was an expense both of stacking and unloading. I was taking the words "stacking and unloading" from the report in the *Times*, but it is more accurate to take it from the pleadings in that case: "They were forced to discharge the said cargo and stack the same on the said quay, and thereby incurred expenses amounting to 11*l*." The whole of that expense was given to the plaintiff. If it had been stacking alone, of course, the expense, small as it was, ought to have been divided, and only the stacking expenses should have been given to the plaintiffs; but I also notice that in the report in the *Times* it is stated that it is necessary in order to unload deals to have a stage from the quay to the ship, and as the deals are unloaded and the ship, being lightened, rises, it is necessary to raise the stage and it is necessary also as the deals are landed to stack them, and all this involves considerable expense." I gather from that that it is not meant that, after there had been a complete delivery, the merchants were asking the shipowners to stack, in the sense that they wanted them to stack and mark qualities or sizes or anything of that kind, but that in the course of delivery it was necessary to stack, because a large quantity of timber cannot be thrown loose upon the quay, as it would take up an unnecessary amount of room. The stacking, I think, was considered as part of the putting upon the quay—part of the delivery.

For these reasons I do not think that that case can be distinguished from this on the ground that it related to stacking only. If it cannot be so distinguished it seems to me to be exactly in point here. It has been acted upon in *The Nifa* (69 L. T. Rep. 56; (1892) P. 411; 7 Asp. Mar. L. Cas. 327) in the Admiralty Divisional Court, and whether it be inconsistent with the decision of Bigham, J. in *Stephens* v. *Wintringham* (1898, 3 Com. Cas. 169) or not, it is not a matter that it is necessary for us to consider here. I can see points of distinction between that case and this; but whether *Stephens* v. *Wintringham* (*sup.*) can be reconciled with *Holman* v. *Wade* (*sup.*) or not, in my opinion, the decision in the case before us cannot be distinguished from that in *Holman* v. *Wade* (*sup.*). Therefore, I think the appeal fails and should be dismissed with costs.

Warrington, L.J.—I agree. I also think that we are bound by the decision in *Holman* v. *Wade* (*Times*, May 11, 1887). It is quite true that the report of *Holman* v. *Wade* is somewhat unsatisfactory, and the rest of the materials for considering that case are afforded only by the record. But this, at all events, is clear both from the report and from the record, that the question between the parties was, who was to pay the expense of the process by which, according to the alleged custom, the cargo was discharged. The shipowner said: "By the terms of the contract, you, the charterers, are to pay the expense of discharging from alongside." The charterers said: "By the custom which we have proved, you, the shipowners, are not only to perform the operation of landing the cargo in the way we say the custom prescribes the landing, but you must also pay the expense of it." The ultimate decision was that, at any rate, that part of the custom which was said to throw the expense upon the shipowner was inconsistent with the terms of the contract, which provided that that cargo should be taken from alongside the ship at the risk and expense of the charterer. The custom may well be held to regulate the mode of discharge according to the express terms of the contract; but the payment of the expense is an absolute obligation thrown by the contract upon the charterer, and not, therefore, capable of being varied by any such custom as alleged in the present case. For the reasons given by the Master of the Rolls, I think we are bound by *Holman* v. *Wade* (*sup.*), and, therefore, so far as we are concerned, there is an end of the matter.

Scrutton, L.J.—I have felt considerable doubt and difficulty as to whether we know enough about *Holman* v. *Wade* (*Times*, May 11, 1887) to be bound by it, as we should, of course, be bound by it, as a decision of the Court of Appeal, if we clearly knew what it decided. I have felt the more doubt and difficulty, because although it is not proper that I should express a final opinion if we are bound by the decision in *Holman* v. *Wade* (*sup.*), I think, as at present advised, that in the absence of *Holman* v. *Wade* (*sup.*) I should have taken the same view as Hill, J. would have taken but for that case. I think I should have treated the custom alleged in this case, as was said by Lord Esher in *Aktieselkab Helios* v. *Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83), as simply explaining what the delivery of the cargo to the consignee alongside is and how it is to be effected. I think I should have taken the same view of that case as Bigham, J. took in his working out of it in *Stephens* v. *Wintringham* (3 Com. Cas. 169), as applicable to the Port of Hull. But we have certain materials upon which we can judge of what *Holman* v. *Wade* (*sup.*) decided. We have the record and the formal judgment, and we have a short report of the case in the *Times* newspaper. It appears from the record that the shipowners alleged that the ship came to Hull; that the charterers did not and would not take the said cargo from alongside the ship at their own risk and expense; and that the shipowners were forced to discharge the cargo and stack it on the quay, and incurred expenses amounting to 11*l.* The charterers, in their reply, alleged a custom in the mode of discharging at Victoria Docks, whereby ships discharge their cargo upon the quay alongside and continue the discharge as long as there is quay space vacant for the discharge thereof. The shipowners replied that the alleged custom was contradictory of the charter-party. For some reason which I do not at present understand, Manisty, J. left to a common jury the meaning of the charter, and it appears from the terms of their answer that something further than was pleaded had been alleged as the custom. They found that the cargo was not to be taken by the shipowners from the ship's rail by means of a staging supplied by them to the quay and there stacked at their risk and expense; but they also found that the alleged usage or custom was proved in fact to their satisfaction. The judge, however, entered judgment for the plaintiffs, the shipowners, for the whole amount claimed on the ground that the custom was inconsistent with the charter-party, and the Court of Appeal upheld his decision.

It is not quite clear what construction the court put upon the charter-party. There have been judges who have said that "alongside" means at the ship's rail; others who have said "alongside" means within reach of the consignee, hanging on to the ship's tackle. Others have said that it means deposited upon the quay, and deposited not haphazard, but in a sort of order. Whichever construction the court took in *Holman* v. *Wade*, it seems to me that they included in the 11*l.* which they gave to the ship something more than mere stacking; they included what they called discharging or unloading, which I think must mean a certain amount of carriage over the quay, and whichever custom it was that the jury found, whether it was the custom as pleaded, or whether that of erecting a stage and stacking which is not the custom pleaded, it must have been held to be inconsistent with one of the constructions of the charter which I have put forward. That being so, there being, so far as I can see, no subsequent decision of this court inconsistent with that finding, although some parts of the judgments in *Aktieselkab Helios* v. *Ekman and Co.* (*sup.*) in my view go very near it, whatever I may think I might have found if I had been sitting in the court at that time, it appears to me that I am bound by that decision of the Court of Appeal, and that it would not be dignified or proper for me to argue against the correctness of that decision. If it is to be reversed—and it may be a case of sufficient importance as affecting other ports to take it to the House of Lords—it is for the House of Lords to say whether they think *Holman* v. *Wade* (*sup.*) was rightly decided and not for me.

For that reason, coming to the decision with considerable doubt, I think I am bound by *Holman* v. *Wade* (*sup.*), and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Trinder, Capron,* and *Co.*

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

Wednesday, Feb. 16, 1921.

(Before Lord STERNDALE, M.R., SCRUTTON and YOUNGER, L.JJ.)

THE DANUBE II. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Limitation of actions—Servant of the Crown—Negligence in the performance of a public duty—Implied repeal of a statute by a subsequent statute—Public Authorities Protection Act 1893 (56 *&* 57 *Vict. c.* 51)*—Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57).

The Public Authorities Protection Act 1893 *protects servants of the Crown in the performance of a public duty in the same manner as it protects the servants of public authorities who can themselves be sued. In an action to which the Maritime Conventions Act* 1911 *applies, sect.* 8 *of that Act, which limits the period for commencing an action to two years, does not repeal the Public Authorities Protection Act by implication.*

Thus a party whose vessel has suffered damage from the negligent navigation of a Government tug by an officer of the Royal Naval Reserve acting in the course of his duty must commence an action against the officer within six months of the day upon which the cause of action arose.

Consideration of the circumstances under which the provisions of one stutute may by implication repeal the provisions of another.

The Caliph (12 *Asp. Mar. Law Cas.* 244; 107 *L. T. Rep.* 274; (1912) *P.* 213) *considered.*

Decision of Hill, J. (infrà) *affirmed.*

ACTION for damage by collision.

The facts fully appear in Hill, J.'s judgment.

Stephens, K.C. and *Dumas* for the plaintiffs.

Sir *Gordon Hewart* (A.-G.) and *Dunlop,* K.C. for the defendants.

In addition to the cases cited in the judgment, the following cases also were cited in the argument:

Wilson v. *1st Edinburgh City Royal Garrison Artillery Volunteers,* 1904, 7 F. 168;
McTernan v. *Bennett,* 1898, 1 F. 333;
Salisbury v. *Gould,* 1904, 68 J. P. 158;
Parker v. *The London County Council,* 90 L. T. Rep. 415 (1904) 2 K.B. 501.

HILL, J.—In this case a further question has been raised for argument based upon a paragraph in the defence that the defendant is entitled to the protection of the Public Authorities Protection Act 1893. The circumstances are these: The claim having been intimated to the Admiralty, the Admiralty offered to accept liability upon the basis that they should compensate as if they were entitled to limit their liability to the tonnage of the tug as ascertained in accordance with the provisions for limitation of liability contained in sect. 503 of the Merchant Shipping Act 1894. They were willing to pay that amount. The plaintiffs were not satisfied with that, and issued their writ on the 17th Dec. 1918 against Mr. Harry Jewiss, the master of the tug *Danube II.*, whom I have found to have brought about the collision with the steamship by reason of his negligence.

I have to decide whether that action ought to have been brought within six months from the 8th Dec. 1917 when the collision happened. It was not brought until rather more than one year after. The defendants' counsel say that they are entitled to the protection of the Act, because the action, being against the master of the tug, is an action against a person in respect of neglect in the execution of a public duty. The plaintiffs, on the other hand, say, first, that the Public Authorities Protection Act does not apply at all to servants of the Crown, but only to public authorities other than the Crown and to servants of such public authorities. Secondly, they say that, if it does not apply to servants of the Crown, and protection would be given by the Act if it stood by itself, then, by reason of the Maritime Conventions Act 1911, which provides in respect of claims for damage and salvage a different period, namely, two years, sect. 1 of the Act of 1893 must, so far as actions for damage are concerned, be taken to be impliedly repealed by the Maritime Conventions Act. The proposition of the defendants, I confess, was to me a startling one. It is not disputed by the defendants that this defence would be open in every case of negligent navigation of a King's ship in an action brought against her navigating officer, so that in every case, unless the action were brought within six months, the defence afforded by the Public Authorities Protection Act would be open to him. And if the navigators of King's ships, who are negligent in their navigation, are persons who are acting in the execution of a public duty within the meaning of the Act, then every servant of the Crown who is carrying out similar duties and who is negligent in the performance of them is also protected by the Act. I instanced the case of the telegraph messenger who was negligent in riding his bicycle while carrying telegrams and knocked a man down, and Mr. Dunlop admitted that his argument carried him to that extent. No such plea has ever been raised in this court, nor, so far as I know, has any claim been made for costs as between solicitor and client. So far as the experience of the practitioners in this court goes, this contention is new since the Public Authorities Protection Act was passed in 1893. The court, however, has to see what the Act means and what are the facts with regard to the defendant in this case. The defendant at the time of this accident was a commissioned officer in the Royal Naval Reserve; he was master of a Government tug—that is to say, a tug which was requisitioned and in commission; he was engaged in the duty of towing Government property, a battle target, from Portsmouth to Scapa Flow, and in the course of that voyage, and in performing that duty, having to come to anchor in accordance with the orders of a patrol boat, he so negligently managed his tug and tow that he came into collision with the plaintiffs' ship. If I had to decide this question without having any authority on the matter, I should have grave doubts whether this Act, which deals with public authorities and their

(*a*) Reported by SINCLAIR JOHNSTON and W. C. SANDFORD, Esqrs., Barristers-at-Law.

servants, dealt also with servants of the Crown, but Mr. Dunlop has referred me to a decision of Darling, J. in *Benney* v. *Fitzgerald* (unreported, June 27, 1918), and a reference in the course of Mr. Branson's argument in that case to a decision of Lawrence, J. in *Sexty* v. *Wells* (unreported, June 14, 1917). Neither of these are reported decisions, but they are to my mind quite indistinguishable from the present case. In both cases actions were brought against persons in the army in respect of negligence in driving motor vehicles belonging to the War Office, and in each case the Act was held to apply to such persons. I can see no distinction at all, nor can Mr. Dumas see any distinction, between these cases and the case of a man who is navigating a Government tug, and I feel bound to follow these decisions and take them as my guide. I therefore hold that the Act does apply to this defendant. The next question is whether it was impliedly repealed by the later Act, the Maritime Conventions Act 1911. As I understand it, having two statutes on the statute-book, the court must, if it can, read them both as subsisting statutes, and not, unless it is clearly driven to it, treat one as repealing the other. One of them, the earlier Act, gives a limitation of six months in favour of a limited class of people; the other creates a limitation of two years in respect of a limited class of causes with action. They are not both of them in terms dealing with the same matter. I think it may be that the explanation of the decision in *The Caliph* (12 Asp. Mar. Law Cas. 244; 107 L. T. Rep. 274; (1912) P. 213) is this, that both Lord Campbell's Act and the Maritime Conventions Act are, in terms, dealing with claims for loss of life and giving different limitation periods; and, it may be, in such a case, the later Act must be taken to impliedly repeal the earlier Act. But here the two Acts are not dealing with the same thing; they cut across one another, and it seems to me that the court is not driven to say that either is inconsistent with the other. Reading the two together, the limitation imposed by sect. 8 in the Act of 1911 of two years can be well read as being subject to the qualification that it does not apply to persons to whom the Public Authorities Protection Act applies, and in their case it will still remain six months. I rather regret that this is the result of what I regard as the logic of the argument, because I think that six months in respect of ships and persons who may be in charge of ships, when their negligence may happen on the ocean, may work out to be a very short limitation indeed, and the period of two years seems to me to be quite short enough. However, that the result works out in a way of which I do not personally approve is nothing to the point; the question is, what is the law? And the conclusion that I have arrived at is that the law is as I have stated. Therefore this defence will be held to be good. There will be judgment for the defendants with costs other than costs of the issue of negligence, which will be the plaintiffs'. The costs that the defendant recovers will be taxed as between solicitor and client.

The Public Authorities Protection Act 1893, s. 1, provides:

> Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of. . . .

The Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57) provides by sect. 8:

> No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment. . . .

The plaintiffs appealed.

R. A. Wright, K.C. and *Dumas*, for the appellants, referred to

Benney v. *Fitzgerald* (unreported);
Sexty v. *Wells* (unreported);
Bradford Corporation v. *Myers*, 114 L. T. Rep. 83; (1916) A. C. 242;
The Caliph, 12 Asp. Mar. Law Cas. 244: 107 L. T. Rep. 274; (1912) P. 213.

Sir *Gordon Hewart* (A.-G.) and *Dunlop*, K.C., for the respondent, referred, in addition, to

Wilson v. 1*st Edinburgh City Volunteers*, 1904, 7 F. 168;
Greenwell v. *Howell*, 82 L. T. Rep. 183; (1900) 1 Q. B. 540.

Lord Sterndale, M.R.—In my opinion this appeal should be dismissed. The defence raises a point which, so far as I know—and so far as Hill, J. in the Admiralty Court knows—has not been previously raised in an action of this kind.

The action is against the master of a tug which was in the service of the Crown, and in that service the master had to take a battle target north to Scapa Flow, for the practice of the fleet. On his way he was ordered to anchor in the Black Deep. In pursuance of those orders in the course of his voyage he navigated his tug so negligently that his tow, the battle target, came into collision with a ship of the plaintiffs, and sank her.

The only defence raised is the Public Authorities Protection Act 1893. [His Lordship read the section and continued:] The appellants raise two contentions: First, it is said that the Act does not apply to this case because it does not apply to any person in the service of the Crown, nor to any persons in the service of a public authority which itself could not be sued. There is nothing to that effect in the Act. So long as it is in pursuance of a "public duty or authority" I do not see anything in the Act to restrict it to the service of any servant of an authority which itself could be sued. The Attorney-General called our attention to the fact that in the schedule which repeals a number of Acts placing restrictions upon actions brought against various kinds of public servants there are

two, at any rate, which relate to actions and proceedings against servants of the Crown; and in the repeal section there occur these words: "There shall be repealed as to the United Kingdom so much of any public general act as enacts that in any proceeding to which this Act applies the proceeding is to be commenced in any particular place or within any particular time . . . and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned." That section seems to recognize that the matters dealt with in the repealed Acts are matters which would be proceedings to which the Public Authorities Protection Act would apply. But apart from that altogether, I think that a man who, under the orders of the Crown——in this case the Admiralty which is a department of the Crown—is taking a battle target to Scapa Flow for the purposes of the fleet is undoubtedly engaged in a public duty. Perhaps no member of the public could complain if he did not take it; but certainly the master was doing what was for the benefit of the public, and under the authority of the Crown; and it can, I think, hardly be denied that the Crown is a public authority. I think, therefore, that the Act applies to this case, and that none of the cases referred to in any way militate against that view. The same view has been held in cases not binding upon us by Lawrence, J. and Darling, J., and it also seems to me to be involved in the decision in *Wilson* v. 1*st Edinburgh City R.G.A. Volunteers* (7 F, 168). In my opinion, therefore, the first point fails.

The second point is that, even if the Public Authorities Protection Act applied before the passing of the Maritime Conventions Act 1911 that Act has altered the position. I cannot see that that is so, even if the Maritime Conventions Act applies to the Crown at all. It is "an Act to amend the law relating to Merchant Shipping," and it is to be read with the Merchant Shipping Acts. The sect. 8 says: "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel . . . unless proceedings are therein commenced within two years from the date when the damage or loss or injury was caused." It does not seem to me that, even assuming this Act to apply as against the Crown, that section is in any way inconsistent with the Public Authorities Protection Act. There may very well co-exist a general limitation of all actions in respect of maritime damage to two years, and a further limitation where the action is brought against persons of a specific class to six months in the case of those persons. I see nothing inconsistent in the two Acts. I think that second point also fails and that the appeal should be dismissed with costs.

Scrutton, L.J.—On the first point argued, I share the difficulty that the House of Lords felt in *Bradford Corporation* v. *Myers* (114 L. T. Rep. 83; (1916) A. C. 242), in knowing exactly what the limit is in the Public Authorities Protection Act between those acts which are protected by the measure of limitation and those acts which are not. But on the best consideration I can give to the matter it appears to me that the Admiralty were under a public duty to make provision for public defence; that in carrying out the particular measure of sending a battle target to Scapa Flow by tug they were carrying out that public duty; and that the neglect of the servant in charge of the tug was a "neglect in the execution of any such duty" within the words of the Act. The particular action, therefore, is *prima facie* within the Public Authorities Protection Act.

On the second point, this court has recently had to consider the principles on which a subsequent statute is held to repeal a prior statute, and the principles are to be found stated with authorities in *Flanagan* v. *Shaw* (122 L. T. Rep. 177; (1920) 3 K. B. 105). In that case I cited a passage of Lord Coke's in *Foster's* case 1614, L. T. Rep. 56 (*b*), 63 (*a*): "Only it must be known, that forasmuch as Acts of Parliament are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated," and the modern expression by A. L. Smith, J. of the same principle in *Kutner* v. *Phillips* (64 L. T. Rep 628; (1891) 2 Q. B. 271): "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together." Then he says: "Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together." In this case, the later Act has a general provision, applicable to all sorts of people, of a two years' limitation; and there was the prior Act, with a special provision applicable to public authorities only, of six months' limitation. I see no reason why the two should not stand together, and I see no plain words in the second Act showing that Parliament intended to repeal the first Act.

For these reasons I agree that the appeal should be dismissed.

Younger, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Constant* and *Constant*.

Solicitor for the respondent, *Treasury Solicitor*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Jan. 18, 1921.

(Before Roche, J.)

Bargate Steam Shipping Company Limited *v.* Penlee and St. Ives Stone Quarries Limited. (*a*)

Charter-party—Discharge of cargo—"As customary"—"Arrived ship"—Commencement of discharge—Time fixed by charter-party—Delay in finding berth—Discharge with customary dispatch—Presence of other ships.

In July 1920 *the plaintiffs, the owners of the steamship* N., *chartered the steamship to the defendants to*

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

proceed to the port of N. and, after loading a cargo, to proceed to Q. and there deliver the cargo. A clause in the charter-party provided that the cargo was to be discharged "as customary," and that the time for discharge should be counted from the first high water on or after the arrival of the steamship at or off a discharging berth. The steamship arrived at the port of Q. and was off her discharging berth at ten o'clock on the morning of the 5th July 1920, *and the first high water after her arrival was at* 3.30 *o'clock in the afternoon of that day. There were a number of other ships in the port, which had arrived before the steamship* N., *and were therefore entitled to priority over the steamship* N. *Consequently, the steamship* N. *did not begin to discharge until about the 9th July. She was then discharged within forty-eight hours. The plaintiff claimed* 150*l. demurrage as being the amount due at* 2*s. per gross ton per day for the period between the 7th July and the 11th July, according to the tonnage of the vessel, under a provision in the charter-party to that effect.*

Held, that the effect of the charter-party was to determine when the N. *became an "arrived ship." Thereafter the defendants were only bound to do what was reasonable under existing circumstances, such as the presence of other ships in the port. The defendants, having discharged with customary dispatch after securing a suitable berth, were not liable for demurrage.*

Action tried by Roche, J. sitting in the Commercial Court.

The plaintiffs, the Bargate Steam Shipping Company Limited, shipowners, claimed from the defendants, the Penlee and St. Ives Stone Quarries Limited, charterers, demurrage on their steamship *Nanset*.

By a charter-party dated the 1st July 1920 the plaintiffs chartered the steamship *Nanset* to the defendants as charterers to load a cargo of stone for conveyance from Newlyn to Queenborough at a freight of 15*s.* per ton. A clause in the charter-party provided that the cargo was to be loaded and discharged as customary, and that the time for discharging was to be counted from first high water on or after arrival at or off the discharging berth. It was agreed that the demurrage, if any, was to be at the rate of 2*s.* per gross ton per day.

The *Nanset* duly loaded the cargo at Newlyn and proceeded to Queenborough, where she arrived at 10 a.m. on the 5th July 1920. She was then off her discharging berth. The first high-water time after her arrival was 3.30 p.m. on the same day. The time allowed under the charter-party for discharging expired at 3.30 p.m. on the 7th July 1920. But when the *Nanset* arrived at Queenborough on the 5th July there were a number of ships in the port, which had arrived before her and therefore had priority over her, so that, from the 5th July to the 9th July, the only berth in the port of Queenborough was occupied. As soon as that berth became vacant the *Nanset* came alongside and discharged with due dispatch. It was admitted that the delay in reaching the berth was not the fault of the defendants. The discharging was not completed until 10.30 on the 11th July, and the plaintiffs claimed 153*l.* demurrage for three days nineteen hours at the agreed rate of 2*s.* per gross ton per day.

W. A. Jowitt for the plaintiffs.

R. A. Wright, K.C. and *Claughton Scott* for the defendants.

Roche, J. stated the facts and said: —I find as a fact that the only suitable discharging berth in the port was the berth at which the ship the *Nansen* did in fact discharge. I further find that the steamship in fact discharged with customary dispatch. The plaintiffs contend that the period of waiting must be for the account of the defendants. The defendants, on the other hand, contend that time was only to run "as customary," which means at such a rate as was reasonable in the circumstances, and that as they had done all that was within their power they were not liable for the delay. I am satisfied that during the period of waiting the berth was never in fact available. It was held in *Hulthen* v. *Stewart* (9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) A. C. 389) and again in *Van Liewen* v. *Hollis Brothers* (14 Asp. Mar. Law Cas. 596; 122 L. T. Rep. 657; (1920) A. C. 239) that the obligation to discharge "as customary" meant "as fast as the ship can deliver and the cargo be discharged having regard to existing circumstances." That being the measure of diligence, the question is whether the words of the charter-party impose on the defendants the obligation to pay for the period of delay. In other words, do the words fixing the time for the commencement of the discharge make any difference? In my opinion they do not. The object and effect of those words are, in my opinion, merely to indicate the place and time at which the steamship *Nanset* became an "arrived ship." They do not put the risk of delay on the defendants. She is an arrived ship from the time of the first high water after her arrival off the berth, and from that time the defendants were only bound to do what was reasonable in existing circumstances, and one of the circumstances which must be taken into consideration was the presence of other ships.

In my judgment the defendants have carried out their obligations and are not liable for the delay. This view of the case is supported by the decision in *Temple Thompson and Clarke* v. *Runnalls* (18 Times L. Rep. 822). The action therefore fails.

Judgment for the defendants.

Solicitors for the plaintiffs, *Holman, Fenwick*, and *Willan*.

Solicitors for the defendants, *Botterell* and *Roche* for *Osborne, Ward, Vassall*, and *Co.*, Bristol.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, July 29, 1920.

(Before Hill, J.)

The Marie Gartz (No. 2). (*a*)

Enemy-owned vessel—Charging order—Solicitors Act 1860 (23 *&* 24 ***Vict. c.*** 127), *s.* 28—*Set off—Loss by submarine action—Treaty of Peace Order in Council* 1919 (***No.*** 1517 *of the* 18*th Aug.*), *s b-ss.* 16, 17—*Treaty of Versailles* 1919, *arts.* 296, 297.

English solicitors had, before the war, secured for German clients a judgment against English owners of an English vessel. Upon an application by them for a charging order under sect. 28 *of the*

(*a*) Reported by Sinclair Johnston, Esq., Barrister-at-Law.

Solicitors Act 1860, *upon the damages recovered by them against the English owners of the vessel on behalf of the German clients:*

Held, that "assets" in art. 297 (*h*) *of the Treaty of Versailles means "net assets," that is, the assets after deducting the expenses of collection and realisation; that there was nothing in the Treaty of Peace or the Treaty of Peace Order in Council to prevent the making of a solicitor's charging order upon the damages.*

SUMMONS for a charging order.

The facts and contentions in this matter are fully set out in his Lordship's judgment.

Stranger for Messrs. Stokes and Stokes.

A. T. Bucknill for the parties liable in damages.

HILL, J.—In this case Mr. Graham Stokes, carrying on business as Messrs. Stokes and Stokes, applies for a charging order under sect. 28 of the Solicitors Act. He is the surviving partner of the firm of Messrs. Stokes and Stokes upon the death in Aug. 1914 of his partner, Mr. Reginald Stewart Stokes. Between some date in 1912 and the 4th Aug. 1914, and since the conclusion of peace with Germany, Messrs. Stokes and Stokes acted as solicitors for the German owners of the *Marie Gartz* in a collision action between the English owners of the steamship *Karamea* and the owners of the *Marie Gartz*, in which there were claim and counter-claim. Before the 4th Aug. 1914, that action, which was carried on appeal to the House of Lords, ended in a decree in favour of the *Marie Gartz* and judgment against the *Karamea* for damages and costs. Since the conclusion of peace with Germany the claim of the owners of the *Marie Gartz* has been investigated by the registrar and merchants, and on the 5th July 1920 I confirmed the report but stayed execution pending further order. The amount payable by the owners of the *Karamea* in respect of the damages is 7391*l.* 9*s.* 10*d.*, with interest at 4 per cent. per annum from the 15th Dec. 1912, until payment. In addition there are payable the taxed costs of the owners of the *Marie Gartz* in this court and the Court of Appeal and House of Lords. Taxation has not yet been completed.

An affidavit has been filed in support of the application wherein Messrs. Stokes and Stokes costs as between themselves and their clients, the owners of the *Marie Gartz*, are estimated to amount to approximately 2000*l.* and the out-of-pocket disbursements to approximately 1100*l.*

The present summons asks for a charging order upon the damages recovered against the owners of the *Karamea* and for an order that Messrs. Stokes and Stokes' costs be taxed as between solicitor and client, and that the owners of the *Karamea* be ordered within seven days after the date of the certificate of taxation to pay to them the amount found due on taxation out of the amount found due to the owners of the *Marie Gartz*.

Apart from questions arising under the Treaty of Peace Order in Council, there would be no difficulty in the matter. The recovery has been by the exertions of Messrs. Stokes and Stokes, and they would be entitled to a charging order, and an order for payment to them, and the order would charge both the damages recovered (*Birchell* v. *Pugin*, 32 L. T. Rep. 495; (1875) L. Rep. 10 C. P. 397) and the costs payable under the judgments: (*Dallow* v. *Garrold*, 52 L. T. Rep. 240; (1884) 14 Q. B. Div. 543). A charge upon the costs, however, is not asked for in the summons. Neither the owners of the *Karamea* nor the owners of the *Marie Gartz* dispute that such an order would in ordinary course be made.

But it is said that the order cannot be made because of some provisions of the Treaty of Peace Order in Council, and of articles in Part 10 of the Treaty of Peace. The applicant had given notice of his application to the Public Trustee as custodian under the Treaty of Peace Order, and I had hoped for some assistance from him. He has, however, written a letter in which he says: "In view of the limited time available it has not been possible to instruct counsel to appear on behalf of the Custodian, but in pursuance of par. 1 (17*a*) of the Treaty of Peace Order 1919, he is prepared to consent to the sum due by the owners of the *Karamea* being dealt with in such manner as his Lordship may direct."

The Public Trustee did not appear upon the summons or upon its adjournment into court; and I must, without his assistance, construe as best I can articles and an Order in Council which are not at all easy of interpretation. The representative of the owners of the *Marie Gartz*, the judgment creditors, did appear, and consented to the order being made. The owners of the *Karamea*, the judgment debtors, also appeared, and while expressing great sympathy with Messrs. Stokes and Stokes, contended that the order could not be made, because the effect of it would be to deprive them *pro tanto* of a right of set-off which they contend they have by virtue of art. 296, annex 14. They state that they lost a ship by German submarine attack, and contend that the concluding paragraph of annex 14 gives them a right to recoup themselves out of the moneys they owe to the owners of the *Marie Gartz*, and that that right is superior to any right of Messrs. Stokes and Stokes.

In addition to considering this contention, I have also to consider whether there is anything in the Treaty of Peace Order which prevents my making the order asked for. I have already on another occasion held (*ante*, p. 123 L. T. Rep. 680; (1920) P. 172) that the right of the owners of the *Marie Gartz* against the owners of the *Karamea* in respect of damages is a right within art. 297 of the Treaty and not a "debt" within art. 296. Now that the right to unliquidated damages has been converted into a liquidated sum, it has not thereby become a debt within art. 296, for the only debts to which art. 296 relates are debts payable before the war, or debts which became payable during the war: (see art. 296 (1) and (2).) Indeed, having regard to par. 2 of the annex to art. 296, it may be doubted whether the annex relates to any debts, except debts payable before the war.

Be that as it may, the judgment debt for 7391*l.* 10*s.* and interest owing by the owners of the *Karamea* to the owners of the *Marie Gartz* did not come into existence, and did not become payable as a debt till the confirmation of the registrar's report on the 5th July 1920. Art. 296 has no direct application to the judgment debt of 7391*l.* 10*s.* and interest. Art. 297 continues to apply to it as it applied to the right for unliquidated damages. In art. 297 I can see nothing which prevents me making the order asked for. On the contrary, art. 297 (*b*) provides that the liquidation shall be carried out in accordance with the laws of the Allied State concerned, and that the German owner shall not be able to dispose of such

property, rights or interests, nor to subject them to any charge, without the consent of that State. This shows that the consent of the owners of the *Marie Gartz* is of no effect. But it provides that the liquidation of the right of the owners shall, in this case, be carried out in accordance with the laws of England. It is in accordance with the laws of England to see that a solicitor who recovers property for a client shall be protected in the way provided by sect. 28, and the solicitor's costs of recovery are expenses of liquidation. Art. 297 (*h*) provides how the property, rights and interests of the owners of the *Marie Gartz*, when liquidated, are to be dealt with. It speaks of "the net proceeds of sales," and "in general all cash assets." I observe that both in (*b*) and in (*h*) the same word "liquidation" is used in the French text, while in the English text "liquidation" is used in (*b*) and "sales" in (*h*).

But if I have to regard only the English text, which is set out in the Order in Council, I read "assets" as meaning net assets, that is, the assets after deducting the expenses of collection or realisation. I therefore hold that there is nothing in art. 297 (*h*) which prevents me making the order asked for. This also disposes of the point made by the owners of the *Karamea* as to set off. Assuming that the last paragraph of art. 296, annex 14, applies at all to assets realised under art. 297, as to which I say nothing, the owners of the *Karamea* can only get the benefit of the set off as against debts which would otherwise have to be credited to the Creditor Clearing Office. And in my view the effect of art. 297 (*h*) is that it is only the net assets, or net proceeds of liquidation, which have to be credited through the Clearing Office.

I still have to consider whether there is anything in the Treaty of Peace Order in Council apart from the incorporated articles of the Treaty which prevents me making the order. The charge created by sub-sect. 16 is a charge upon the net proceeds. Sub-sect. 17 (*e*) provides that "if any person called upon to pay any moneys . . . has reason to suspect that the same are subject to such charge . . . he shall before paying in report the matter to the Custodian and shall comply with any directions that the Custodian may give with respect thereto."

The owners of the *Karamea* have reported to the Custodian and so have Messrs. Stokes and Stokes. The Custodian has given no directions. I understand that he leaves it to the Court. I need not, in those circumstances, decide whether I could override express directions of the custodian, and I see no reason why I should not order payment to Messrs. Stokes and Stokes.

In my judgment there is nothing which prevents me making a solicitors' charging order in the usual way, ordering payment to the solicitors by the judgment debtors. I make a charging order as prayed. I direct Messrs. Stokes and Stokes' costs to be taxed as between solicitor and client. I order payment in seven days thereafter, including their costs of this application.

Solicitors, *Stokes* and *Stokes; Ince, Colt, Ince*, and *Roscoe*.

Naval Prize Tribunal.

Jan. 30, *March* 12, *and May* 12, 1920.

(Before Lord PHILLIMORE, Admiral of the Fleet Sir GEORGE CALLAGHAN, and Sir GUY FLEETWOOD WILSON.)

THE ADOLPH AND OTHER VESSELS. (*a*)

Naval Prize Tribunal—Prize Claims Committee—Sums paid by Treasury on recommendation of committee not recoverable against Naval Prize Fund—Naval Prize Act 1918 (8 & 9 *Geo.* 5. *c.* 30), *Part II. of Schedule, par.* 4.

The Treasury, having, on the recommendation of the Prize Claims Committee, paid various claims made in respect of ships condemned as prize and declared to be droits of the Crown, claimed to be repaid out of the Naval Prize Fund. None of the claims could have been established in the Prize Court.

Held, that the sums paid were not repayable out of the Naval Prize Fund, as they were not claims which could have been established in a Prize Court.

CLAIM by the Treasury.

Certain sums had been paid by the Treasury on account of claims for necessaries, general disbursements, seamen's wages, dock dues, freight and towage, or arising out of a mortgage, an advance against shipping documents, and an unpaid vendor's lien, in each case in respect of ships subject to prize jurisdiction and being droits of the Crown.

Par. 4 of part 2 of the schedule to the Naval Prize Act 1918 (8 & 9 Geo. 5, c. 30) provides:

Part II.—Charges on Naval Prize Fund.—(4) Any claims in respect of any ships or goods subject to prize jurisdiction, which are droits of the Crown, or which, if condemned, would have been droits of the Crown or of the proceeds of sale of, or money representing, any such ship or goods which the Treasury on the recommendation of the Prize Claims Committee, may have paid, or may hereafter pay, being claims of a nature that had they been established in prize proceedings would have been ordered by a Prize Court to be paid by the persons entitled to the ship or goods, or out of the money representing the same.

The Treasury claimed to be repaid these sums out of the Naval Prize Fund, and the claim was opposed on behalf of the Naval Forces.

The facts and the argument are fully stated in the judgment of the tribunal.

The *Attorney-General* (Sir *Gordon Hewart*, K.C.) and *Pearce Higgins* for the Treasury.

Sir *Reginald Acland*, K.C. and *Darby*, for the Naval Forces.

The judgment of the tribunal was delivered by Lord PHILLIMORE, who said:—Under part 2 of the schedule to the Naval Prize Act, par. 4, certain claims in respect of ships subject to prize jurisdiction and being droits of the Crown have been preferred before this tribunal by the solicitor to the Treasury on behalf of the Exchequer to be paid out of the Naval Prize Fund. Certain typical examples have been supplied to the tribunal. They are all instances of sums of money which the Treasury, on the recommendation of the Prize Claims Committee, has paid. In the case of *The Adolf* the claim was

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

for necessaries supplied by a coaling company. In *The Concadoro* for general disbursements on her behalf, presumably of a nature similar to those in the case of *The Adolf*. In the case of *The Australia* it is wages to a seaman. In the case of *The Ulla Boog* the claim was for dock dues; in *The Werner Vinnen* for towage. These expenditures were all before the war. These five cases seem to stand in one class.

In the case of *The Emil* a firm of English shipowners had sold the vessel before the war to German owners and received part only of the purchase money, and had a mortgage on the ship to secure the balance. The Prize Claims Committee recommended a payment of the principal without interest. In *The cargo ex Achaia* the claim was for an advance made on the security of the shipping documents; and in *The cargo ex Derfflinger* the goods had been sold to German firms, but not paid for, and the lien of the unpaid vendors was recognised. These three cases, again, seem to stand in a class.

In the case of *The Ulrich* the ship was sailing under a charter arranged by English shipbrokers, who would have collected the freight and deducted their commission. As the ship was seized the Crown collected the freight, and the Prize Claims Committee allowed the brokerage.

The first condition of par. 4 of the schedule is that in order that this tribunal should allow a charge on the Naval Prize Fund the claim must be one which the Treasury has paid or will pay on the recommendation of the Prize Claims Committee. This committee, which was a purely consultative body, but to which the Naval Prize Act refers as an authority, consists of a body of eminent persons appointed by the Lord Commissioners of the Treasury on the 18th Nov. 1914, with the following reference:—"To receive and consider claims made by British, Allied, or Neutral third parties against ships or cargoes which have been condemned or detained by order of Prize Courts, and to recommend to what extent, in what manner, and on what terms such claims should be met or provided for out of the Prize Funds."

It will be observed that the reference only mentions cases where ships or cargoes have been condemned as prize or have been detained under the Hague Convention. The paragraph in the Naval Prize Act rather looks as if the draftsman had supposed that the reference was wider because it speaks of "claims in respect of any ship or goods . . . which are droits of the Crown or which, if condemned, would have been droits of the Crown," which at first sight looks as if the Prize Claims Committee might sometimes have to deal with claims where the vessel had been released. Possibly the words "which if condemned would have been droits of the Crown" may be meant to cover cases of detention under the Hague Convention.

Passing this question by, we have next to consider the second condition. Any claim with which we deal must be in respect of money which the Treasury pays on the recommendation of the Prize Claims Committee—condition No. 1. But it must also be a claim "of a nature that had it been established in prize proceedings would have been ordered by a prize court to be paid (condition No. 2)."

We are, however, informed that the Prize Claims Committee has made it a rule to entertain no claims which could be supported in the Prize Court, which apparently leaves us in the position that the statute requires the claim to fulfil two conditions, and the action of the Prize Claims Committee has been such that it never can fulfil both. It may be noted that there is nothing in the reference precluding the Prize Claims Committee from entertaining claims which could be preferred in the Prize Court. It is conceivable that an applicant might have put his case before the Prize Claims Committee in this way: "I think I have a good case for submission to the Prize Court, but instead of going to that court to have it decided and to have it assessed, I will be content with anything that you will recommend for me." And in that event the claim might fulfil the two conditions of this paragraph. But on the other hand, it is to be presumed that those who framed this paragraph and submitted it to Parliament were aware of the fact that the Prize Claims Committee had never construed its reference so as to enable it to do anything of the kind. The construction of the paragraph submitted by the Attorney-General on behalf of the Exchequer was that it referred to claims of a nature which, if it had been possible to establish them in a Prize Court, as it is not, would have been ordered to be paid; and he supposed that this would cover cases of mortgage and bottomry. What a Prize Court would do, if it could do what it cannot do, it is impossible to say. The possibilities are infinite. We cannot accept this construction.

Then there is the third condition. The Prize Court is to order money to be paid "by the persons entitled to the ship or goods, or out of money representing the same." Who are the persons entitled to the ship or goods? Counsel on both sides suggested that it meant the captors, but they are not, and never were, entitled to the ship or goods. If there had been a Prize Act, as there is not, or a proclamation, as there is not, giving to the actual captors any ship or goods which they captured and procured to be condemned as prize, they might possibly be considered as the persons entitled to the ship or goods. But again there is no such Prize Act and no such proclamation. Moreover, the Legislature seems to have known how to express itself when it wanted to refer to the actual captors, because they are mentioned by name in the succeeding par. 5. The idea occurred during the course of the argument that par. 4 might be intended to cover cases where the Prize Court would have ordered payment out of the proceeds of the prize—for example, for such matters as pilotage and towage, if not paid by the marshal and deducted as an expense from the gross proceeds, or for salvage. We have a claim for salvage of a prize now pending before us. But this suggestion is answered, because such a case is covered by par. 5, so that par. 4 seems unnecessary. It is just possible that a scintilla of meaning could be given to par. 4 if it were to be considered as giving power to the Prize Claims Committee to assess claims that would come under par. 5, so that the claims could come to the Naval Prize Tribunal for a liquidated sum instead of leaving it to this tribunal to assess and liquidate.

However all this may be, it is not so much for the Tribunal to discover what cases fall within par. 4 as to determine whether the present applications do fall within it. They are applications which fulfil the first condition. The Treasury has paid, or will pay,

the claims upon the recommendation of the Prize Claims Committee. But they are confessedly not claims of a nature which could have been established in prize proceedings, and therefore they are not claims which would have been ordered by a Prize Court to be paid by anyone or out of any funds, and therefore we must disallow them. It is satisfactory to think that this decision follows the practice with regard to such matters on grants of prize in former wars. In cases where a claim was established by a third party as mortgagee, bottomry bond holder, or as having a lien on a parcel of cargo, the Crown made a grant to him of its bounty out of the national Exchequer, and not out of the proceeds of the prize, and the captors took the whole proceeds undiminished and free of any charge.

Solicitor for the Treasury and for the Naval Forces: *Treasury Solicitor.*

Judicial Committee of the Privy Council.

Jan. 31 *and March* 16, 1921.

(Present: Lords SUMNER and WRENBURY and Sir ARTHUR CHANNELL.)

THE VESTA AND OTHER VESSELS (PART CARGOES EX). (*a*)

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

Prize Court—Enemy cargo—Sale in transitu*—Contract of sale—Enemy vendor to "take back" the goods—Delivery under the contract—Title of a neutral purchaser.*

A German steamer bound for Rotterdam took refuge in Lisbon on the outbreak of war. She had on board a non-contraband cargo which was the property of a company of enemy character. The cargo was subsequently sold to a Dutch company. The Dutch company, who acted in complete good faith, shipped the cargo in three neutral vessels to Amsterdam. The contract of sale gave the purchasers the right to reject the goods if they found them to be unsuited to their manufacturing business, and provided conditions upon which the vendors were to "take back" the goods in this event.

The three ships were captured on the way to Amsterdam and the cargo seized as belonging to enemies of the Crown at the time of the seizure.

Held, that the clause in the contract did not render the sale ineffective as a transfer of the goods to the purchasers. The provisions of the contract under which the vendors agreed to "take back" the goods contemplated a new transaction, not a failure of the sale.

The appellants having got actual delivery of the cargo after a genuine sale, the condemnation was not in the circumstances justified.

Decision of Sir Henry Duke, P. (reported sub nom. The Naxos *and other Ships,* 15 *Asp. Mar. Law Cas.* 52; 123 *L. T. Rep.* 556; (1920) P. 385) *reversed.*

APPEAL from a judgment of the Admiralty Division (in Prize) dated the 19th May 1920.

The appellants, a Dutch company, appealed from a judgment of the President, Sir Henry Duke, condemning as enemy property about 1000 tons of magnesite ore (non-contraband) seized in the *Vesta* and other neutral steamships.

Inskip, K.C. and *Balloch* for the appellants.

Sir *Ernest Pollock* (S.-G.) and *Clement Davies* for the Procurator-General.

Artemus Jones, K.C. and *Wilfred Lewis* for the Netherlands Oversea Trust.

The facts are fully set out in the course of the judgment.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—About the middle of July 1914 the steamship *Naxos,* a German vessel belonging to the Deutsche Levante Linie, sailed from Lefkandi and Limni, ports in Eubœa, with a cargo of about 1000 tons of raw magnesite, shipped by the Internationale Magnesiet Werken of Rotterdam and made deliverable to order at Rotterdam. These shippers own magnesite mines in Greece, and the finding of the President, that they were of enemy character though formally a Dutch incorporation, is not now contested. The *Naxos* was still on passage when the war broke out, and to avoid the risk of capture took refuge in Lisbon and there remained. An enemy ship cannot thus defeat belligerent rights exercisable so long as the original *transitus* is deemed to continue. Even transhipment would not have this effect. It is not a question of abandoning the adventure for insurance or other contractual purposes. What is done by an enemy in consequence only of the peril of capture, which is imposed by the opposite Power, is not for prize purposes a voluntary abandonment at all.

Early in 1916 the appellants, the Naamlooze Vennootschap Chemische Fabriek Kampen, a Dutch company who manufacture magnesia out of magnesite at their works at Kampen, in Holland, were in great need of the raw material necessary for their business. On the other hand, the owners of the cargo on the *Naxos* were very willing to sell it, as it was lying useless on their hands at Lisbon, without waiting indefinitely for peace to terminate the risk of capture. The parties came together, and by an agreement dated the 4th Feb. 1916 the appellants bought the cargo, and arranged for its transhipment and carriage to Amsterdam by neutral vessels, the *Vesta, Castor,* and *Titan.* These ships were detained *en route* and the magnesite was captured by British captors. The case for condemnation was that the original transit of the magnesite was still in course of execution at the time of seizure; that it was not in the power of the enemy vendors or of the enemy shipowners to abandon the voyage by the *Naxos* to Rotterdam, so as to create a new voyage in neutral ships to the detriment of belligerent rights; and that, even if the agreement of purchase was a genuine and not a merely colourable transaction, no title was acquired by the appellants which could be asserted in a Court of Prize so as to defeat a British capture of enemy goods.

The case of enemy ships laden with enemy cargo taking shelter from the risk of capture in neutral ports frequently occurred in the early stages of the recent war, as in older wars, and the question has then arisen how far and under what circumstances the belligerents' rights can be defeated, if the first physical step of successfully eluding capture is followed up by mercantile transactions intended to transfer the ownership of the goods to

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

neutrals. Sir William Scott, in *The Vrow Margareta* (1799, 1 C. Rob. 336), thus states the general rule, applicable alike to ships captured at sea and to goods captured at sea after transfer from ships which have taken refuge in a neutral port: "In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He goes on to give as a reason for the rule what is rather a maxim of prudence than a consideration of law, namely, the risk of protection being given to the enemy goods by transfers to neutrals, the true character of which it might be impracticable to expose. (See, too, *The Jan Frederick*, (1804, 5 C. Rob., at p. 131). *The Vrow Margareta*, however, was a case where the transfer to the neutral took place both in good faith and before actual or anticipated outbreak of war.

In *The Baltica* (11 Moo. 141) the question came before the Judical Committee in the form of a transfer made in contemplation of outbreak of war, and the committee applied the rule as stated in *The Vrow Margareta*, and also by Story, J. (Pratt's Story, p. 64), "the same distinction is applied to purchases by neutrals of property *in transitu*; if purchased during a state of war, existing or imminent, and impending danger of war, the contract is held invalid and the property is deemed to continue as it was at the time of shipment until the actual delivery." Accordingly the property having been not merely bought by but delivered to the neutral buyer before seizure in good faith and without any reservation to the seller, the transaction was held to be protected. The actual words of Mr. Pemberton Leigh (p. 150) should be quoted: "At this time the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the *transitus* in the sense in which for this purpose the word is used, had ceased."

In the recent war, the same principle has been recognised in cases where the alleged transfer has taken place not merely while war is imminent, but after it has actually broken out; but until the present case it has not been necessary to decide on the validity of the transaction, because either the purported sale has not been *bonâ fide* or the cargo was contraband with an ulterior enemy destination (*The Rijn*, 14 Asp. Mar. Law Cas. 424; 120 L. T. Rep. 395; (1917) P. 145; (1919) A. C. 546; *The Jeanne*, 13 Asp. Mar. Law Cas. 567; 115 L. T. Rep. 838; (1917) P. 8; *The Bawean*, 14 Asp. Mar. Law Cas. 255; 118 L. T. Rep. 319; (1918) P. 58), or the matter has rested in contract only without actual delivery to the buyer before the time of the seizure: (*The United States*, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 19; (1917) P. 30). It was, however, observed in *The Bawean* by Sir Samuel Evans, P. that actual possession by the neutral buyer is essential. Mere removal of goods from the enemy vessel, which is in shelter, to a neutral vessel which can carry them on, will not serve, even though constructively the possession of the captain of the neutral vessel is that of a bailee for a buyer who will be liable for the freight. Upon this point it is not necessary for their Lordships to pronounce any opinion. They, however, do not agree that as long as the original voyage of the enemy vessel, on which the goods were loaded, is incomplete, there always remains an indefeasible right to capture. Though in *The Baltica* the ship had actually completed her voyage to Copenhagen when the new owner took possession of her, the passage above quoted from the judgment shows that the taking possession was itself a determination of the transit, and the observations of Sir W. Scott in *The Danckebaar Africaan* (1 C. Rob. 107) and *The Carl Walter* (4 C. Rob. 207) bear this out.

It is worth while to consider the object and operation of the agreement of purchase in this case before passing to its terms. No doubt the enemy vendors wished to avert the loss which capture of their cargo would involve; and, if they could do this by means which did not merely shift the loss to the shoulders of the neutral buyers, they would in effect by saving themselves defeat the belligerent enemy right of capture. Such a result would cause them no regrets, but there is no reason to suppose that their object was not principally the mercantile one of turning their goods into cash, or that, if the price was satisfactory as it apparently was, they had any concern in recovering the goods for any purpose or in any event.

The appellants, on the other hand, knew the position of the cargo. They equally obviously had no mind to see the ore captured and condemned, and if the transaction in the result extricated the cargo from the possible risk of capture and placed it in ultimate safety, incidentally they intended to defeat the rights of belligerents. Though on both sides the primary object was purely commercial, the operation in fact involved the secondary result of finally avoiding capture.

There was a further consequence involved. The ore was bound for Holland, where it would be adjacent to Germany. In Lisbon it was isolated and remote. If by any means, legitimate or illegitimate but successful, it could be conveyed to Holland and there in one way or other again fell into the hands of its original shippers, they would have successfully performed their original importation, the risks of war notwithstanding, and could, if so minded, send the ore on into Germany. How far ultimate transport to Germany was ever in the sellers' minds does not appear and need not further be considered. As regards the buyers it must be remembered that the Internationale Magneseit Company was on its face a Dutch company and that, even if the appellants had been shown to be aware of the ownership of the shares and the control of the business which invested it with enemy character in time of war, they might still, on the state of the decisions at the time in question, have supposed that its Dutch incorporation availed to make it for all purposes a neutral *persona*.

The materiality of these considerations is that they show the importance in this and in all similar cases of a close and vigilant scrutiny of the whole transaction, for the purpose of seeing whether it truly is what it purports to be—an out and out and genuine sale without reservation of any interest in or to the seller in the goods—or whether it merely cloaks under the form of a sale an operation for transporting the seller's goods to the destination from which risk of capture at sea excludes him.

In the present case it has been found by the President, and is not now contested, that the appellants acted in complete good faith; that they were in great need of raw material; that they intended to consume it in their own works

in Holland; and that, except in so far as the true construction of the agreement of sale may involve another conclusion, they were buying out and out for themselves, and were not designedly reserving to the sellers any interest in the goods for their benefit. Accordingly the matter now turns on the construction and effect of the agreement, for, if that be plain, the mere fact that under other circumstances it might have been put to illicit uses cannot affect its meaning.

It was an agreement "regarding the sale and purchase of 1000 tons of raw magnesite lying in the steamship *Naxos*," and it declared that "the magnesite is purchased lying in the steamship *Naxos*, and all the expenses arising through the release, delivery, transloading and transport of the goods . . . shall be borne by the buyer." The price was 25 florins per kilo, payable in two instalments, half payable as soon as the seller should produce evidence that the goods would be released by the Portuguese Customs and no objections were raised by the shipowners, the other half payable as soon as the goods have arrived. The agreement proceeded: "And, in case of superficial approval by the buyer or in case the ship or cargo is lost or is declared forfeited by one of the belligerent parties, immediately after this has become known, but not later than two months after the payment of the first instalment, irrespective of whether all the goods have been shipped or not. The transloading, shipment, &c., shall take place in the sellers' name for the account and risk of the buyer. If the goods when being manufactured are found to be unsuitable for buyers' industry, the buyers shall have the right to refuse to accept the parcel, and the sellers shall be bound to take back the magnesite and to repay the amount of the purchase price already paid, increased with the sea freight from Lisbon, to a maximum of 30*s.* per ton."

The agreement was made without first inspecting the magnesite, or drawing and testing samples, or forwarding a trial shipment for experiment in the works of the Chemische Fabriek at Kampen. It contemplated that the whole 1000 tons would be sent forward to Holland and yet that, when they reached Holland, they might not suit the buyers' purposes. The reason probably is that the appellants had been buyers of Eubœan magnesite before the war and were generally well acquainted with its character. At any rate the circumstance, which might have excited a good deal of suspicion but for the admission of the appellants' good faith, is not now of any real significance.

The result is that the appellants agreed to buy specific and ascertained goods, as they lay in the *Naxos*, undertaking all risk and expense thereafter arising, except general average and demurrage in connection with the vessel, and were bound to pay half of the price in advance of shipment and in certain events the other half also. Without saying anything as to the prudence of it, of which the parties were the best judges, the agreement so far seems clearly to intend that the sellers are to part with all interest in the ore as soon as it leaves the *Naxos*, and to receive their price for the goods, lost or not lost, with considerable promptitude. There is no provision even for adjusting the price in case the quantity falls short of 1000 tons, beyond anything that can be inferred from the fact that, while each moiety is named as one-half of 25,000 florins, the price itself is described as 25 florins per 1000 kilos.

The Procurator-General contends, and the learned President held, that the effect of the clause, beginning "if the goods when being manufactured," is to reserve an interest in the enemy vendor, which prevented an effective transfer of them at Lisbon; that, in the language of Sir William Scott in the *Sechs Geschwistern* (4 C. Rob. 101), there was not "a sale divesting the enemy of all further interest," for "anything tending to continue his interest vitiates a contract of this description altogether." The President's view was that the sale was only to be complete on the fulfilment of a condition subsequent, namely, that the goods should be found suitable for the buyers' industry—in other words, that it was a sale on approbation, a delivery of the goods of the enemy company to the neutral company on sale or return. The expression is relied on that "the buyer shall have the right to refuse to accept the parcel," as showing that the time for his acceptance and consequent acquisition of the property does not arrive until he has at least had a reasonable opportunity of testing the magnesite in his works at Kampen.

Their Lordships are unable to adopt this view. If the words "refuse to accept" stood alone, or if the scheme of the agreement was that the sellers should deliver at Kampen and there tender the ore to the buyers, much might be said for holding that the property had not previously passed. Prefaced, however, as they are by a whole series of expressions pointing to an earlier passing of property, and combined with provisions which disinterest the seller in the shipment and transport and the risks of the voyage, the words are susceptible of another interpretation. They form part of a clause the remainder of which provides that the sellers shall be bound to "take back" the magnesite. Physically a person takes back something that he has brought to a place, but the sellers were not to bring this cargo to Kampen. The buyers were to do that. In connection with passing property a person "takes back" what had previously been but has ceased to be his; by a repurchase he undoes part at least of the prior transaction. That the taking back is here a new transaction and not merely the failure of the old one is further indicated by the fact that the next provision is not simply one for undoing the payment for the goods, as it would undo the physical tender of them. The seller is not to repay all the buyer's outlay—the expenses at Lisbon, the expenses of discharge and the freight incurred, whatever it might be—but only the purchase price and "the sea freight from Lisbon to a maximum of 30*s.* per ton"; that is to say, he is to pay a different and a smaller total consideration than had been paid by the buyer, and he gets the goods safely arrived in Holland in addition. It is further to be observed that what is expressed is the buyer's right and the seller's obligation if that right should be exercised. The words do not invest the seller with a corresponding right to have the goods back, if they are found unsuitable for the buyer's industry. Even if the sellers had such a right as that, in the event of the goods being found unsuitable, they could require a resale to themselves whether the buyers desired it or not; this would be a personal right the breach of which would sound in damages only. There was not reserved to them any proprietary

interest in the goods themselves. What is provided for is a liability on, not a right in, the seller, and none the less for the fact that, if that liability were enforced, he might find it mitigated by substantial advantages to himself. The buyers were at all times in a position to give a good title to third parties without the concurrence of the sellers. It is not as though the buyer's title was to be automatically divested in the happening of an event. It is divested only at his option, an option which indeed only becomes exercisable in a certain event but remains his option still. Nor is it a possibility that the seller may become owner again, if called upon to take the goods back, equivalent to the reservation of an interest under the original sale. No authority was forthcoming for the contention that it suffices for the preservation of a belligerent right of capture, if mere provision is made for the contingency of a new interest arising in the original enemy seller upon the happening of a condition subsequent, and their Lordships are not minded thus to extend a rule which in itself may in some cases press hardly upon neutral trade. Their Lordships are accordingly of opinion that the agreement, truly construed, provides for a sale out and out to the buyers and a consequent passing of the property to them on delivery to them at Lisbon, with a supplementary option to the buyers in a certain event to require the sellers to buy back the goods at a price agreed.

It was laid down by their Lordships' board in *The Ariel* (11 Moore, 119) and in *The Baltica* (*sup.*), after full discussion, and more recently in the consolidated appeals of *The Kronprinsessan Margareta, The Parana, and other Ships* (15 Asp. Mar. Law Cas. 170: 1_4 L. T. Rep. 609; (1921) A. C. 486), that a neutral can acquire the property in merchandise from an enemy owner, while the merchandise is afloat, if there is an out and out transfer, neither accompanied by elements of unreality nor by any reservation of property therein to the seller, provided that the buyer takes actual delivery and not a mere symbolical delivery by handing over mercantile documents.

The question, therefore, arises whether the appellants got actual delivery of the magnesite at Lisbon, and this comes to be the crucial question in the appeal as being the real test whether the *transitus* of the ore was truly determined. After the agreement for the sale of the magnesite had been entered into war broke out between Portugal and the German Empire, and the Portuguese Government took possession of the German ships lying in the Tagus, including the *Naxos*, and hoisted on them the Portuguese flag. It is suggested that this in itself terminated the original *transitus* of the *Naxos*, as no doubt in a physical sense it did, and thereby put an end to the rights of His Majesty, such as they might be, to seize the cargo of the *Naxos* if afterwards found at sea, no matter what the circumstances or nature of its transfer to new owners. It is a singular result of the entry into the war of a friendly Power in aid of His Majesty and his allies, and there is no reason why the exercise by the Portuguese Government of their right to requisition the ship should prejudice their allies as to the cargo. No authority for the proposition was forthcoming.

For some time no progress was made with the discharge of the magnesite, but eventually in September the appellants sent to Lisbon, as a special representative, their managing director, M. Barendrecht, and he obtained from the Portuguese Government permission for the discharge of the magnesite from the *Naxos*. This was done, and for a time the ore was stored on the quay, the costs of stevedoring and storage being paid by the appellants and the instructions for the work being given by M. Barendrecht, who was present, according to his affidavit, on their behalf. From the quay the ore was subsequently loaded on the three vessels, belonging to the Koninklyke Nederlandsche Stoomboot Maatshappij, which were detained by the British naval forces. The Internationale Magnesiet Werken indorsed the *Naxos* bills of lading to the appellants, M. Barendrecht handed them to the Netherlands Consulate at Lisbon, and new bills of lading were given for the carriage by the ships in question to Amsterdam. It is true that these bills of lading described the Netherlands Consul as shipper and as consignees the Netherlands Overseas Trust, but the former was acting on behalf of the appellants, to whom he was giving official assistance, and the consignment to the latter was in accordance with the general regulations of the Trust and for the purpose of effecting delivery to the appellants for consumption in Holland. Indeed, in the bills of lading there are express provisions that the ships' agents are to notify the appellants, and one at any rate of them is indorsed to the appellants by the Netherlands Overseas Trust. Their Lordships think it clear that, on delivery of the ore overside ex the *Naxos*, the Internationale Magnesiet Werken washed their hands of it, and that, in accordance with the contract, the appellant company directed and were liable for whatever was done with it till it was reloaded on the forwarding steamers. It follows that the appellants took actual delivery at Lisbon. It is not a question of constructive possession by delivery to a carrier, who recognises by the form of his bill of lading his obligation to deliver to the consignee; it is as complete delivery as is possible to a company, which can only act by human agents.

Had the claimants failed to establish their title, an argument was to have been submitted to their Lordships, which was admitted before the President, that if the ore had not become neutral property it remained enemy property and was being carried under a neutral flag to a neutral country without ulterior destination of any kind. Accordingly the Declaration of Paris was to have been invoked. It appears to have been overlooked that the claimants could only use this argument after their own title to independent rights had been negatived. They never purported to have merely bought the enemy owners' right or chance of escape. They could not claim on behalf of the enemy owners, if the enemy owners could not claim for themselves, and if the enemy owners were competent to claim for themselves, they should have entered an appearance and have done so. Enemy claimants have been repeatedly recognised, to assert rights under international conventions (*e.g.*, *The Möwe*, 13 Asp. Mar. Law Cas. 17; 112 L. T. Rep. 261; (1915) P. 1; *The Marie Glaeser*, 12 Asp. Mar. Law Cas. 601; 112 L. T. Rep. 251; (1914) P. 218), or to contest condemnation of their goods, if shipped or carried under circumstances which give immunity from capture: (*The Roumanian*, 13 Asp. Mar. Law Cas. 8; 114 L. T. Rep. 3; (1916) 1 A. C. 124; *The Hakan*, 13 Asp. Mar. Law Cas. 479; 117 L. T. Rep.

619; (1918) A. C. 148, at p. 150). Their Lordships have already decided that ownership claims on appeal must be made by appellants who come before the board as owners. It follows that, if this point had arisen for decision, the claimants would have failed upon the preliminary ground that it was not available to them.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, and that the decree appealed against should be reversed and the goods or their proceeds should be released to the appellants.

Solicitor for the appellants, *A. M. Oppenheimer.*
Solicitor for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Feb. 25, 1921.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

JAPY FRERES AND CO. *v.* R. W. J. SUTHERLAND AND CO.; R. W. J. SUTHERLAND AND CO. *v.* OWNERS OF STEAMSHIP THOEGER. (*a*)

APPEALS FROM THE KING'S BENCH DIVISION.

Charter-party — Dead-weight—Permanent ballast of cement—"Whole reach and lawful burthen of ship"—Carrying capacity—"Carrying about 600 *tons dead-weight without guarantee"—Rate of hire.*

The steamship T. *was described in a charter-party dated the* 24*th April* 1917 *as being "supposed to carry about* 600 *tons but no guarantee given dead-weight on Board of Trade summer freeboard inclusive of bunkers." The charterers on the same day sub-chartered the vessel by a sub-charter, describing her therein as "carrying about* 600 *tons dead-weight on Board of Trade summer freeboard inclusive of bunkers without guarantee." At the time when the vessel was delivered under the terms of the charter and the sub-charter she had some* 100 *to* 150 *tons of hard cement fixed in her holds, which reduced her total dead-weight capacity to about* 497 *tons.*

Held, (1) *that in giving the whole reach and burthen of the ship as it existed at the time of the charter, the owners had performed their covenant that the whole reach and lawful burthen of the ship should be at the charterers' disposal; and* (2) *that the words "without guarantee" protected the owners from liability in respect of the dead-weight capacity being short of* 600 *tons.*

Decision of Rowlatt, J. reversed.

APPEALS from decisions of Rowlatt, J. on the awards of an umpire in the form of special cases stated for the opinion of the court. The two charter-parties were treated as one for the purposes of argument in court.

By a charter-party in writing dated the 24th April 1917 made between Robertson, Shankland, and Co. Limited, as agents for the owners of the steamship *Thoeger* (thereinafter called "the owners") and the above-named R. W. J. Sutherland and Co. (thereinafter called "the charterers") it was agreed that the owners should let and the charterers hire the said steamer for the term of twelve calendar months from the time she was placed at the disposal of the charterers as therein mentioned.

The said steamer was described in the charter-party as follows: "Of 459 tons gross register, 265 tons net register, carrying about loaded March 1917 464 tons coke and 51 tons bunkers supposed to carry about 600 tons but no guarantee given dead-weight on Board of Trade summer freeboard inclusive of bunkers." By clauses 5 and 33 of the charter-party it was agreed that the charterers should pay as hire 3000*l.* sterling per calendar month, the hire to be paid at a minimum rate of exchange of 17 kroners to the pound sterling. By clause 8 it was provided that the whole reach and lawful burthen of the steamer, including lawful deck capacity (compatible with vessel's seaworthiness), not exceeding what she could reasonably stow and carry, should be at the charterers' disposal, reserving only proper accommodation for the steamer's officers, crew, tackle, provisions, and stores. By clause 27 it was provided that in the event of any dispute arising it should be referred to arbitration in London, one arbitrator to be nominated by each party, and in case the arbitrators should not agree the matter was to be referred to the decision of an umpire. The said vessel was duly delivered by the owners to the charterers for the purpose of fulfilling the said charter-party, and ran thereon for twelve and one-third months. On the same date—*i.e.*, the 24th April 1917—the charterers sub-chartered the vessel to Japy Frères at the rate of 3600*l.* per month. In the sub-charter the vessel was described as follows: "Of 459 gross register, 265 tons net register, carrying about 600 tons dead-weight on Board of Trade summer freeboard inclusive of bunkers without guarantee." In other respects the sub-charter party was identical with the head charter. Both charter-parties contained a clause giving the charterers the option of sub-letting the vessel. The sub-charterers made claims under the sub-charter against the charterers alleging that the vessel was capable of carrying on Board of Trade summer freeboard about 497 tons dead-weight only. The said claims were eventually referred to an umpire for his decision, and by an award in writing in the form of a special case the umpire held that, subject to the opinion of the court, the sub-charterers were entitled to recover from the charterers the sum of 8394*l.* 1*s.* 11*d.* Disputes then arose between the charterers and the owners, the former alleging that, relying upon clause 8 and the statement as to tonnage in the said (head) charter-party, they had entered into the aforesaid sub-charter to Japy Frères, and that if Japy Frères were entitled to recover any damages from the charterers, the latter were entitled to recover the same amount from the owners. The charterers further claimed that a vessel of the net and gross registered tonnage of 265 and 459 respectively had ordinarily a total dead-weight capacity of about 600 tons, and that in April 1917 the market rate hire of a vessel of the carrying capacity of 497 ons total dead-weight (which they alleged to be the capacity of the *Thoeger*) was 600*l.* per month les than the market rate hire of a vessel carrying 600 tons dead-weight all told, making a difference on the hiring for twelve and one-third months of 7400*l.*, and, further, that, having had to pay at a fixed rate of exchange, they had (owing to the fall in the Swedish exchange against the United

(*a*) Reported by R. F. BLACKISTON and W. C. SANDFORD, Esqrs., Barrister-at-Law.

Kingdom) in fact paid in all 8394*l.* 1*s.* 11*d.* more than they would have paid on a hiring at 2400*l.* per month. The charterers further alleged that the steamer was placed at their disposal with 100 to 150 tons of hard cement fixed in her holds, which had reduced the total dead-weight capacity the vessel would otherwise have had to about 497 tons.

The questions between the owners and charterers were duly referred to arbitration, and eventually an umpire was desired to state a case for the opinion of the court on the questions of law arising out of the dispute. The umpire found as a fact in the first instance that on the delivery of the said vessel to the charterers she had in her holds between the floors a large quantity of cement approximately from 100 to 150 tons. The said cement was fixed and irremovable, it having apparently been placed in the vessel for the purpose of acting as permanent ballast. The effect of the said cement was that upon the vessel loading a dead-weight cargo instead of loading and carrying (as she would otherwise have done) about 600 tons on her Board of Trade summer freeboard she was capable of loading about 500 tons. The charterers claimed that they had suffered damage by reason of this to the extent of any damages they might be held liable to pay to their sub-charterers, or, alternatively, 600*l.* per month, plus the extra cost of the arbitrary rate of exchange, viz. :

	£	*s.*	*d.*
Difference in value between a vessel of 600 tons dead-weight capacity and a vessel of 497 tons at 600*l.* per month for 12¼ months	7,400	0	0
Additional cost by reason of Exchange fluctuation	994	1	11
	8,394	1	11
They further claimed in the event of their being held liable to their sub-charterers for the same the cost of insurance in excess of an insurance on Kr.300.000	4,383	19	9
	12,778	1	8

The charterers on the arbitration put forward the following as their contentions :

(1) That a cargo steamship of the measured tonnage described in the charter-party of the 24th April 1917 between the parties had ordinarily a total summer dead-weight carrying capacity of about 600 tons.

(2) That the hold of the *Thoeger* contained 100 to 150 tons of cement, and was therefore unable to carry the amount of cargo ordinarily carried by a cargo steamship of the tonnage described.

(3) That the owners failed to give the charterers any notice of the fact that the hold of the *Thoeger* contained such quantity of cement, or that the vessel was unable to carry the ordinary amount proper to her tonnage as described.

(4) That the presence of the said quantity of cement constituted a breach of the warranty contained in clause 8 of the charter-party of the 24th April 1917.

(5) That the charterers, relying upon the warranty contained in clause 8 and the statements as to tonnage contained in the said charter-party between the parties of the 24th April 1917, rechartered the *Thoeger* to Messrs. Japy Frères on the same day.

(6) That the true measure of the damages which the charterers will suffer is the loss, if any, resulting to the charterers from the breach of warranty of clause 8 by the owners, or from the omission of the owners to notify the charterers of (*a*) the presence of the cement in her hold ; (*b*) the fact that the vessel could not carry the ordinary amount of cargo proper to her tonnage as described.

(7) That the amount of such damage is the amount. if anv. which the charterers may be called upon to pay to their sub-charterers, Messrs. Japy Frères, in respect of the charter-party between them of the 24th April 1917.

The owners put forward as the points of law which they required to be stated :

(1) That on the true construction of the charter-party there was no guarantee of the carrying capacity of the vessel.

(2) That the presence of the cement in the hold did not constitute a breach of any representation made in the charter-party or deprive the charterers of the carrying space for which they had contracted.

(3) That if, as the charterers alleged. the vessel tendered was commercially different from that described in the charter-party, the charterers by their conduct in continuing to trade the vessel after they became aware of the presence of the cement waived any objection and treated the vessel as a proper tender under the charter-party.

(4) That the presence of the cement did not constitute a breach of the warranty of seaworthiness.

(5) That the charterers had not suffered any damage the true measure of which was the difference between the amount paid for the ship and the amount which the vessel was worth as a ship of about 500 tons dead-weight, which was proved to be at the rate of 6*l.* per ton, or 3000*l.* in all. The owners claimed that on this view of the measure of damages they were not concerned with any restitution which the charterers might be liable to make to their sub-charterers on the speculative sub-charter.

The following facts were found by the umpire :

No evidence was offered that the statements in the charter-party that the vessel had loaded 464 tons coke and 51 tons bunkers in March 1917 was not correct, nor was any evidence offered as to the owners' reasons for stating that she was "supposed to carry about 600 tons, but no guarantee given."

The statement as to the quantity of coke and bunkers carried would be no guide to the vessel's dead-weight capacity on account of the light and varying specific gravity of coke, and, if and so far as it be material and a question of fact for me, I find that the owners would not have been justified in making any representation or warranty that the vessel in fact had a dead-weight capacity of anything approximating to 600 tons in that they had no reasonable ground for such a statement. If and so far as it be a question of fact for me, I find that the statement in the charter-party did not amount to any representation or warranty of fact on this point except as to a supposition.

No evidence was given by either party as to when the cement was put in the vessel (which was built in 1889) or as to whether it was in her when she was measured for the calculation of her registered tonnage, but it was assumed by the charterers and not challenged by the owners that it was added subsequently to such measurement, and there is a very strong presumption that this was so. If I am entitled to act on this, I find that the cement was not in her when she was measured. Its presence would probably have made no difference in her registered tonnage, which depends on certain arbitrary rules for calculation of the ship's cubical contents based on certain measurements, but, owing to the specific gravity of cement,

even if it had been in her then and allowed for in her measurement, it would not have made any very substantial difference in her measurement for registration tonnage purposes. The dead-weight capacity of a vessel may vary after she is built and measured for registration purposes by reason of alterations or additions. In my view the charter-party in question does not imply that the vessel has the same dead-weight capacity when chartered as when she was measured for registration. Subject to this, I find, if it be material, that the owners did not place at the charterers' disposal the whole reach and burthen of the steamer as she was originally built and measured for her gross and net registered tonnage not exceeding what she could reasonably stow and carry in that the vessel contained, as stated above, about 100 or more tons of cement fixed between the floors of the holds as permanent ballast, the addition of which to the vessel's weight prevented the utilisation of the dead-weight lifting capacity for cargo and bunkers which the vessel would otherwise have had to the extent of 100 tons or thereabouts. If, however, the vessel is to be taken as she was when chartered, *i.e.*, with her fixed ballast, then her full reach and burthen was placed at the disposal of the charterers. No notice was given to the charterers that this ballast was in the vessel. The dead-weight capacity of the vessel with this permanent ballast was about 500 tons and no more. If and so far as it is material, I find that the difference between a vessel of 500 tons dead-weight capacity and of 600 tons dead-weight capacity is so great as to make the latter commercially a different thing from the former. The presence of the cement did, subject as stated above, encroach on the original dead-weight capacity of the vessel, but being between the floors it did not encroach on the cargo space, *i.e.*, cubic capacity of holds as distinguished from dead-weight capacity.

The gross and net register tonnage of the vessel was correctly stated in the charter-party, but that would not give a reliable indication of her dead-weight capacity. There is no fixed ratio between the two things, but the dead-weight capacity of 500 tons as compared with her gross and net register tonnage was abnormally small. A steamer of 459 tons gross and 265 tons net would ordinarily be estimated as likely to carry nearer 600 than 500 tons, but such estimates are mere approximations based on rule of thumb and are liable to considerable error from a variety of causes, and a prudent commercial man would not rely on such estimates for the purpose of buying or hiring such a steamer for dead-weight carrying purposes. The presence of the cement in the hold of the *Thoeger* did not in any way detract from her seaworthiness. No sufficient evidence was given to enable me to decide whether the vessel would have been seaworthy without ballast, but the probability is that the vessel having no water ballast would when sailing light have required some although not fixed ballast, but no evidence was given to enable me to form any conclusion as to the quantity of ballast (if any) that she would have required under such circumstances. The difference in hire value between a vessel of 500 tons and of 600 tons dead-weight capacity on the time charter in question was difficult to ascertain, there being little or no market at the time in question, and rates paid fluctuated considerably. No evidence was given to me by either party of any other measure of damages than a comparison of time charter rates. On the assumption that in the absence of other evidence the proper measure of damages is the difference in time charter hire value at the date the charter was made, then I find that this vessel was worth 600*l.* per month less with a carrying capacity of 500 tons only than she would have been with a carrying capacity of 600 tons. The charter-party imposed upon the charterers an obligation to pay at a fixed rate of exchange, and, taking this into account, I find that the charterers during the period of the charter-party paid 8394*l.* 1*s.* 11*d.* more than they would have paid at a hire of 2400*l.* per month. If the court is of opinion that the cost of exchange should not be taken into account, then this amount will be reduced to 7400*l.*

I find that it would have made no substantial difference in the value of this vessel for insurance purposes whether she was capable of carrying five or six hundred tons, and in my finding above in allowing 600*l.* per month as the difference in value for time charter purposes of the vessel I am of opinion and find that a charterer paying 2400*l.* per month for the *Thoeger* of 500 tons carrying capacity would have had to pay the same insurance as that provided in the charter-party now under consideration. Subject to the opinion of the court on all questions of law arising upon the facts as above stated, I find and award as follows:

(*a*) That the charterers are not entitled to recover anything from the owners.

(*b*) That the charterers do pay to the owners their costs of this reference and shall also pay the arbitrators' and my fees and expenses of this award and special case amounting to 230*l.* 9*s.*

If the court be of opinion that the statements and provisions in the charter-party as to the vessel's capacity and the findings of fact as above do impose a liability upon the owners and that my finding in par. 17 is wrong in law, then I find and award that the charterers shall recover from the owners (*a*) the sum of 8394*l.* 1*s.* 11*d.*

If the court whilst holding the charterers entitled to recover damages shall be of opinion that the charterers are not entitled to recover the additional cost of hire by reason of the fixed exchange or the damages which the charterers have been held liable to pay to their sub-charterers, then I find (*b*) that the charterers shall recover from the owners 7400*l.* and no more.

And, further, in either of the last-mentioned cases I direct that the owners shall pay to the charterers the costs of this reference and the arbitrators' and my fees and expenses of the reference and this my award as above set out.

Leck, K.C. and *G. P. Langton* for the appellants, Messrs. R. W. J. Sutherland and Co.—The umpire was wrong in the conclusion he came to in his award. No guarantee as to the dead-weight capacity of the vessel was given, and, there being no warranty, there was equally no condition under the contract. The presence of the cement in the hold of the vessel did in fact render her more seaworthy. As to the question of warranty or condition, see

Harrison (*T. and J.*) v. *Knowles and Foster*, 14 Asp. Mar. Law Cas. 249; 118 L. T. Rep. 566; (1918) 1 K. B. 608.

MacKinnon, K.C. and *Rowland Thomas* for Messrs. Japy Frères and Co.—There was not merely a breach of warranty, but a condition was implied in the form of the words used in the charter-party. The description of the vessel as carrying about 600 tons constituted a condition in the contract between the parties for the breach of which the charterers are liable in damages. The court is referred to the case of

Wallis and others v. *Pratt and another*, 105 L. T. Rep. 146; (1911) A. C. 394.

R. A. Wright, K.C. and *W. A. Jowitt* for the Norwegian owners.—The umpire has found in my clients' favour on his award. There was no contract of any kind that the vessel should be capable of lifting 600 tons. On the contrary, the owners had expressly refused to give an undertaking of that nature, and had been careful to state that there was no guarantee as to lifting capacity. There was

no implied term in the contract to the effect that the vessel was not to have ballast.

Rowlatt, J.—The two charter-parties in these cases are, in my judgment, the same in effect. In both charters the vessel was described correctly as to her net tonnage and supposed carrying capacity of 600 tons dead-weight without guarantee. When the vessel was delivered it was found that she carried permanent ballast in her hold, consisting of cement, which had the effect of reducing her carrying capacity from 600 to 500 tons or thereabouts. In my opinion, both charterers and sub-charterers are entitled to recover because the owners did not place at their disposal the full reach and burthen of the steamer. I am not considering any question as to the alleged breach of warranty in clause 1 of the charters, nor do I think that the case of *Wallis* v. *Pratt and Haynes* (*sup.*) cited in argument affects the question. The charterers are entitled to the full reach and burthen of the ship as constructed, and this they did not obtain. It was lessened owing to the presence of the cement in the hold of the vessel. The cement was certainly ballast, but it was permanent ballast and could not therefore be taken out. The charterers have been prevented from fully loading the ship, and the description of the ship in the first clause of the charter-party, dealing with burthen and capacity, does not affect the question in the case. The result of my judgment is that the award in favour of Messrs. Japy Frères and Co. is confirmed to the extent of 7400*l.*, and that part of the award which is in favour of the owners, Messrs. Sutherland and Co., is reversed. The award will have to go back to the umpire on the question of damages relating to the removal of the ballast and other similar matters.

R. A. Wright, K.C. and *Jowitt* for the owners.

Leck, K.C. and *G. P. Langton* for the charterers.

F. D. MacKinnon, K.C. and *Rowland Thomas* for the sub-charterers.

Bankes, L.J.—A claim was made by time charterers for damages on the ground that the vessel which had been chartered to them was not of the carrying capacity to which they were entitled under the charter-party. The charterers had themselves sub-chartered the vessel, and the sub-charterers had brought an action against the charterers on the same ground. Both claims were referred to arbitration; in both cases the umpire stated a special case, which came before Rowlatt, J. Before the umpire and before the learned judge two points were made: one in reference to the proper construction of the opening words of the charter, the contention being that there had been a warranty that the carrying capacity of the vessel was about 600 tons; the other, which depended on clause 8 of the charter, being an allegation that the owners had failed to give the whole reach and lawful burthen of the vessel to the charterers and sub-charterers respectively.

The vessel, the *Thoeger*, was apparently very old, and at some time in her career (the date when and circumstances in which it occurred are not given) a considerable quantity of concrete or cement had been placed in her bottom as permanent ballast. The umpire has found that "the said cement was fixed and irremovable, it having apparently been placed in the vessel for the purpose of acting as permanent ballast." I think that this point about placing the whole reach and lawful burthen of the ship at the disposal of the charterers depends on what is the true inference to be drawn in reference to that operation. If the true inference is that it was merely loose ballast, however heavy or difficult it might be to remove, the charterers might perhaps have had a right to call upon the owners to remove it, or to complain, if it was not removed, that they were not getting what they were entitled to, viz., the full reach and burthen of the vessel. But this cement was fixed and irremovable and was intended to act as permanant ballast; and the inference which I think should be drawn is that from the time when it was placed there the cement must be treated as if it were a part of the vessel herself just as much so as the deck or any other permanent part of the vessel. If that is the true inference to draw I understand that it is not disputed that if the owners gave the charterers the full cargo space existing at the time of the charter they would be fulfilling their obligations under the clause. Rowlatt, J., as I understand his judgment, has drawn the same inference as I from the facts. He says "then it was found that she had been permanently ballasted with cement and that reduced her dead-weight carrying capacity to 500 tons." If he meant by that that he drew the same inference from this alteration—I feel satisfied that it was an alteration—of the vessel as I do, then with great respect I cannot agree with his conclusion that the charterers were entitled to recover on the ground that the full reach and burthen of the vessel were not put at their disposal. He goes on to say "they did not get the full reach and burthen of the ship as I understand she was constructed." By that he must mean "originally constructed," and I do not think that that is the true view of clause 8 of the charter-party. I think that it refers to the reach and burthen of the vessel as then existing. I agree that by clause 8, providing that the full reach and burthen of the vessel shall be given, the charterer is to have both the full cargo space and the full lifting capacity; but I cannot agree that where such a permanent alteration as this has been made in the vessel the owner is committing a breach of his contract if he does not remove it.

The other point in the case depends on the construction of the language of the charter-party. Before the umpire it was contended, as I understand, that there was a warranty of the capacity of the vessel. The umpire found that in fact the vessel's full capacity was about 500 tons dead-weight, and it was said that upon a true construction of the language used there was a warranty that the carrying capacity was 600 tons dead-weight. But we have heard no argument in support of that contention in this court beyond this, that there was a description of the vessel as being of 600 tons dead-weight, and that as she was in fact of only 500 tons dead-weight capacity the difference of 100 tons rendered her commercially something different from the thing contracted for. It is said that because the owners handed over a vessel substantially different from the one referred to in the charter-party the charterers and sub-charterers have a right of action for damages for breach of warranty. Reliance was placed on the case of *Wallis and others* v. *Pratt and another* (105 L. T. Rep. 146; (1911) A. C. 394); but in my opinion there is a clear distinction between that case and this. The sale there was of common English sainfoin, and what was supplied was not common English sainfoin at all, or English sainfoin of any description, but giant sainfoin, which is something quite different. The contract of sale contained a

provision that "the sellers give no warranty, express or implied, as to growth, description or any other matters," and it was held that, inasmuch as the article supplied was not the article contracted for at all, the sellers had not protected themselves by a provision which had reference to some failure in quality or description in the article which they had contracted to sell. But here the charter is of a named vessel, so there is no doubt that the charterers and the sub-charterers have got the thing which they contracted for, in the sense that they got the very vessel. Besides the description of the vessel by name there were words of description dealing with her carrying capacity, and the question is whether the owners in the one case, and the charterers in the other, sufficiently protected themselves against any action for breach of warranty in respect of that description. The language used in the charter is not quite the same as that used in the sub-charter, but it is not suggested that there is really any substantial difference between them. In the charter the words are "supposed to carry about 600 tons but no guarantee given"; in the sub-charter, the words are "carrying about 600 tons dead-weight but without guarantee." There is, therefore, a description of the named steamer with reference to her carrying capacity, but a perfectly plain statement that the description is given without guarantee; and it appears to me that the charterers and the sub-charterers fail in establishing any right of action on the ground that the vessel was not of a guaranteed carrying capacity. The appeals therefore succeed; the judgments must be set aside and the appropriate judgments entered according to the findings of the umpire upon the view of the case which I have presented.

Scrutton, L.J.—I agree, and can shortly express my opinion. This case relates to a small tramp steamer of considerable antiquity. At some time in her history her owners had thought it advisable to provide her with permanent ballast by filling in the space under the hold with cement, so that her bottom was a mass of cement. The effect of that was not to reduce the space of her hold, but to reduce her effective lifting power for certain sorts of cargo which might not need ballast. Rowlatt, J. has found that this permanent ballast is a breach of a clause in the charter to give the full reach and lawful burthen of the ship to the charterers, and apparently he has come to that conclusion because he regards the charter as a charter of the ship as originally constructed.

In my view the charter is *primâ facie* a charter of the ship as she existed at the time when the charter was made. It is the duty of a shipowner to provide the necessary ballast for a chartered voyage, and if he has on board movable ballast which is unnecessary for the chartered voyage it is his duty to discharge it. But—and this is entirely a question of degree—if the ballast is so permanent that it may be treated as part of the structure of the ship I can see no obligation on the shipowners to remove that permanent ballast because it is not necessary, or there is more of it than is necessary, for the particular voyage. In that case it appears to me there is no breach of the contract to provide the burthen of the ship, for I think that that contract refers to the ship as she is at the time of the contract, with the permanent ballast in her.

Here the umpire found that the cement is fixed and irremovable and was intended to act as permanent ballast. We are bound by his finding of fact, and on that finding I think there has been no breach of the contract to provide the full reach and burthen of the ship. Mr. MacKinnon has referred to a case which actually occurred where a cargo of asphalt became solidified without the intention of the parties, but there there was no intention to make the solidified material part of the structure of the ship; the intention was to the contrary. I think, therefore, that the decision of Rowlatt, J. on this point was wrong.

Now it was argued that though the charter was of a named ship, the words "carrying about 600 tons dead-weight" had the effect, in spite of the words excluding any guarantee, of making the ship not of the description contracted for. For my own part whenever I find a statement of fact I am inclined, if I can, to give some legal effect to it. I always assume that people have a reason for putting in a statement of fact. Here the general description of the ship is correct; it was named as stated and was of the tonnage stated, and I can only read the statement that she could carry 600 tons "without guarantee" as being a refusal to contract that she shall actually carry 600 tons and that there shall be a right to claim damages if she does not. Such a phrase ought to put the charterers on inquiry as to what is really the matter with the ship. It is not necessary to decide the point, but I myself should have been disposed to think that this was a representation the untruth of which would have enabled the other party to rescind the contract on discovering the untruth. But the charterer here had obtained much too profitable a sub-charter for him to want to rescind the charter; and nobody did take any steps to rescind the charter, treating this as a representation. If it is attempted to treat it as a term of the contract the breach of which gives a right to damages then I think the words "without guarantee" preclude any claim; and the description of the named ship appears to be satisfactorily complied with, for it was that named ship that was handed to the charterers. I think, therefore, that the appeal should be allowed.

Atkin, L.J.—I agree. I think that the original reach and burthen of the ship had been permanently changed by an irremovable alteration of her arrangement, and since that alteration her reach and burthen had been of the smaller capacity mentioned by the umpire. In these circumstances I think that there was no breach of contract by the shipowner, because he gave to the charterers the full reach and burthen of the ship at the time the contract was made.

As to the second point, I think that the words "without guarantee" negative the notion that the words as to carrying capacity had any contractual operation, and therefore there was no breach of contract in reference to the alleged condition or warranty as to carrying capacity.

Appeals allowed.

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

Solicitors for the charterers, *Downing*, *Handcock*, *Middleton*, and *Lewis*.

Solicitors for the sub-charterers, *Helder*, *Roberts*, *Giles*, and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 11 *and* 12, 1920.

(Before Rowlatt and McCardie, JJ.)

Re Sutherland and Co. and Hannevig Brothers Limited. (*a*)

Arbitration and award—Practice—Amendment of award—"Error arising from any accidental slip or omission"—Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *s.* 7 (*c*).

S. and Co. were the charterers and H. and Co. were the sub-charterers of a steamship. At the termination of the charter-party questions arose with regard to the balance of hire and of insurance premiums. The owners claimed against the charterers, and the charterers claimed against the sub-charterers. Both disputes were referred to arbitration. As the arbitrators disagreed, the disputes came before the same umpire, who, in the first case, namely, that between the owners and the charterers, awarded that the costs of the arbitration, which he assessed at 130*l.*, *and taxed costs should be paid by the charterers. In the second case, that between the charterers and the sub-charterers, the umpire awarded that the sub-charterers should pay to the charterers for hire and insurance, and proceeded: "I further find and award that the costs of this arbitration, which I assess at* 130*l. and taxed costs, as well as costs of the arbitration between the owners and Sutherland and Co. (the charterers) on the same subject, except taxed costs of the sitting of the* 27*th June* 1919, *shall be paid by the charterers"* [i.e., *the sub-charterers in the second arbitration.*].

As the parties were not clear as to what costs were payable by the sub-charterers under the umpire's award, correspondence ensued between the solicitors for S. and Co. and the solicitors for H. and Co., and a letter was written to the umpire suggesting that a clerical mistake or error arising from an accidental slip had been made in the award. The umpire being under the impression that he had made an error in writing his award delivered a further award which he said he had amended so that it should read as he had originally intended to state it. The amended award was as follows: "I further find and award that the costs of this arbitration, which I assess at 130*l.*, *and taxed costs, as well as costs of the arbitration and the taxed costs of the owners against Sutherland and Co. and Sutherland and Co.'s own costs of the arbitration . . . shall be paid by the charterers* [i.e. *the sub-charterers in the second arbitration*] . . . "

Held, that the amended award must be set aside because the umpire had no power to expound what he had purposely written in his original award. The arbitrator had written down everything which he intended, and nothing which he had not intended, to write down; he had therefore no jurisdiction to alter his award. There was no "error arising from an accidental slip or omission" within the meaning of sect. 7 (*c*) *of the Arbitration Act* 1889, *which enacts that an arbitrator had power "to correct in an award any clerical mistake or error arising from an accidental slip or omission."*

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

Motion to set aside an award.

By a charter-party made on the 30th April 1917, between R. W. J. Sutherland and Co., the charterers (herein called "the respondents"), and the owners of the steamship *Steady* (re-named the *Oistein*), the owners chartered the steamship in question to the respondents. On the 4th May 1917, the respondents by a sub-charter, re-chartered the steamship *Steady* to Hannevig Brothers Limited, the sub-charterers (herein called "the applicants") The terms and conditions of the sub-charter were identical with those of the charter-party of the 30th April 1917.

Disputes arose between the parties, and these were referred to two arbitrations, one between the owners and the respondents, as charterers, and the other between the respondents, as disponents, and the applicants as sub-charterers. The owners claimed against the respondents as charterers. The respondents, in their turn, claimed over against the applicants, the sub-charterers. Both disputes ultimately came before the same umpire. In the first arbitration, the umpire having made his award on the points at issue ordered the charterers to pay the costs in these terms: "I further find and award that the costs of this arbitration, which I assess at 130*l.*, and taxed costs shall be paid by the charterers, and, if in the first place they shall have been paid by the owners, the latter shall forthwith be reimbursed for such costs by the charterers."

In the second arbitration, namely, the one between the respondents (the charterers) and the applicants (the sub-charterers), the umpire awarded that the applicants should pay certain sums, and on the question of costs, he added: "I further find and award that the costs of this arbitration which I assess at 130*l.* and taxed costs, as well as costs of the arbitration between the owners and Messrs. Sutherlands (the respondents) on the same subject, except taxed costs of the sitting of the 27th June 1919, shall be paid by the charterers (in this case the sub-charterers, the applicants), and if, in the first place, they shall have been paid by the disponents (*i.e.*, the respondents), the latter shall forthwith be reimbursed by the charterers (*i.e.* the applicants)."

The respondents thought that the award did not define sufficiently clearly, the costs which the applicants (Messrs. Hannevig Brothers Limited) were to pay. Accordingly, the respondents' solicitors, on the 20th May 1920, wrote to the umpire as follows:

Dear Sir,—On perusing the award in this matter we are under the impression that a clerical mistake or error arising from an accidental slip or omission has been made in the award. The award gives to our clients, Sutherland and Co., the costs of the arbitration between the owners of the steamship *Steady* and *Sutherland and Co.*, and what we are anxious to understand is as to whether that was intended to cover the costs which Sutherland and Co. have to pay the owners, and Sutherland and Co.'s own costs of that arbitration as well as the arbitrator's fees. For your guidance we enclose herewith the original award, and shall be glad to hear from you on the point."

A few days later, the umpire informed a member of the firm of the respondents' solicitors that he certainly had made an error in writing his award and had amended his award so that it should read as he originally intended to state it. The umpire then issued an amended award in which the clause

dealing with costs read as follows: "I further find and award that the costs of this arbitration, which I assess at 130*l.* and taxed costs as well as costs of the arbitration and the taxed costs of the owners against Sutherland and Co., and Sutherland and Co.'s own costs of the arbitration between the owners and Sutherland and Co., on the same subject . . . shall be paid by the charterers" (*i.e.* in this case) Hannevig Brothers Limited.

The applicants refused to pay the costs added by the amended award, and they moved to set aside the award on the ground that such an amendment was not within sect. 7, sub-sect. (*c*) of the Arbitration Act 1889, which provides that: "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

The applicants contended that the umpire was *functus officio* and had no power to alter his award.

D. C. Leck, K.C., and *Hildesley* for the applicants, Hannevig Brothers Limited.

Le Quesne for the respondents, Sutherland and Co.

Rowlatt, J.—In this case an extremely difficult and important question has arisen with regard to the extent of the powers conferred on arbitrators by clause (*c*) of sect. 7 of the Arbitration Act 1889. Sect. 7 of the Act of 1889 provides that: "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

On the construction of those words as a matter of grammar "clerical" belongs to "mistake" only, and "error arising from any accidental slip or omission" is a second and independent limb of the clause. The words of the clause are similar to those found in Order XXVIII, r.11, R. S. C., and, in my opinion, the greater part of the difficulty has arisen owing to the extent of the meaning which has been given to the words of that order. I cannot help feeling that, as applied to arbitrators, the words ought to be construed rather strictly.

Before the passing of the Arbitration Act 1889, it is clear that the courts regarded it as very dangerous to allow arbitrators to alter or amend their awards after they had made them. The well-known case on that point is *Mordue* v. *Palmer* (23 L. T. Rep. 752; L. Rep. 6 Ch. 22). In that case the error corrected by the arbitrator arose from the mistake of a clerk in copying the draft award, and it was held that the arbitrator could not put the mistake right, being *functus officio*. Such a state of things as that has been clearly altered by sect. 7, clause (*c*) of the Arbitration Act 1889. The difficulty, however, which still remains is to see how far the alteration has gone.

In the present case, the arbitrator made an award, and he included in his award certain costs incurred in a matter between one of the parties and a third party, and the question arose whether the words he had used included all those costs or only some of them. The award was sent back to the arbitrator and he told Mr. Lewis, of the firm of solicitors representing the respondents, that he certainly had made an error in writing his award, and he amended it so that it read, as he said, as he had originally intended that it should read.

Now that was not correcting a clerical mistake within the meaning of clause (*c*) of sect. 7 of the Act of 1889. What is meant there is something almost mechanical—a slip of the pen or something of that kind. Then the question is did the arbitrator correct an error arising from an accidental slip or omission? Here we get upon ground which is almost metaphysical. An accidental slip implies that something has been wrongly put in by accident, and an accidental omission implies that something has been left out by accident. That raises a further question, namely: What is an accident in this connection, an accident affecting the expression of a man's thought?

Such an accident is a very difficult thing to define, but I am of opinion that what took place in connection with the award in this case was not an accident within the meaning of the clause. I cannot pretend to give a formula which will cover every case, but in this case there was nothing omitted by accident. The arbitrator, in fact, wrote down exactly what he intended to write down, although it is doubtful what that really meant when considered from a legal point of view; and he has now really assumed a jurisdiction to expound what he had purposely written down. That is a thing which he has no jurisdiction to do.

Mr. Le Quesne, counsel for the respondents, has contended that it was by inadvertence that the arbitrator did not put down all that he meant to put down. I am of opinion that inadvertence is not the right word to use in this case. A man may inadvertently write down a word which if he had thought more about the matter, he would have written differently, but that merely means that he has gone wrong. I am of opinion, that, in substance, the arbitrator assumed a jurisdiction which he did not possess, namely, to insert in the award an exposition of his words, because he found the words that he had used were not so well chosen as they might, and ought, to have been if chosen after further deliberation. The motion succeeds, and the award must be set aside.

McCardie, J.—I agree that this motion raises a difficult and important question, and my mind has fluctuated a good deal in the course of the argument.

This alteration of the award by the arbitrator was a serious matter, and it involves an important and serious point of law. It is quite clear that under the old law as it stood before the Arbitration Act 1889, the arbitrator could not have made this alteration in his reward, for the law was most rigorous with regard to the limitation of the powers of an arbitrator, and from the moment that he put forward a paper as his award he was *functus officio*, and could not put right any mistake at all; any alteration was nugatory, and the original award stood—*Henfree* v. *Bromley* (6 East 309).

The question for our decision is how far the law has been altered by sect. 7 (*c*) of the Arbitration Act 1889, which empowers an arbitrator "to correct in an award any clerical mistake or error arising from any accidental slip or omission." I think that the word "accidental" in clause (*c*) applies both to "slip" and to "omission." The clause is taken from Order XXVIII, r. 11, and decisions under that rule are in point in so far as they are decisions on the rule and not, as many of them are, decisions based rather on the inherent jurisdiction of the court.

In *Inland Revenue Commissioners* v. *Hunter*, Scrutton, J. (as he then was) said (110 L. T. Rep. 825; (1914) 3 K.B. 423, at p. 428): "A referee, having once issued his award, cannot issue another without the consent of both parties." In saying that I do not think that the learned judge could have had present to his mind sect. 7 (*c*) of the Arbitration Act 1889. In *Oxley* v. *Link* (110 L. T. Rep. 248; (1914) 2 K. B. 734), the Court of Appeal imposed a most stringent rule. In an action against a married woman sued in respect of her separate estate, judgment was by mistake drawn up in the ordinary form against the defendant personally, instead of in the form settled by the Court of Appeal in *Scott* v. *Morley* (57 L. T. Rep. 919; 20 Q. B. Div. 120.). It was held that the plaintiffs were not wanting to correct a slip, but were seeking to substitute one form of judgment for another, and that consequently Order XXVIII, r. 11 did not apply.

In this case, the arbitrator clearly did not make a clerical mistake, and the question is: Did he make an accidental slip? I do not think he did. He appears to have put down precisely what he meant to put down, and he did not put in anything that he did not intend to put in, nor did he omit anything that he intended to put in.

I am, therefore, of opinion that the arbitrator was not entitled, under sect. 7 (*c*) of the Act of 1889, to make the alteration which he did in this case. I may add, that in my view, the court in *Doswell* v. *Norton* (18 Times L. Rep. 228) took a very liberal view in interpreting Order XXVIII., r. 11, and I think that it is very doubtful whether that case should be followed.

I agree that the motion succeeds, and that the award must be set aside.

Award set aside.

Solicitors for the applicants, *Roney* and *Co.*
Solicitors for the respondents, *Downing*, *Handcock*, *Middleton*, and *Lewis*.

Wednesday, Feb. 9, 1921.

(Before ROCHE, J.)

BROOKE *v.* THE KING. (*a*)

Requisition — Undertaking to pay market rate of hire—Limitation order effect—Indemnity—Limitation of Freights (French) Ports Order 1918—*Indemnity Act* 1920 (10 & 11 *Geo.* 5, *c.* 48), *ss.* 1, 2.

At the outbreak of the war with Germany, in 1914, *a number of ships, British and neutral, were in the Baltic Sea, and owing to the risk of capture and destruction in attempting to escape from the Baltic, these vessels remained there. But after a time the scarcity of shipping became greater, and it was decided to make every effort to get these ships out of the Baltic. Accordingly, in July* 1916, *the Board of Trade made a general offer, which was addressed to the Baltic Exchange and communicated to the public, as an inducement to the owners of such vessels to attempt to escape, to the effect that the Admiralty had informed the Board of Trade that they were prepared to guarantee that any British vessel escaping from the Baltic up to March* 1917, *would either not be requisitioned, or if through some special emergency they had to be requisitioned, they would be paid market rates and not Blue Book rates. The guarantee was to apply also to ships bought by British owners from neutrals. The rates, known as Blue Book rates, on which the Admiralty began to requisition ships in Aug.* 1914, *were much lower than the current market rates. B., the suppliant, was a shipowner, and, relying on the Board of Trade guarantee above mentioned, purchased two ships at prices far in excess of the value of such ships if they were requisitioned at Blue Book rates, and he took the risk of getting the ships out of the Baltic. In Feb.* 1918, *the two ships were requisitioned on the express terms that the rate of hire to be paid should be in accordance with the undertaking of July* 1916. *The Government, however, only paid the suppliant at Blue Book rates, and the suppliant, by a petition of right, claimed the difference between the Blue Book rates paid by the Government and the full market rate of freight. The Crown, by their answer, admitted the undertaking, but relied on the Limitation of Freights (French Ports) Order of the 5th Feb.* 1918, *and said that that Order fixed the market rate and that the suppliant had been paid the full rate allowed by such Order. They also relied on the Indemnity Act* 1920.

Held, that the Limitation of Freights Order did not fix a market rate. The meaning of the undertaking of July 1916, *was that the Government would not impose a rate of their own, but would pay what could be obtained in a free market.*

Held, also, that the defence of the Indemnity Act 1920 *failed, and that the suppliant was entitled to be paid hire at the market rate.*

PETITION of right tried by Roche, J.

The suppliant's claim was in respect of the hire of two vessels requisitioned by the Government during the war.

The suppliant, T. E. Brooke, carried on business as a shipowner under the style of T. C. Beatley and Sons. He claimed to recover from the Crown a sum of 69,257*l.*, alleged to be due to him in respect of the employment on requisition of two ships, the *Duva* and the *Cumbrian*, from the 5th Feb. 1918 to the 23rd March 1918 in the case of the *Duva*, which was sunk on that date, and to the 4th March 1919 in the case of the *Cumbrian*, which was released from requisition on the last-named date. The sum claimed represented the difference between the maximum rate of 28*s.* per deadweight ton per month allowed under the Limitation of Freight (French Ports) Order 1918 (which had been paid by the Crown) and the rates which the two vessels could have earned in an unrestricted market which, according to the suppliant's contention, would be 4*l.* 0*s.* 3*d.* per month.

Immediately after the outbreak of the war with Germany in Aug. 1914, the Government began to requisition ships as required, paying the owners therefor at Blue Book rates, which were considerably lower than the market rates for unrequisitioned tonnage. There were at the outbreak of the war a considerable number of ships, British and neutral, in the Baltic, escape from which was rendered difficult and dangerous by enemy action. Later, when the scarcity of shipping became more acute, the Government offered inducements to the owners of these ships to attempt to effect their escape. The following letter was sent by the Board of Trade at the request of the Admiralty to

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

the Secretary of the Baltic Exchange, and communicated to the public:

Board of Trade, Whitehall, S.W., the 4th July 1916. —Dear Sir,—British shipping in the Baltic.—The Admiralty have informed the Board of Trade that they are prepared to guarantee that any British ships which escape from the Baltic up to the end of March 1917 will either not be requisitioned or if through some special emergency they have to be requisitioned, they will be paid market rates and not Blue Book rates.—Yours faithfully, C. Hipwood.—P.S. It will be remembered that this guarantee applies also to ships bought by British owners from neutrals.

Among the ships then detained in the Baltic were the *Duva* and the *Cumbrian*, which were the property of British owners and were the two ships in question in this petition of right. The owners of those two ships, relying on the guarantee contained in the above letter dated the 4th July 1916, at considerable risk procured their escape from the Baltic before the end of March 1917. The suppliant purchased both ships, the one in Jan. 1917, and the other in June 1917, and relying on the terms of the letter of the 4th July 1916, he paid for both vessels much higher prices than he would have done if they had been subject to requisition in the ordinary way. The suppliant then let the two ships on charter, at the rate of 7*l.* 1*s.* per deadweight ton per month, for the carriage of coal to France, as they were best adapted for the French coal trade.

In Feb. 1918, the Ministry of Shipping requisitioned the suppliant's two ships and at the same time addressed to the suppliant a statement that the rate of hire would be "in accordance with the undertaking given in respect of vessels which were formerly in the Baltic."

On the 5th Feb. 1918, there was issued an order called the Limitation of Freights (French Ports) Order 1918. This order came into force on the 11th Feb. 1918, and it fixed 28*s.* per ton as the maximum rate of freight chargeable by British ships engaged in the French coal trade. This rate was paid by the Crown to the suppliant, who claimed that he was entitled to be paid the rate which he could have earned in an unrestricted market. There was some conflict of evidence as to what this would in fact be, but Roche, J. found that 41*s.* per deadweight ton per month was the proper figure.

The Crown filed an answer admitting the facts but contending (1) that the undertaking of the 4th July 1916, could not exempt the suppliant from the operation of the Limitation of Freights Order, and that he had been paid the full rate applicable thereunder; (2) that the claim was not maintainable by reason of the Indemnity Act 1920, and the court had no jurisdiction to entertain the proceedings.

The Indemnity Act 1920, provides as follows:

Sect. 1, sub-sect. (1) No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter, or thing done, whether within or without His Majesty's Dominions, during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty, or for the defence of the realm . . . by a person holding office under or employed in the service of the Crown in any capacity . . . and, if any such proceeding has been instituted . . . it shall be discharged and made void. . . . Provided that except in cases where a claim for payment or compensation can be brought under sect. 2 of this Act this section shall not prevent . . . (*b*) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within one year from the termination of the war or the date when cause of action arose, whichever may be the later. . . . Sect. 2, sub-sect. (1) Notwithstanding anything in the foregoing section . . any person . . . (*a*) being the owner of a ship or vessel which . . . has been requisitioned at any time during the war . . . shall be entitled to payment or compensation for the use of the same. . . .

Sect. 2, sub-sect. 2 (ii.). Where the payment of compensation is claimed under par. (*a*) of sub-sect. 1 of this section, it shall be assessed in accordance with the principles upon which the Board of Arbitration constituted under the Proclamation issued on the 3rd day of August 1914 had hitherto acted, which principles are set forth in Part I. of the schedule to this Act.

Sect. 2, sub-sect. 2 (iii.). In any other case the compensation shall be assessed as follows: (*a*) If the claimant would apart from this Act have had a legal right to compensation the tribunal shall give effect to that right. . . .

Sect. 2, sub-sect. 4. The tribunal for assessing payment or compensation shall, where by any of the Defence of the Realm Regulations any special tribunal is prescribed, be that tribunal, and in cases where the claim is made under par. (*a*) of sub-sect. 1 of this section be the said Board of Arbitration, and in any other case be the said Defence of the Realm Losses Commission.

Schedule, Part 1. The payment or compensation to be awarded for the use of a ship . . . and for services rendered shall be based on the rates and conditions contained in the Blue Book reports, or in cases of a class where those rates and conditions have not been applied on some other liberal estimate of the profits which the owner could have made if there had been no war, and shall be assessed without taking into account any increase of market values of tonnage or of rates of hire due to the war. . . . For the purposes of this part of the schedule the expression "Blue Book reports" means the reports as to rates and conditions published in Oct. 1914 by the sub-committee of the Board of Arbitration, subject to such increases or modifications thereof as may have been agreed to before the 1st day of Jan. 1920.

Sir *John Simon*, K.C., *R. A. Wright*, K.C., and *C. T. Le Quesne* for the suppliant.—The suppliant's two ships were requisitioned on the 5th Feb. 1918, and by the requisitioning letter of that date the Government contracted to pay hire in accordance with the undertaking given by the letter of the 4th July 1916 that the suppliant should be paid hire at market rates instead of Blue Book rates. That contract could not be affected by the Limitation of Freights (French Ports) Order 1918, which did not come into force until the 11th Feb. 1918. Moreover, the Indemnity Act 1920 does not apply. Sect. 1 of that Act does not prevent the institution of proceedings in respect of breaches of contract. The present proceeding comes within that exception, and is not a claim for compensation within sect. 2 of the Act.

Sir *Gordon Hewart* (A.-G.) and *G. W. Ricketts* for the Crown.—The undertaking relied on by the suppliant was that these ships should not be requisitioned except in case of emergency. The emergency arose in connection with the shortage of coal in France. The suppliant was given an

option, either to charter the vessels to the French Mission of the Inter-Allied Executive, or to have them requisitioned. He chose to have them requisitioned. Then came the Limitation of Freights Order, dated the same day as the requisition. The rate fixed by that order constituted the market rate at the date the order came into force, because if the vessels had not been requisitioned they would not have been able to obtain a higher rate. The Indemnity Act 1920 renders these proceedings void. The right to requisition ships is a part of the prerogative of the Crown, and therefore its exercise carries no legal liability to pay compensation, but it has been the practice to pay compensation *ex gratia*. When the Indemnity Act of 1920 was passed there were already two tribunals, the Admiralty Transport Arbitration Board and the Defence of the Realm Losses Commission dealing with *ex gratia* payments. This is a case under sect. 2 of the Indemnity Act 1920, and the suppliant ought to have taken his claim before the Admiralty Board of Arbitration. The court has no jurisdiction to entertain the proceeding. Further, the maximum rate fixed by the Limitation of Freights (French Ports) Order 1918 became the market rate for vessels engaged in that trade.

Sir *John Simon*, K.C. replied.

ROCHE, J.—This is a petition of right. The suppliant carries on business under the name of T. G. Beatley and Sons, shipowners. By his petition he prays from the Crown a sum of money in payment for the use of two of his ships, and he claims that sum under a contract. On the 4th July 1916 His Majesty's Government, being anxious to increase the amount of British shipping, or shipping available for the use of Great Britain, desired to encourage shipowners to bring out of the Baltic a number of ships which were interned there by fear of the blockading forces of the German Empire. Accordingly, on that date a letter was addressed to the shipping world in general to the following effect: [His Lordship read the letter set out above, and continued:] The suppliant, in Jan. and June 1917, bought two vessels called the *Duva* and the *Cumbrian* which satisfied the conditions laid down in that letter. By methods which have not been gone into in this case because they were not material, but with considerable skill and courage, a large number of ships were brought out from the Baltic, and the *Duva* and the *Cumbrian* fell within that class, and were bought by the suppliant with the benefit of that undertaking attaching to them: that they would not be requisitioned unless in the event of some special emergency, and that if they were requisitioned they would be paid market rates and not Blue Book rates; and, of course, it naturally follows that a larger price was given for the vessels than would have been given if a clog attached to them of the ordinary liability of a British ship to requisition. The ships ran free of requisition until the month of Feb. 1918. They were then requisitioned by the Shipping Controller under the Defence of the Realm Regulations by reason of some special emergency. The emergency indicated was the great need of the Allies, particularly the French people, for shipping tonnage to take coal and other things to France.

I assume that the vessels were properly requisitioned and that that is not a matter in question. The matter in question is the rate applicable for the payment for the use of these vessels.

It is not, of course, questioned by the Crown that this guarantee or undertaking is in general one that they are bound and pleased to honour. The dispute is whether in the particular circumstances of this case there has been paid a sufficient remuneration to comply with the undertaking. What has been paid is a sum of 28*s*. per dead weight ton per month, that being the rate which was laid down as applicable and payable to ships engaged in certain trades with France under and by reason of an order known as the Limitation of Freights (French Ports) Order of 1918 dated the 5th Feb. 1918. It is said that that rate was the market rate within the meaning of the agreement.

Before dealing with that point I must deal with an objection which is made in point of law in the answer and plea of the Attorney-General to the petition.

That point is this. In par. 8 of the answer and plea it is said: "That since the commencement of these proceedings, to wit on the 16th Aug. 1920, the Indemnity Act 1920 came into force and the Attorney-General relies upon the said Act and submits that by the operation of the same the petition is discharged and made void." The Attorney-General has laid great stress on that point and developed it very fully before me. I am of opinion that the plea and answer fails, and I will shortly express my reasons. I will assume for the present purpose (but I do not decide) that the first paragraph of sect. 1 (1) of the Indemnity Act 1920 bars or restricts the right of the suppliant to bring these proceedings. I say I do not decide that because it is not at any rate certain that an action or petition based upon a contract, as this is based, is an action or legal proceeding on account or in respect of an act matter or thing done during the war within the meaning of that clause, and I say that for the purpose of the present case I will assume in favour of this answer and plea that that paragraph standing alone would bar or restrict the right of the suppliant to bring these proceedings.

But the matter does not rest there. There follows a proviso that this section shall not prevent, among other things, the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract; and a petition of right is, for the purpose of the section, to be deemed a legal proceeding. Now, resting the matter there, having regard to that proviso, it would be clear that these proceedings, being based upon a contract (a contract which indeed is undisputed) would not be debarred or defeated by the Act; but the proviso states that it (the proviso) does not apply in a case where a claim for payment or compensation can be brought under sect. 2 of the Act; and one then turns to sect. 2 of the Act and finds that sect. 2 deals in sub-sect. (1) (*a*) with the case of the requisition of a ship or vessel or space or accommodation therein, and to a case where there is a requisition and the owner is entitled to payment or compensation for the use of the same, and it goes on to provide that it applies to a case where such payment or compensation is to be assessed on the principles and by the tribunal thereinafter mentioned. I am intentionally paraphrasing these clauses because they have been read once or twice already. When one turns to the schedule which is mentioned as the place where one finds the principles of assessment of compensation, it is

there provided that the payment or compensation to be awarded for the use of a ship or vessel shall be based on the rates or conditions contained in the Blue Book in force or, in cases where those rates and conditions have not been applied, on some other basis and shall be assessed without taking into account any increase of market values of tonnage or of rates of hire due to the war; and, finally, by another paragraph in the schedule, Blue Book reports are defined to mean the reports as to rates and conditions published in the order of Oct. 1914, subject to such increases or modifications thereof as may have been agreed to before the 1st Jan. 1920.

The substance of the Attorney-General's argument on this part of the case is that the special agreement relied upon by the suppliant in the present case, that is to say the agreement contained in the letter of the 4th July 1916, that market rates and not Blue Book rates are to be paid, is an increase or modification of the Blue Book rates. I do not agree. I think it is inapt to say that a provision that Blue Book rates shall not be applied, but that some other rates shall be applied, is a provision for the increase or modification of the Blue Book rates. And apart from that consideration, when one examines the schedule it is plain that the sentence as to the increase or modification of Blue Book rates really applies only to a case where Blue Book rates are themselves applicable under the first limb of the main part of the schedule, and that this would be a case, if it fell within the schedule at all, where those rates and conditions could not be applied. That branch of the schedule is obviously inapplicable to this case because there is special provision that in that event no attention whatever shall be paid to market rates. Accordingly I hold that that part of the Attorney-General's argument was not sound and that that contention fails.

Alternatively it is said that the case falls within sect. 2 sub-sect. 2 (iii) of the Act, and is a case within these words: "In any other case compensation shall be assessed as follows"; then it goes on to provide for the cases and the assessment of compensation in such a case. I hold that that sub-section does not apply at all to the case of a requisitioned ship, and is not intended so to apply. I also hold that this present case is not a case at all where compensation is claimed within the meaning of that sub-section. It is a case where payment is claimed under a contract, and for the recovery, not of compensation but of due and proper payment under a contract; and I think the comment of the suppliant's counsel is abundantly justified that if this argument were good that all other cases of compensation were to be assessed as provided in that sub-section, and if this were a case to be so assessed, it is difficult, if not impossible, to see that the main provision contained in sect. 1 would have any meaning or effect whatever. It would simply mean that all claims against the Crown of whatsoever kind or nature were to be swept into sect. 2, and to be dealt with in the manner there indicated. I hold that that is not the meaning or effect of the Act, and that the objection to the jurisdiction of this court fails.

I should have added, of course, that the point of this answer and plea is not that the suppliant is not entitled to recover, or rather to ask for, somewhere what he is asking for here, but that this is not the right place, and this is not the right tribunal before which he can ask to be given it—and that he is relegated to one of the arbitration tribunals which existed before the Act, and are continued (in a somewhat modified form in one case) under the Indemnity Act itself. I therefore pass from that plea and that objection.

It remains to consider, first, whether the suppliant is entitled to anything more than he has already been paid, and if so, how much. At first the argument would seem plausible, and did seem plausible, that when the Limitation of Freights Order came into force, that did fix a market rate for the trade which was not only appropriate to those two ships, but was the trade in which they were actually engaged, and that that became and was the market rate, and that accordingly, if the suppliant was paid for the use of his ships at that rate, he had no cause of complaint, or at any rate no cause of action, or no ground of petition under the agreement of the 4th July 1916. That is to say, that you may have a fixed market rate as well as a market rate which is determined by competition; but I think that is not giving a fair meaning to the agreement of the 4th July 1916. The emphasis, I think, is upon the words "market rate," as contrasted there with "Blue Book rate." But I think, and I hold, that the meaning and intention of that document is to say in substance and in effect: We will leave you free in the market, and if we have to requisition you we will not impose upon you rates of our own, but we will pay you the rate which you would get under free and open competition; and I therefore hold that the limitation rate is not, within the meaning of that agreement, a market rate, or the market rate to be paid for the use of these ships.

[His Lordship, having found on the evidence that 41*s.* per dead weight ton per month was the "market rate," gave judgment for the suppliant for an amount based on the difference between the 28*s.* per ton already paid by the Crown to the suppliant and the 41*s.* per ton found to be the "market rate." The judgment to be in the form provided by the Petition of Right Act, with costs.]

Judgment for suppliant.

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

Solicitor for the Crown, *Treasury Solicitor.*

Feb. 22, 23, 24, *and* 25, 1921.

(Before ROWLATT, J.)

LYNCH BROTHERS LIMITED *v.* EDWARDS AND FASE. (*a*)

Carriage of goods—Shipping and forwarding agents—Casual transaction—Contract to collect and lighter goods—No express terms—Usual terms—Loss of goods by pilferage — Lightermen's liability — Common carrier.

The plaintiffs employed the defendants, who were shipping and forwarding agents, in Oct. 1919, *to collect and carry a quantity of goods, including tin, from certain wharves where they were lying to a ship on the Thames. The defendants were not lightermen, having wharves and barges of their own, and nothing was said about the terms on which this lighterage was to be done, except that the defendants were to be paid a flat rate for their services. The*

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

defendants employed carters to cart the goods from the wharves where the goods were lying to a wharf which they used under an arrangement with the wharf owners,, and which they described in their correspondence with the plaintiff as "our wharf." They then employed a firm of lightermen to lighter the goods from the wharf to the ship in the river. Owing to the watchman's negligence a quantity of the tin was stolen. The plaintiffs claimed to recover the value of the stolen goods. The defendants relied on a custom that all contracts for lightering goods in the Port of London were subject to the terms of the London Lighterage clause, which exempted lightermen from liability for any loss in any circumstances whatever, howsoever, whensoever any such loss might be caused, and whether caused by negligence or the wrongful act or default of the servants or agents of the lightermen, or other persons for whose acts the lightermen would otherwise be liable. The transaction was of a casual nature, and the defendants did not act strictly as shipping agents but were contractors to employ carriers at a rate which included their own remuneration.

Held, that no express terms with regard to lighterage having been arranged, the defendants must be taken to have been employed on the usual terms. They were, therefore, exempt from liability for loss by pilferage, and the plaintiffs could not recover.

ACTION in the Commercial List tried by Rowlatt, J.

The plaintiffs claimed to recover from the defendants the value of a quantity of tin which was stolen while being lightered from a wharf to a ship lying in the River Thames, by a firm of lightermen employed by the defendants.

In Oct. 1919 the plaintiffs employed the defendants, who carried on business in London as shipping and forwarding agents, and so described themselves, to collect and carry a quantity of goods, including 111 slabs of tin, the property of the plaintiffs, from the wharves where they were lying to a ship lying in the River Thames. The defendants were not lightermen, and had no wharf or barges of their own, but they had an arrangement with a firm for the use of a wharf, which they described in their correspondence with the plaintiffs as "our wharf," and they also referred to barges as "our barges." The defendants were to be paid a flat rate for their services, but no express terms were agreed with regard to the lighterage.

The defendants duly collected the goods. They employed carters to cart the goods from the three wharves where the goods were lying to their own wharf, and they then employed a firm of lightermen to take them from the wharf to the ship in the river on which the goods were to be shipped. Owing to the negligence of the watchman employed by the firm of lightermen, in leaving the barge unattended, the 111 slabs of tin were stolen. The plaintiffs now claimed the value of the stolen tin from the defendants.

The defendants, by their defence, said (*inter alia*) that the goods were stolen or lost without any negligence on their part or of any person for whom they were responsible. They said that they had to employ lightermen on the usual terms for the collection, carriage, and shipment of the goods, and that by the custom of the Port of London lightering was only done on the terms of the London Lighterage clause, and that under that clause lightermen were not liable for any loss in any circumstances whatever, whether such loss was occasioned by negligence or wrongful act or default of the servants or agents of the lightermen or other persons for whose acts the lightermen would otherwise be liable. They alleged further, or in the alternative, that the provisions of the London Lighterage clause were an implied term of any contract between the plaintiffs and the defendants for the collection and shipment of the goods, and further that it was agreed between the plaintiffs and the defendants that the defendants were not to be liable for loss or theft of any of the plaintiffs' goods, for which the shipping and forwarding arrangements should be placed in the hands of the defendants, and that the plaintiffs should insure against such risks.

MacKinnon, K.C. and *T. Mathew* for the plaintiffs.—The defendants are liable for negligence. They were not employed as agents, but they contracted as principals. To protect the defendants from liability in respect of pilfering there should be a clause to that effect in the contract, and the words relied on must be clear and unambiguous. Here there was no such clause and the plaintiffs are, therefore, entitled to succeed. See:

Hill v. *Scott*, 73 L. T. Rep. 458; (1895) 2 Q. B. 713;

Price and Co. v. *Union Lighterage Company*, 89 L. T. Rep. 731; (1904) 1 K. B. 412;

Rosin and Turpentine Import Company v. *Jacobs and Sons*, 102 L. T. Rep. 81;

Travers v. *Cooper*, 110 L. T. Rep. 159; 111 L. T. Rep. 1088; (1915) 1 K. B. 73.

Alex Neilson, K.C. and Sir *Robert Aske* for the defendants.—It is universally known that the London Lighterage clause applies to all contracts for forwarding goods in the Port of London. It is always implied. In *Armour and Co.* v. *Tarbard Limited* (37 Times L. Rep. 208) it was held that the clause is to be taken judicial notice of. [ROWLATT, J.—I do not know that it is meant to be taken judicial notice of in all cases.] In that case the defendants were not common carriers. The only contract that the defendants could make in this case would be one subject to the London Lighterage clause. The defendants are protected. See:

Jones v. *European and General Express Company*, 15 Asp. Mar. Law Cas. 138; 124 L. T. Rep. 276;

Lawrence v. *Produce Brokers*, 4 Lloyd's List, 231.

ROWLATT, J.—In this case the plaintiffs are a firm carrying on an export business, and the defendants are shipping and forwarding agents carrying on business in the City of London, having an office in Fenchurch-street, where they so describe themselves. They have no wharf nor barges of their own, but they have relations with a wharf which they refer to in their correspondence with the defendants as "our wharf," and barges described by them as "our barges." In so describing the wharf and barges they merely meant a wharf or barges for the use of which they had facilities, and they did not mean that the wharf and barges were their own.

The plaintiffs arranged with the defendants for the conveyance of some goods to a ship in the river. The goods were at three wharves, and they were to be carted to the defendants' wharf, and thence conveyed by lighter to the ship's side. The

defendants were to be paid a lump sum for their services in collecting and carrying the goods, according to the principle which had been followed in previous dealings of a similar nature which had occasionally taken place between the parties. The defendants did not know the value of the goods, and, as to some of them, they did not even know what they were. Among the goods to be carried to the ship were 111 slabs of tin, a very valuable commodity, the loss of which is the substance of this action.

The defendants employed carters to cart the goods to their wharf—thence they employed a firm of lightermen to take them to the ship. The watchman employed by the firm of lightermen left his post and the tin was stolen. The firm of lightermen pleaded a clause in their agreement with the defendants which exonerated them from liability for the loss. The trouble in this case arises out of the casual nature of the transaction, which makes it difficult to ascertain with accuracy the rule of law applicable to the facts. There was some evidence on the part of the defendants, denied, however, by the plaintiffs, that at some period on the occasion of a previous transaction, the defendants had mentioned insurance to the plaintiffs, and that they must cover themselves, and that the plaintiffs had agreed to insure against all risks. I have some difficulty about that. I do not think, however, that it was intended to mislead me, but this point is not proved to my satisfaction. I am quite clear that what the plaintiffs' representatives thought was, that the plaintiffs had sufficient protection under a clause in their policy by which they were protected from risk. They were protected in their ocean policy against risks of craft, but they were disappointed in finding that this sort of pilfering before shipment was not included in the clause. I have no doubt that the plaintiffs never thought about it at all. They did not think of the defendants as carriers. In what capacity did the defendants undertake this work? Mr. MacKinnon has argued that these people are to be looked on as carriers and are responsible as carriers unless a special contract can be properly proved between the parties. A clause sufficient for this purpose was brought to the attention of the plaintiffs. I think it is clear that the defendants did not act strictly as shipping agents and did not undertake to act as agents. If they had so acted the present difficulty would not have arisen. But were the defendants assumed to be common carriers? I think they are best described as contractors to procure carriage; to make a contract, to employ carriers, and they were to receive for their services a lump sum payment, out of which they would keep what they could for their own profit. I think they were employed on what may be called the usual terms. Mr. MacKinnon contends that the defendants must prove a special contract in order to escape liability. Everyone knows that a bill of lading will be issued; probably the same bill of lading as will be issued to other consignors. The bill of lading is posterior and not anterior to the actual arrangement. He referred to the case of *Hill* v. *Scott* (*sup.*), in which there was no bill of lading, and where the defendant was held to have undertaken a liability equal to that of a common carrier.

Here, the whole point is that lightermen are employed without regard to any bill of lading system. Lightermen do not issue any documents. I have to decide this simply as a case where a man goes into an office and says, "get this done for me." What are the usual terms? I think the usual terms are those which protect the wharfinger from liability for loss by pilfering from lighters. The lighterman always has that clause put in when the matter is gone into. It is quite clear that lightermen do not do business in the River Thames on the terms that they are to be liable for loss of goods by pilferage from the lighters. Broadly speaking, it seems abundantly clear that, so far as a pilfering risk is concerned, a lighterman will not undertake it. The clauses exempting liability are not all in the same words, but they are all wide enough to exempt lightermen from pilferage risks, and lightermen always refuse the risk of loss by pilferage. Where, as in the present case, a man asked for lighterage work to be done for him without making any stipulations with regard to the terms on which it is to be done, he must be taken to have agreed that the work is to be done on the usual terms, and the usual terms include exemption from liability for loss by pilferage. I must hold that the plaintiffs, in employing the defendants, have impliedly assented to that exemption and therefore they cannot recover for the loss of these goods. There must be judgment for the defendants with costs.

Judgment for the defendants.

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

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

Judicial Committee of the Privy Council.

Oct. 25, 26, 28, 1920, *and Jan.* 20, 1921.

(Present: The Right Hons. Lords Sumner, Parmoor, Wrenbury, and Sir Arthur Channell.)

The Kim and other Vessels (Part Cargoes ex). (*a*.)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Conditional contraband—Application for release of goods seized—Evidence of ownership—Documents not put in evidence in court below by an oversight—Admission of documents on appeal.

The onus of proving an innocent destination of goods seized as conditional contraband rests upon the owners under the Declaration of London Order in Council, No. 2, of the 29th Oct. 1914. *Receipts of prior payment for such goods by the claimants on their own behalf and not as sale agents for consignors are evidence which would have a material bearing on the question; and therefore an opportunity should be allowed the claimants of putting in such receipts on the hearing of an appeal which were not put in at the trial in the court below, such documents having been in existence and disclosed before the trial, and the omission to put them in being the result of a mistake.*

Appeal, heard with three connected appeals, from a judgment of Evans, P., reported 14 Asp. 65; 113 L. T. Rep. 1064; (1915) P. 215.

The cargoes which had been seized and which were claimed in the Prize Court proceedings were

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

laden on four steamships belonging to neutral owners, but under time charters to an American corporation, the Gans Steamship Line. Mr. John H. Gans, the president of the company, was a German. He had resided in America for some years, but he had not been naturalised. The general agent of the company in Europe was one Wolenburg, of Hamburg. The four ships were the *Kim* (Norwegian), the *Albert Nobel* (Norwegian), the *Bjornstjerne Bjornson* (Norwegian), and the *Fridland* (Swedish). They all started within a period of three weeks in Oct. and Nov. 1914 on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat, and other foodstuffs. Two of the vessels had cargoes of rubber, and one of hides. They were captured at sea, and proceedings in the Prize Court with reference to the cargoes resulted in their being condemned as lawful prize on the ground that their ultimate destination was an enemy source of supply.

In the case of the *Kim*, the appellant, a Danish subject, claimed two parcels which had been consigned to the shippers' agents at Copenhagen. He alleged that he had paid for the goods and taken up the documents before the seizure, and that he thereupon became owner. The President held that the evidence before him failed to prove this allegation, and gave judgment against the claim.

By a petition, which was heard at the hearing of the appeal, the appellant prayed that there might be admitted in evidence documents, including two receipts, which were not put in evidence at the hearing in the Prize Court. By an affidavit in support of the petition it was stated that the documents in question had been submitted to the Procurator-General for examination before the date of the trial; that they had been produced in court and remained there throughout the hearing; that they had on several occasions been handed to the officers of the Crown at their request; and that the reason they were not put in at the hearing was that the appellant's claim, which formed one of several separate claims which were being dealt with in a long trial, was reached unexpectedly and in the absence of the representative of the appellant's solicitors.

Sir *Erle Richards*, K.C. and *Darby* for the appellant.

Sir *Gordon Hewart* (A.-G.), *R. A. Wright*, K.C., *James Wylie*, and *Pearce Higgins* for the Crown.

After consideration their Lordships granted the petition and allowed the appeal in the case of the *Kim* and dismissed the appeals in the other three cases.

The considered opinion of the board was delivered by

Lord PARMOOR.—These appeals relate to various consignments consisting chiefly of oleo stock, lard, and fat backs, which were carried on the steamships *Kim*, *Alfred Nobel*, *Bjornstjerne Bjornson*, and *Fridland* from New York to Copenhagen. The *Kim* was a Norwegian steamship which sailed from New York to Copenhagen on the 11th Nov. 1914, and was seized at Falmouth on the 1st Dec. 1914. The *Alfred Nobel* was a Norwegian steamship which sailed from New York to Copenhagen on the 20th Oct. 1914, and was captured on the 5th Nov. 1914. The *Bjornstjerne Bjornson* was a Norwegian steamship which sailed from New York to Copenhagen on the 22nd Oct. 1914, and was captured on the 11th Nov. 1914. The *Fridland* was a Swedish steamship which sailed from New York to Copenhagen on the 28th Oct. 1914, and was seized on the 10th Nov. 1914.

All the goods in question in the appeal were at the time of seizure conditional contraband. They were suitable for the provisioning of troops, and the lard and fat backs yielded glycerine, a component of high explosives. The consignments were part of a larger number of consignments—more than 600 in all—shipped by various firms of American packers. It is not necessary to consider the conditions, under which all these numerous consignments were dispatched, in order to determine whether the appellants are entitled to the release of the goods they claim. It is right, however, to say that their Lordships do not dissent from the summary contained in the case of the respondent: "Consequently in the case of every consignment there was a presumption that goods were destined for the use of the armed forces, or for a Government department of an enemy State, and that the onus was upon the owners to prove that their destination was innocent." It is necessary to consider in each case whether the appellant has established his ownership of the goods claimed, and, if so, whether he has discharged the onus of proving that their destination was innocent.

There are certain general considerations which apply to the claims in all the appeals. It will be convenient to deal with them at the outset. Subject to any special conditions, which attach to any of the consignments claimed, the consignments were carried on terms in accord with a course of business practice which had for some time been in operation. The usual practice was for the American consignors to draw bills of lading to order, and to indorse them in blank, inserting in some cases, though not in all, the name of the sale agent as the person to be notified. The bills of lading were then sent through a bank to Copenhagen with drafts for acceptance by the agent, or by whomsoever might be the purchaser in Copenhagen or Denmark. In some instances the goods were shipped in response to specific conditions made by the agent to fulfil the requirements of particular customers. In other instances the goods were shipped either to order of the agent as purchaser, or as goods to be sold by him, as sale agent, in the Copenhagen market. Under this course of business the property in the consignments purchased would pass on payment of the price, and on the taking up of the shipping documents In all cases the first question to be determined is whether the appellants prove that they have paid for the goods seized, and have thus become entitled to claim as owners. The learned President decided this question adversely to all the appellants. The respondent further contends that, whether payment can be proved or not, the goods in question were consigned to the appellants, not as independent purchasers, but merely as sale agents for the consignors. There is, however, evidence that the sale agents were allowed to purchase on their own behalf with certain limitations, and the appellants claim to have proved that the goods seized were purchased by them on their own behalf, and that they were not acting, in respect of those goods, as the sale agents of the consignors. It is only in the event of both these issues

being decided in favour of an appellant that the further question will arise, whether the appellant has discharged the onus, placed upon him, of proving that the destination of the goods was not such as to render them liable to seizure and condemnation.

ERIC VALEUR.

The claimant Eric Valeur is a Danish subject, a dealer in lard, oleo and oils, used in the manufacture of margarine. There is no allegation made against his character as a merchant. He was entitled as a neutral to trade with Germany, subject to the risk of the capture and condemnation of his goods by a belligerent in exercise of belligerent rights. He claims two consignments from the cargo of the *Kim*: 140 tierces oleo stock marked "M.P. 208 Copenhagen"; 100 tierces oleo stock marked "M.P. 218 Copenhagen."

The oleo stock marked "M.P. 208 Copenhagen" was shipped by Morris and Co., a company incorporated under the laws of the State of Maine (U.S.A.). The bill of lading contains the following terms: "Consignee and destination order, Morris and Company, Copenhagen, Denmark. Party to be notified, Morris Packing Company, Christiana, Norway." Morris and Co. had head offices in many of the principal towns in Europe, but not in Copenhagen. Their head office in Scandinavia was in Christiana, where the Morris Packing Company have been established for several years. The goods are to be delivered as consigned, or to consignees' assigns, upon payment of the freight charges. The conditions as to delivery and payment in the case of the two consignments of oleo stock M.P. 218, aggregating 100 tierces, are substantially the same as in the case of consignment M.P. 208. There is a note attached to the bill of lading that the merchandise covered thereby is the sole property of Morris and Co., but the case for the claimant is that, prior to the date of seizure, the property in the goods had passed to him, by payment of the price and delivery of the documents. The affidavit filed on behalf of the claimant states that his agency on behalf of Morris and Co. comprehends Denmark only, and a schedule is attached differentiating between goods sold by the claimant as agent and those bought by him on his own account. Among the goods stated to be bought by him on his own account are the goods in question, being the consignments M.P. 208 Copenhagen and M.P. 218 Copenhagen. In confirmation of this statement a sale note was produced purporting to show that the oleo stock M.P. 208 was sold to the claimant on the 13th Oct. 1914 for prompt shipment upon the terms "cash less 1 per cent. against documents, destination Copenhagen." This document is not dated, but the price payable is calculated at kr. 26,561.54. A sale note is produced in similar terms relating to the consignment M.P. 218, dated the 19th Oct. 1914. In this case the document is dated the 16th Nov. 1914, and the invoice price is calculated at kr. 14,212.23.

There is nothing unusual in the form of these documents, and there is no reason to doubt their genuine character. They support the contention of the claimant that in the business of these consignments he was acting as purchaser, and not merely as sale agent. They are not sufficient in themselves to prove that payment had been made or that the property and the goods had passed to the claimant before the date of seizure. A petition was, however, presented on the hearing of the appeal asking their Lordships to allow the production and admission of two documents which were said to be the receipts for payment, but which had not been formally put in at the trial.

After the learned President had given his decision an application was made that two documents, purporting to be the receipts for payment, might be included in the record, although these documents had not been put in during the hearing in the Prize Court. This application was dismissed by the registrar, whose decision was upheld on appeal by the President. In support of the application to their Lordships, an affidavit was filed by Thomas H. Warland, managing clerk for the solicitors of the appellant. It was sworn in the affidavit that the two receipts marked respectively "T.H.W. 1" and "T.H.W. 2," produced and shown to him were received by him from Messrs. Botterell and Roche on the 12th March 1915, and that he was informed and verily believed that the said receipts were received by Messrs. Botterell and Roche from Mr. Drexell, the agent in this country of a Danish war risk insurance, for goods, in the month of March 1915, after they had been amongst other documents submitted to H.M. Procurator-General; that these receipts were included in documents referred to in the affidavit sworn in this cause on the 10th Dec. 1917, and included in the record. This affidavit states that all the said documents "were produced in court and remained there during the whole period at the trial, and were on several occasions handed to the law officers of the Crown at their request so as to enable them to offer any criticism which they might desire to make upon any or all of the documents, which had been sent to this country by the claimants in support of their respective claims."

The affidavit then states in pars. 5 and 6 the reasons why the documents were not put in at the trial. "(5) The reason why the documents set out in Supplemental Record 'A' were not put in on the hearing of these cases in the Prize Court is, the deponent attended in court with the documents printed in Supplemental Record 'A' for nine days, but the cases involved in this appeal were not reached. On the closing of the court on each of the said nine days the deponent left the documents printed in Supplemental Record 'A' in a bag in the care of the usher of the court.

"(6) On the morning of Wednesday, the 28th of July 1915, the deponent had an important engagement in the City, and, being under the impression that these cases were not likely to be taken for another day or two, did not attend in court until 2 p.m. When he arrived in court he was informed by the counsel briefed in the cases, on behalf of the claimants, that they had been called on suddenly and that he had not been able to communicate with the deponent's office."

The effect of this affidavit is to show that the documents in question were in existence and had been submitted for examination to H.M. Procurator-General before the date of the trial, that they had been produced in court, remaining there during the whole period of the trial, and that they had on several occasions been handed to the law officers of the Crown at their request, so as to enable

them to offer any criticism which they might desire to make; and that the reason they were not put in at the hearing was that a mistake was made as to the date at which the case of the claimant would be called on in court, during the course of a long trial, including a number of parties whose claims were separately heard, and which depended largely on different considerations and special evidence.

Under these special circumstances their Lordships decided, during the hearing of the appeal, that the documents having been in existence before the date of the trial, and open to the inspection of the respondent, and the omission to put them in being the result of a mistake, as explained in the affidavit, it was in the interests of justice that the documents should be produced and admitted. The case is clearly distinguishable from one in which evidence is alleged to have been discovered subsequently to the hearing in the Prize Court and not open to the objections which arise in such cases. In several instances their Lordships have refused an application to admit such evidence. The documents were thereupon produced before their Lordships, and no question was raised as to the genuineness of their character. They are receipts for payment by the claimant on the 13th Nov. 1914 of the sum of kr. 26,561.54 in exchange for documents covering 140 tierces extra oleo stock, being the 140 tierces M.P. 208; and for payment by the claimant on the 16th Nov. 1914 of the sum of kr. 12,204.23 in exchange for documents covering 100 tierces peerless oleo stock, being the 100 tierces M.P. 218.

These receipts are evidence sufficient to prove that payment was made at the respective dates in exchange for the attached documents. On such payment the property in the goods in question passed to the claimant, and the payment was made prior to the date of seizure. Their Lordships therefore find, on evidence which was not before the learned President, that the claimant, Mr. Eric Valeur, has proved that he was the owner of the goods claimed at the date of seizure. Having regard, however, to the failure to put these documents in at the trial in the Prize Court, their Lordships propose to make a special order as to costs, which will be referred to later.

The further question, therefore, as to the effect on the appellant's claim of the provisions of the Declaration of London Order in Council No. 2 of the 29th Oct. 1914 arises for decision. These provisions clearly apply. They were in operation both at the date when the *Kim* sailed and at the date when she was seized. The Order in Council of the 29th Oct. 1914 repealed the earlier Order in Council of the 20th Aug. 1914, and provided that, notwithstanding the provisions of art. 35 of the Declaration of London, 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; and that in such cases it shall lie upon the owners of the goods to prove that their destination was innocent. Therefore in this appeal the question is whether the appellant has discharged the burden which the Order places on him of proving the innocency of the destination of the goods. In order to discharge the burden which lies upon him, the appellant states that the goods were required for consumption in Norwegian and Danish margarine factories. *Primâ facie* there is no improbability in this allegation, and it is not inconsistent with the statistical evidence produced on behalf of the respondent. The evidence of the claimant is that out of the 140 tierces oleo stock M.P. 208 eighty tierces were sold to Danish margarine makers, but that these orders were cancelled, so that the whole lot became unsold; and that out of the 100 tierces peerless oleo stock M.P. 218, fifteen tierces were sold to Margarine Fabrik Samhold, Stavanger, Norway, and thirty tierces to Odense Margarine Fabrik, Odense, Denmark, but that this latter order was cancelled, so that eighty-five tierces were unsold. In support of this case a document is produced of the 23rd Oct. 1914, before the date of the sailing of the *Kim*, directed to the appellant, and confirming a purchase of seventy tierces Morris extra stock on terms of nett cash against documents, shipment first half of November from factory in America, including sea insurances. On the 28th Nov. 1914 there is a sale note of seventy tierces extra stock to Faellesforenngen, &c., Margarine Factory, Viby, identified as part of M.P. 208, nett cash against documents. There is no reason for holding that these documents are not genuine, and they corroborate the statement made in the affidavit of the claimant. Under these circumstances their Lordships are of opinion that the appellant has discharged the burden which the order places upon him of proving the innocency of the destination of the goods. In the result the appeal of Eric Valeur succeeds. Their Lordships will humbly advise His Majesty accordingly. There will be no costs of the appeal.

PAY AND CO.

The firm of Pay and Co. consisted of Carl Marius Pay, a Norwegian, carrying on business in Copenhagen since 1901 as a dealer in provisions, raw materials of butterine and margarine. It is alleged that the greater part of the purchases of the firm were made for the purpose of keeping up stock, in order to comply with orders from customers who were all resident in Scandinavia. The shipments of the appellants were mainly in lard products. There were four shipments on the *Kim*, two on the *Alfred Nobel*, three on the *Bjornstjerne Bjornson*, and one on the *Fridland*. The learned President has decided that in the case of all these shipments the appellants acted as agents for the consignors, and that they had failed to satisfy him that in any instance they were the owners of the goods claimed. The shippers were Sulzberger and Sons, Morris and Co., and the Southern Cotton Oil Company. The consignments were shipped to order of the shippers, but in the case of Sulzberger and Sons there was a direction to notify the appellants. The firm of Sulzberger and Sons had for many years, prior to the war, maintained a resident agent in Denmark for sale of its products on commission, and the appellants had acted as such sale agents. The practice of Sulzberger and Sons did not differ from the usual practice followed in the case of consignments dispatched to Denmark by American packers. They drew bills of lading to order, endorsed them in blank, and inserted the name of the agent as the person to be notified. The bills were then sent through a bank at Copenhagen, with drafts for acceptance by the agent, or by whomsoever might be the purchaser in Copenhagen, or in Denmark. In some instances goods were shipped to Copenhagen in response to specific

requisition by the agent, in other instances they were shipped to the agent to be sold on the open market in Copenhagen. The appellants state that on or about the 1st Aug. 1914 their agency for the firm of Sulzberger and Sons was cancelled, and that since that day Leopold Gyth had been the agent of the firm for the sale of its products in Denmark; the evidence, however, shows that the agency continued to a later date, and did not terminate earlier than Jan. 1915.

On the 6th Dec. 1914, five days after the capture of the *Kim*, the appellants wrote a letter to H.M. Procurator-General inclosing letters, telegrams, invoices, and bills of lading which were said to tell their own tale, and to prove that the goods in question were intended for the firm of the appellants. On the 13th Feb. 1915 the appellants wrote a second letter to H.M. Procurator-General, stating that all the goods, including those shipped by Sulzberger and Sons, had been bought by them as customary c.i.f. Copenhagen, and that they had no knowledge whatever as to by what ships these parcels would be shipped, that most of the goods were insured in British Lloyd, and the remainder in Danish and Norwegian companies. Is there sufficient evidence that the goods referred to in the above letter had become the property of the appellants at the date of seizure? The course of business pursued is not in itself unusual, and there seems no reason for doubting the character of the letter, but the goods would not become the property of the appellants until payment, and the question to be determined is whether the appellants have proved payment. It is the more essential to examine carefully the evidence adduced by the appellants in proof of payment as purchasers, seeing that it is alleged that in all these transactions they were acting, not as purchasers, but as sale agents on behalf of their principals.

The evidence adduced by the appellants in proof of payment consists of a letter written by them to Danske Landmandsbank Hypothek and Vekselbank on the 21st Nov. 1914, of the answer thereto of a letter of the 24th Nov. 1914, and of a further letter from the Danske Landmandsbank to Botterell and Roche of the 6th April 1915. The first letter in the correspondence incloses a list of shipments on the *Alfred Nobel*, the *Fridland*, and the *Bjornstjerne Bjornson* between the 24th Oct. 1914 and the 16th Nov. in the same year, and in regard to these shipments includes a bank statement of drafts drawn at sight by the various shippers. The answer of the bank on the 24th Nov. 1914 states "that for your account we have paid and placed to your credit the following amounts for shipments." It was suggested on the hearing of the appeal that "credit" had been wrongly inserted and that "debit" should be substituted. Then follows the list of shipments set out in the letter of the 21st Nov. 1914. The letter further states: "The bills of lading in question are de-deposited in this bank, and in accordance with same, the destination of all these goods is Copenhagen. We further beg to state that hitherto we have not from your esteemed firm received any instructions to transfer these bills of lading to any other receiver than your esteemed firm." It will be noted that none of the shipments on the *Kim* are included in the correspondence, but the explanation given is that the shipments were of later date. In the further letter from the Danske Landmandsbank, the 6th April 1915, the bank incloses original and duplicate bills of lading covering five of the shipments referred to above, and says: "We would add that these documents have been taken up under a documentary credit opened by us for account of the said firm, and consequently proceeds of the shipment or fresh documents covering the shipments or similar shipments in substitution are to be handed to our bank." Are these letters sufficient evidence of payment by the appellants before the dates of seizure?

The answer must be in the negative. The most important letter is that of the 24th Nov. from the Danske Landmandsbank to the appellants. It is difficult to understand the true meaning of this letter, but it clearly cannot be accepted as proving that the shipments referred to had in fact been paid for by the appellants before the dates of seizure.

At the hearing of the appeal an application was made that leave should be granted to refer to certain documents included in the supplementary record "B," containing, *inter alia*, certain letters between the Danske Bank and the appellants. This petition was not granted. The result is that the appellants fail to establish their ownership of the goods claimed at the dates of seizure. In the case of the shipments on the vessels other than the *Kim*, the Order in Council of the 29th Oct. 1914, although not promulgated at the date of sailing, had been promulgated at the date of seizure, and therefore would apply to the goods captured; but, except as regards one consignment on the *Kim*, all the goods remained unsold at the date of capture. It would not be possible under these circumstances to say that the appellants, even if they had established their right to claim as owners, had discharged the burden which the Order in Council places upon them. Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

BRODRENE LEVY.

The firm of Brodrene Levy consists of two partners, Herman Levy and James Levy, both of whom are Danes. The firm was established in Copenhagen in the year 1888, and has carried on business as merchants, dealing in herrings, codfish, and provisions. The business is with customers all over Denmark.

The appellants claim in repect of goods carried on the *Kim*, the *Bjornstjerne Bjornson*, and the *Alfred Nobel*. The dates of purchase are alleged to have been the 3rd and 4th Oct. 1914, and the goods are said to have been purchased for the purpose of furnishing regular buyers, and to have been placed with ordinary stock, so that the firm might be in the condition to comply with the orders of customers, from time to time, when received. It is not necessary to examine the consignments in detail. The two parcels shipped on the *Alfred Nobel* were included in a list of consignments claimed by Morris and Co. The second consignment on the *Alfred Nobel*, as well as the consignment on the *Bjornstjerne Bjornson*, was shipped by Morris and Co. to order of Morris and Co., Copenhagen. Party to be notified, Morris Packing Company, Christiana. The same practice was followed in the shipments on the *Kim*, both in regard to the parcel said to have been bought from Backstrom of Stockholm, as well as in the case of the parcels said to have been purchased

from Armour and Co. It is clear, therefore, that evidence of payment is necessary in order to prove ownership. This fact is recognised by the appellants.

In the affidavit of Hermann Levy it is stated that the firm have paid for the goods and taken up the shipping documents, and that they have become the property of the firm. No document is, however, produced to support this contention, and no receipt is forthcoming.

In the absence of such evidence their Lordships are not satisfied that the appellants were at the date of seizure owners of the goods claimed or that there is any reason for dissenting from the judgment of the learned President. Their Lordships will humbly advise His Majesty that this appeal shall be dismissed with costs.

THE KORSOR MARGARINE FABRIK.

The appellants are a margarine factory carrying on their business at Korsor in Denmark. They claim thirty tierces oleo oil M.P. 190 on the *Kim*, said to have been bought from Eric Valeur, and thirty tierces of oleo stock M.P. 191 on the *Fridland*, also said to have been purchased by them from Eric Valeur. Both consignments were shipped by Morris and Company to order of Morris and Co. Copenhagen (party to be notified, Morris Packing Company, Christiana), and were claimed to be the property of Morris and Co. In the documents attached to the affidavit of Eric Valeur the thirty tierces oleo stock M.P. 190 are stated to be sold by them, not on their own account, but as agents to the Morris Packing Company, and in a later letter attached to the same affidavit on the 19th Oct. 1914 the contracts for purchase were forwarded, including both consignments from the Morris Packing Company, with the request that the appellants would kindly return the copies duly furnished with their signature. There were no further documents produced to support the claims of the appellants, and no attempt was made to prove payment, prior to the date of seizure.

It is clear, therefore, that the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for the appellants, *Thomas Cooper* and *Co.*; *Botterell* and *Roche*.

Solicitor for the Crown, *Treasury Solicitor*.

May 11, *Nov.* 5, 6, 1920, *and Jan.* 25, 1921.

(Present: Lords SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE OSCAR II. (No. 2). (*a*)

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

Prize Court—Property found to be enemy property under Reprisals Order in Council of the 11th March 1915*—Subsequent sale by enemy owner to neutral purchaser—Treaty of Versailles, art.* 297.

In 1915 *the O. II., a neutral vessel, carrying* (inter alia) 350 *bags of clover seed consigned to Copenhagen, touched at a British port, when the seed was ordered to be seized as prize. The O. II., however, was allowed to proceed upon the undertaking of her owners that the seed should be returned. In* 1917 *the claimant, with knowledge of these facts, purchased the interest in the seed at Copenhagen from the agent of the enemy owner for* 42,000 (*odd*) *kronen, and paid into court* 52,000 (*odd*) *kronen as a condition of the release of the goods and as representing their proceeds. On the* 10*th Jan.* 1920 *the Treaty of Versailles was ratified. By art.* 297 (*b*) *this country reserved "the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present treaty to German nationals. . . ."*

Held, that, the effect of the Reprisals Order in Council of the 11*th March* 1915 *not being to divest the original German owner of the seed of his right of disposal thereof, the fund was not within art.* 297 (*b*), *and must be paid out of court to the claimant, the neutral purchaser.*

MOTION for payment out of court.

The facts and contentions are fully set out in his Lordship's judgment.

Sir *Gordon Hewart* (A.-G.) and *J. Wylie* for the Procurator-General.

R. H. Balloch for the claimant.

Sir HENRY DUKE, P.—This is a claim by Peter M. Kaae, a trader of Copenhagen, a Danish subject, for payment out to him of a fund in court of between 3000*l.* and 4000*l.*, which represents 52,919kr. paid into court as a condition of the release to him of 350 bags of Alsyke clover seed. The goods had been seized in course of transit from New York to Malmo in December of 1915. By an amendment, dated the 11th Jan. 1918, to a writ in prize which had been issued by the Procurator-General in Feb. 1916, the Procurator-General claimed condemnation of the goods as prize, or alternatively detention under the Reprisals Order of the 11th March 1915. That cause of condemnation was pending until March 1919, when it came to trial. A claim had been interposed on behalf of a firm in New York, Herbst Brothers and Co., who claimed to be the owners of the goods which had been consigned by Bushnell and Co., a firm of forwarding agents, to Hermann Lindberg. In March 1917, when the cause was pending on the claim of the Procurator-General for condemnation or detention, the claimant, under the circumstances stated in his affidavit, purchased whatever property there was in the vendor of these goods, one Rasmussen, and purchased them at a price of 42,000 odd kronen. It is said quite truly on the part of the Crown that he took his chance—if the goods were subject to condemnation as prize he lost his money; if the goods were not subject to condemnation as prize, but were liable to the fate which awaited goods by virtue of the clauses of the Reprisals Order of March 1915, then his ultimate right to demand delivery of the goods—or of the fund which he brought into court to be the substitute for the goods—must depend upon the proper effect of the Reprisals Order on a transfer of goods brought in under that order, and purchased, after being brought in, by a neutral claimant. No question has been raised that the claimant honestly bought the rights of his vendor in the 350 bags of clover seed, and that—subject to the effect of the Reprisals Order in Council, of the judgment of Lord Sterndale at the hearing of the cause, and of the provisions of the Treaty of Peace—the purchase by the claimant was effectual to transfer to him such rights as his vendor could transfer at the time

(*a*) Reported by SINCLAIR JOHNSTON and W. E. REID, Esqrs., Barristers-at-Law.

of the transaction. I dwell upon this part of the matter because it has been made clear to me on the part of the Crown that what is desired in this case is not to defeat the claim upon some collateral ground, but to have the question decided as to what is the effect of the Treaty of Peace upon such a purchase as has been made by the claimant in this case. I therefore limit what I propose to say to that question, and I put aside all collateral questions which might conceivably have arisen.

I have to consider first of all what was the effect of the Reprisals Order? That is necessary in order to see what was the right of an enemy owner of goods at the date, March 1917, when the owner of these goods, whom I must take to have been an enemy owner, sold them to the present claimant. The Reprisals Order of March 1915 does not appear to me to be designed, of its own effect, to divest any enemy of his property. It leaves rights in prize to be determined in prize—questions of enemy goods under an enemy flag, enemy goods captured by various means, contraband, and all questions of that kind it leaves where it found them. But it makes provision for the lawful interception of goods coming from German ports which are enemy property, and of goods proceeding to German ports, and it provides with regard to vessels sailing from ports other than German ports after March 1915—and having on board goods which are enemy property—that such vessels may be required to discharge their goods in a British or allied port; that the goods so discharged are to come into the custody of the marshal; if they are not requisitioned, they are to be detained or sold, and, if sold, the proceeds are to be paid into court and dealt with in such manner as the court may in the circumstances deem to be just. Then there is this proviso, that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace, except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of the order. I do not find anything in the terms of the relevant articles of the Reprisals Order which purports to divest enemy property or subject it to confiscation. It provides for detention, and it creates the jurisdiction in the Prize Court to deal with detained enemy goods in the way in which goods brought in as prize may be dealt with in a Prize Court; but it leaves the ownership in those goods as it found the ownership. It subjects the goods to be detained and to be kept in court, or their proceeds to be detained and kept in court, and neither the goods, nor the proceeds, are to be parted with except upon the application of the Crown, or with the consent of the Crown. That was the state of affairs as to these 350 bags of clover seed when the present claimant made his purchase from Rasmussen. Rasmussen represented the owners of goods lawfully detained in this country until the close of the war. The claimant purchased their interest in those goods. Everything Rasmussen could grant to the claimant he got; Rasmussen was not disabled by any means known to British law, or to international law, from making his bargain with the claimant. That was the event of March 1917.

In March 1919, as I have said, the cause of condemnation instituted by the Procurator-General, with the claim raised in it by Herbst Brothers, came on for determination. There was no condemnation, and condemnation was not then sought, so that these goods were not prize, and were not confiscated. But there was a decision that the 350 bags of clover seed (identifying them) had an enemy destination, and they were pronounced to be enemy property. It is suggested that that decree determined some question relevant to the issue which I have to determine. In my judgment, the decree determined only that at the time when these goods were seized and brought in they were enemy property. That clearly was the intention of my predecessor, Lord Sterndale, as appears from the language used by him in delivering his judgment. It not only was his intention—it was the necessary limitation of the judgment—because the only question which had to be decided was whether, when these goods were seized and brought in, they were enemy property, and that was determined. The decree of the 21st March 1919 does not, in my judgment, determine any question which comes before me to be decided. I have, therefore, these facts: goods detained under the Reprisals Order adjudged to be properly held under the Reprisals Order and adjudged to have been, at the time of seizure, enemy property; and, pending the determination of the court, a sale by the enemy owner to a neutral purchaser—the claimant.

It is to that state of facts that I have to apply the terms of the Peace Treaty, and, in particular, of art. 297. If the fund at the time of the Peace Treaty had been the property of any German subject, art. 297 would have been effective to transfer all proprietary interests in it to His Majesty the King. Art. 297 effectually provides by treaty between the Sovereign Power of Germany and the Sovereign Powers of the United Kingdom and her allies, that assets such as this fund, which belong, at the time of the coming into force of the treaty, to German nationals, or companies controlled by them within the territories, colonies, possessions, and protectorates of the allied Sovereigns, shall vest, for the purposes named in the treaty, in the respective allied Sovereigns. The goods are claimed by the Crown as having passed under the treaty. It is said, however, by Mr. Balloch on the part of the claimant, that when the limitation in the treaty is examined, this fund, the proprietary interest in which had been purchased by a neutral purchaser in 1917, clearly was not property, rights, or interests, belonging at the date of the coming into force of the treaty to German nationals. I have examined the question whether the effect of the Reprisals Order was to divest the original German owner of this fund of his right of disposal of it; and, in my opinion, as I have said, it was not. I have examined the judgment of Lord Sterndale to ascertain whether he had made any determination which affects this claim, and I am satisfied that he had not. I now have examined the Peace Treaty, and I am satisfied that this fund is not within the description of "property," "rights," and "interests," which are dealt with by art. 297 (*b*) of the Peace Treaty. It was not a fund belonging to a German national at the time there named. This, therefore, is a fund which ought to be paid out of court to the claimant.

The Procurator-General appealed.

James Wylie (Sir *Gordon Hewart*, A.-G., with him) for the appellant.

Balloch, for the respondent, was not called on.

The considered opinion of their Lordships was delivered by

Lord PARMOOR.—The respondent in this case trades under the firm name of Joergen Jensens Successors, Copenhagen. In March 1917 he bought from Knud Rasmussen, of the firm of Levysohn and Rasmussen, Copenhagen, the bills of lading for a consignment of clover seed shipped at New York on a Danish ship, which sailed on or about the 4th Dec. 1915 from New York for Copenhagen. On the arrival of the ship at Kirkwall in December the clover seed was seized as prize, but permission was given to take it to Copenhagen, on an undertaking, by the owner of the ship, that it would be returned to the United Kingdom for the purpose of being placed in the Prize Court. The respondent, on the 25th March 1917, paid for the bills of lading kr. 42,335.20, and applied to the British Legation at Copenhagen for permission to have the goods delivered. It was made a condition that a sum of kr. 52,919.00 should be deposited, and thereupon the respondent received delivery of the clover seed. The amount deposited was transmitted to the Admiralty marshal, and paid into the Prize Court by him for adjudication. This is the sum of 3639*l.* 10*s.* 11*d.* now in dispute.

On the 11th Jan. 1918, by an amendment to a writ, which had been issued in Feb. 1916, the Procurator-General claimed condemnation of the clover seed as prize, or, in the alternative, detention under the Reprisals Order of the 11th March 1915. The cause came on for trial in March 1919, when a claim was made on behalf of a firm in New York, Herbst Brothers and Co., who claimed as owners and shippers of the goods. The Procurator-General did not ask for the condemnation of the goods (or their proceeds) as contraband, but for an order of detention under the Reprisals Order of the 11th March 1915, on the ground that the goods had an enemy destination and were enemy property. The learned President, Lord Sterndale, decided that Herbst Brothers and Co. were acting as agents and intermediaries for the German firm of Ernst und von Spreckelsen, passing the goods through one Hermann Lindberg, and that they never really had the property in the goods. He accordingly pronounced the goods to have had an enemy destination, and to be enemy property, and ordered the proceeds of sale thereof to remain in court until the end of the war or pending further order of court. The only question which came before him for decision, and which he decided in his judgment, was that the goods when seized were enemy property. The respondent is not concerned to question this decision, and it does not affect the claim which he makes.

It is not disputed that the respondent purchased from an enemy. The purchase was honestly made, but subject to the risk of all belligerent rights, consequent on the seizure of the goods. The learned President states in his judgment that it had been made clear to him on the part of the appellant that it was not desired to defeat the claim on some collateral ground, but to have the question decided of the effect of the Treaty of Peace upon such a purchase as the respondent had made, and that he proposed to limit his judgment to that question, and to put aside all collateral questions which might conceivably have arisen. Having regard to this statement, it is not open to the appellant to raise collateral questions on the hearing of the appeal.

It was argued on behalf of the appellant that the decision of Lord Sterndale affected adversely the claim of the respondent. Their Lordships are unable to accept this contention. No doubt Lord Sterndale found that the goods at the time of seizure were enemy property, but they were not condemned as contraband, and the only order made was an order for detention of the proceeds of the sale of the goods until the end of the war, or pending further order of the court. No question was raised at the hearing before Lord Sterndale as to the effect of a detention order in the case of goods which at the date of seizure were enemy property, but which had subsequently been transferred to a neutral.

It was further argued that the Reprisals Order of the 11th March 1915 operated to restrict the rights of the neutral purchaser in March 1917. The relevant article of the Reprisals Order provides 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 of enemy property, may be required to discharge such goods in a British or allied port. The steamship *Oscar II.* is a vessel within the terms of this article, and at the time of seizure was carrying goods of enemy property. The article proceeds: "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 under the circumstances deem to be just. Provided that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace, except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of the order."

In international law there is no rule which forbids the purchase of goods by a neutral from an enemy after seizure by a belligerent. Such a purchase is no doubt subject to all rights which accrue to a belligerent as a consequence of the seizure. For instance, if the goods purchased by a neutral are condemned as prize in a Prize Court, this is a risk which a neutral must have known would attach to his purchase at the time when he made it, and defeats any right which he otherwise might have to claim the goods. On the other hand, if, apart from the operation of some special order such as the Reprisals Order of the 11th March 1915, the purchased goods are liberated by the Prize Court, the ownership of the neutral purchaser becomes effective, if, as is admitted in the present case, the transaction has been carried through by a *bonâ fide* transfer which in itself is not open to question, and which the appellant does not question.

In the present case the only special order which can in any way affect the claim of the respondent or restrict his rights is the Reprisals Order of the 11th March 1915. The question therefore arises, whether this Reprisals Order operates to defeat the claim of the respondent to the proceeds of the goods. The order was passed *alio intuitu*. The object was to provide in specified cases for the detention of goods seized, or their proceeds, until the close of the war, in order to insure that, during the war, the enemy should not be benefited, either by obtaining possession of the goods, or of their proceeds. The order does not affect the ownership of property. It leaves the ownership just as it would have been if the order had not been passed. It does not purport to deprive a neutral purchaser of a right, to which

he would otherwise be entitled, and which does not conflict with any belligerent right. There is not a word in the order which can be construed as depriving an enemy owner of the right which he otherwise would possess to transfer the goods seized or their proceeds to a neutral purchaser, or as invalidating the title of the neutral purchaser. Whatever interest in the goods therefore Rasmussen possessed at the time of sale, as representing the owner of goods detained until the close of the war, passed under the terms of the purchase to the respondent; and the respondent, as a neutral purchaser, is entitled to claim payment of the proceeds of the goods after the close of the war, unless he is placed under a disability either by the terms of the Treaty of Versailles or of the Treaty of Peace Order of the 18th Aug. 1919.

If the effect of the Reprisals Order of the 11th March 1915 has been accurately stated, it is impossible to maintain that art. 297 of the Treaty of Versailles and the Treaty of Peace Order of the 18th Aug. 1919 can operate to defeat the claim of the respondent. Art. 297 reserves to the Allied and Associated Powers the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the treaty. Germany undertakes to compensate its nationals in respect of the sale or retention of their property, rights, or interests in allied or associated States.

The money claimed as proceeds of the sale of Alsyke clover did not belong to a German national at the date of the coming into force of the treaty, but to a neutral. The contention on behalf of the appellant involves therefore a claim to confiscate, under the terms of the treaty, property at that date vested in a neutral owner, a contention which is negatived by the words of limitation in the terms of the treaty, and which is not capable of serious argument. The same limitation is to be found in the terms of the Treaty of Peace Order. The property charged under that order is all property, rights, and interests belonging to German nationals at the date when the treaty comes into force (not being property, rights, or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation, or other dealings therewith. It does not affect in any way property which at the date when the treaty came into force, was the property of a neutral. The appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for the appellant, *Treasury Solicitor.*

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

Oct. 29, *Nov.* 1, 1920, *and Jan.* 25, 1921.

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

THE VALERIA. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Enemy ship—Capture of German vessel in Norwegian waters — Subsequent loss of ship — Claim for restoration in money—Restitutio in integrum.

On the 19th March 1918 a British cruiser captured the V., *a German steamship, in Norwegian territorial waters. The cruiser was unaware that she was within the territorial limit. On the way to Lerwick, under escort, the* V. *had to be abandoned owing to very bad weather, and as she would have been dangerous as a derelict, she was sunk by gunfire. The Norwegian Government claimed restoration of the vessel in money.*

Held that, though the Norwegian Government might be entitled to have the V. *released to them had she been in existence, because the sovereignty of the King of Norway had been wronged by her capture in territorial waters, it did not follow that if she was not in existence her value in money must be restored to them. The principle of redress was* restitutio in integrum *not reparation. The Government of Norway had no property or interest in the ship nor possession, nor did it appear that the Government had come under any liability or incurred any expense, except for costs in respect of the capture. Payment of the value of the ship would either leave in the hands of the Norwegian Government a profit on the whole transaction or would constitute the Government a trustee for the enemy owners, and in neither case would the payment come within the principle of an indemnity.*

The Dusseldorf (14 *Asp. Mar. Law Cas.* 478, 15 *Asp. Mar. Law Cas.* 123; *L. T. Rep.* 732; (1920) *A. C.* 1034) *distinguished.*

Judgment of Sir Henry Duke, P. (*reported* 122 *L. T. Rep.* 751; (1920) *P.* 81) *affirmed.*

APPEAL from a judgment of the President of the Prize Court (Sir Henry Duke), dated the 14th Jan. 1920, reported 123 L. T. Rep. 751; (1920) P. 81.

Sir *John Simon*, K.C., *Butler Aspinall*, K.C., and *Balloch* for the appellant.

Sir *Gordon Hewart* (A.-G.) and *Dunlop*, K.C. for the respondent.

The following cases were referred to:

The Maria and Vrow Johanna, 1803, 4 C. Rob. 348;
The Betsey, 1798, 1 C. Rob. 93;
The Anna, 1805, 5 C. Rob. 373;
The Der Mohr, 1802, 4 C. Rob. 314;
The Zamora, 13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;
The Bangor, 13 Asp. Mar. Law Cas. 397; 114 L. T. Rep. 1212; (1916) P. 181;
The Dusseldorf, 14 Asp. Mar. Law Cas. 478, 15 Asp. Mar. Law Cas. 84; 122 L. T. Rep. 237; (1919) P. 245; 123 L. T. Rep. 732; (1920) A. C. 1034;
The John, 2 Dods. 336.

The considered opinion of the board was delivered by

Lord SUMNER.—This is a "claim of territory" made by the appellant on behalf of His Majesty

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

the King of Norway. It is preferred in a cause in prize instituted by the Procurator-General in order that all outstanding questions as to the *Valeria* might be disposed of. On the 19th March 1918 H.M.S. *Glendale* captured the *Valeria*, a German vessel, about fifty yards within the limits of the territorial waters of Norway. The captors had no intention of intruding on those waters and believed, though erroneously, that they were outside of them, nor was their mistake due to negligence or rashness. The *Glendale* proceeded to escort the *Valeria* towards Lerwick, but encountered very bad weather, and had to take the officers and crew off the prize and to abandon her. As a derelict she would have been a danger to navigation and she was properly sunk by gunfire. This is common ground between the parties to the appeal. It must be taken that the ship was lost by natural causes, and not by the conduct of the captors, though she was sailing under their direction. The personal claim of the Norwegian pilots is to be dealt with elsewhere and is not now in dispute. Accordingly the sole question raised is one of law.

The appellant's case is that, having done wrong in seizing the ship, the captors ought to restore her *in specie*. As they cannot do that they must restore her in money. This involves the proposition that, having seized her in neutral territorial waters, they became insurers of her against all risks and in all events whatsoever for the benefit of the neutral Sovereign. The appellant's counsel did not shrink from putting the case.

Both authority and principle were appealed to. For the former *The Dusseldorf* (14 Asp. Mar. Law Cas. 478; 15 Asp. Mar. Law. Cas. 84; 123 L. T. Rep. 732; (1920) A. C. 1034) was relied on. In that case their Lordships observed: "Simple release of the ship in this country to the claimant Sovereign may be an inadequate redress. The fact that the court has duly received into its charge and jurisdiction a ship, which ought not to have been seized at all, leads to the conclusion that the true claim of the appellant" (who was the same official as the appellant in the present case) "is for a *restitutio in integrum* so far as the Government of Norway are concerned."

From this the conclusion was drawn that *restitutio in integrum* involved the payment of money in case of the fortuitous loss of the ship. Their Lordships do not agree. No such consideration arose in *The Dusseldorf*. There the ship existed *in specie* and the right of the claimants to her release was uncontested. What was in debate was, whether it was sufficient to place the ship at the disposal of the Norwegian Government in a British port or whether, as the equivalent of returning her to the waters from which she had been taken, the cost of transporting her from England to Norway should be paid. If this were not done, however venial and trivial the captors' original error might have been, the Government of Norway might be put to unmerited inconvenience and expense by reason of an act of which they had the right to complain. This was the connection in which the expression *restitutio in integrum* was used. The case had no analogy to the technical *restitutio in integrum* of Roman law, nor to the measure of damages for injury to property wilfully or carelessly inflicted, nor were such matters considered. The plain fact is that no money can restore this ship, and to claim money, with which to buy another ship, or as a *solatium* for her loss, is to shift the ground of the claim from restitution to reparation.

The judgment in *The Dusseldorf* further observed: "It may therefore well be that the rules which apply to capture on the high seas are by no means closely applicable to capture in neutral territorial waters."

One of such rules, apart from questions of probable cause for the original seizure, is that the court does not hold captors liable for damages and costs where their dealings with the prize have been reasonable and prudent and where, if she has been lost, it has not been through their neglect or default. The passage above quoted does not imply that in case of a claim of territory the exact opposite must be the rule, and that the captors must be decreed to pay for the ship, if, however excusably, they are unable to produce and return her. Their Lordships find in the language used in *The Dusseldorf* no warrant for the present contention.

Although this matter arises virtually, if not formally, between Sovereign and Sovereign, their Lordships, as a court, are bound to act judicially. It may be right that such claims should be encouraged, so that all sense of grievance in neutral Sovereigns may be peacefully and regularly removed, but their Lordships, however disposed to the fullest liberality of treatment, must be guided by settled rules and decisions. Anything in excess of this must be sought, if at all, through diplomatic channels. The Government of Norway had no property or interest in this ship; they had no possession of her nor, so far as appears, have they come under any liability or incurred any expenses, other than costs, in respect of her capture. Alike in vindication of their Sovereign's territorial right and of his high obligations of impartiality as a neutral in time of war, they claim on his behalf that the steps which the captors took should be retraced, that what was done should be undone, and that the belligerent should retain no advantage from the captor's mistaken action. This is His Norwegian Majesty's right, but compensation in money for the loss of the ship under circumstances such as these can only be asserted in the interest of the owners of the vessel. It is not as though Great Britain had profited by what happened. If the Norwegian Government be really entitled to recover money, no one is entitled to inquire into the use to which they may choose to put it; but, for the purpose of testing the right, it is germane to ask in what title that money would be recovered. Even though it is measured and described as the value of the vessel, it is money still, and would be recovered only on behalf of the German shipowners, who have no rights in the matter. The appellant conceded that the decision in *The Dusseldorf* precluded any claim for damages, as such, in a case where the captors were not guilty of any intentional offence or of any negligence or want of skill, and, in this case, between restoration and damages there is no middle term. It is argued that, if so, in spite of the fact that within the territorial waters of Norway no capture should have been made at all, the claimant will under the circumstances of the case have no more redress than in the case of an honest but mistaken capture on the high seas. It may be so. In the latter case the claimant shipowner is met by the rights which attach to the captor's *bonâ fide* possession

and can vindicate his ownership only by obtaining the release of the ship, unless the misconduct of the captors give him exceptionally a claim for costs and damages. In the former, the same result is reached by a different road. The rights of the territorial Sovereign, vindicating neither ownership nor possession, but his claims of territory only, are satisfied in the absence of such misconduct by the restitution of the ship herself, in the sense and under the conditions laid down in *The Dusseldorf*. He has, as a Sovereign, no alternative or additional claim to receive another ship or the means of buying one. If the ship had been neutral-owned, the owner could have made his claim directly and in his own name, and the Norwegian Government would have been independent claimants in another and separate right. From the fact that there was an enemy owner they can be no better off. In his own name the enemy owner cannot be heard, nor in his name or in his behalf can the Norwegian Government be heard either, but only on behalf of the Norwegian Crown.

It is unnecessary to re-examine the authorities generally, which were so recently discussed in *The Dusseldorf*. In the case of *The De Fortuyn*, in 1760, cited from Marsden's collection of Burrell's Reports, p. 175, it may be pointed out that the violation of neutral waters was intentional, the claimant himself was before the court in his own proprietary right, and the prize was apparently still existent *in specie* in the hands of the captors or of purchasers from them. It has therefore no bearing on the present appeal.

Two points, however, were made upon expressions to be found in the decided cases, which ought to be briefly considered. In *The John* (2 Dods. 336, at p. 339) Lord Stowell distinguishes cases of unjustifiable seizures which have been made in an ignorance which is "vincible" from those in which the ignorance is "invincible," and it is said that, at this point at least, decisions upon capture on the high seas ought to apply in favour of claims of territory, and the error of the present captors, being due to "vincible" ignorance, ought to be compensated with costs and damages, as if the capture had been on the high seas. The coast of Norway was fixed and three miles to seaward from that coast could have been fixed too. There was no uncertainty in the limits of the territorial waters, but only in the navigating officer's mind. He was ignorant of the fact of his precise position, not because it was doubtful but because he was. With better charts or better instruments his ignorance would have been vincible. Their Lordships think that this argument is a mere metaphysical subtlety. The invincible ignorance spoken of by Lord Stowell arises at any rate when a captor, making reasonable use of all the means of information at his disposal, is yet misled. He was discussing cases where it is impossible to tell from the ship's register, sea pass, or bills of lading on board what her national character or what not may be. How is the proposition any less applicable when it is impossible with the ordinary charts and instruments to tell exactly how many scores of yards distant the shore may be? If there is no want of diligence and skill in using the instruments or other means of observation at their disposal officers are just as invincibly ignorant or the reverse when they investigate the geographical position as when they investigate the legal status of a ship under search. There seems therefore to be nothing in this distinction.

The other point arises out of the use of the word "indemnification" in *The Hendrick and Jacob*, decided in 1790 by the Lords of Appeal. It is relied on as deciding that a general rule exists, whereby captors who have seized a vessel wrongfully are bound to restore her *in specie* or, if they cannot do that, to indemnify in money those who suffered wrong by her capture.

Their Lordships have made extensive inquiries in order to ascertain whether any record exists of the reasons given by the Lords of Appeal in this case, but without success. Although collections are to be found, though by no means complete, of the printed papers laid before the Lords of Appeal by the parties in cases heard during the latter part of the eighteenth century, and in some cases at least the original documents connected with the ship and cargo captured have been preserved in the Record Office, no note or report has been found of the reasons for the judgment, if any were given. They may well have turned on the facts of the case, for the captors alleged and the claimants denied that those on board avowed the ship's Dutch enemy nationality when challenged, and endeavoured to destroy some of the ship's papers. What is known of them is to be found in Sir W. Scott's judgment in *The Betsey* (1 C. Rob. at p. 96), and this account was probably taken from one of the MS. collections formed by advocates practising in prize cases from time to time, and possibly from the notes of Sir W. Scott himself, as he signed the respondents' case on the appeal. The actual decree is thus indorsed on the appellant's case in the Library of Lincoln's Inn—"the Lords pronounced against the seizure and decreed the value to be paid to the claimants for the use of the owner."

The case is one of a vessel taken on the high seas without any justification. On demand for restitution by her owners against the original British captors the Lords of Appeal decided that the owners were entitled to restitution from some quarter, and, as the ship had been lost when in the justifiable possession under prize of French re-captors, that quarter could only be the original British captors. The ship no longer existed *in specie* so that it could be followed into French hands, and since that claim was absolutely extinguished by the loss, the proprietor was entitled to his indemnification from the original captor.

Without discussing this case, their Lordships need only point out that it is distinguishable. It was a case of capture on the high seas of a ship supposed to be an enemy but really a neutral ship, so that the only wrong was one to her owners, and that a wrong in respect of proprietary right. In the present case the capture was within territorial waters and the only wrong that can be vindicated is the wrong to the sovereignty of His Majesty the King of Norway. Whether indemnity be an apt term or not in the case of captures, it is at any rate plain that it is a term which would preclude the appellant from recovering anything in respect of the proprietary interest in the ship. Restitution of the vessel is a restoration of the *status quo*, but payment of her value in money would either leave in the hands of the Norwegian Government a profit on the whole transaction, which is a contradiction of the whole idea of indemnity, or would constitute them agents or trustees for the German

owners, who, on receipt of the money, would be recompensed for that which was no wrong to them, so that again the principle of indemnity would be departed from.

Their Lordships are therefore of opinion that the appeal fails and should be dismissed with costs, and so they will humbly advise His Majesty.

Solicitors for the appellant, *Waltons.*

Solicitor for the respondent, *Treasury Solicitor.*

Jan. 24 *and* 25, 1921.

(Present: Lords SUMNER, PARMOOR, WRENBURY, Sir ARTHUR CHANNELL.)

THE AXEL JOHNSON; THE DROTTNING SOPHIA. (*a*)

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

Contraband—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.

Certain bales of wool, absolute contraband of war, were shipped in two Swedish vessels from Buenos Ayres in 1916. *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 purposes 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.*

Without deciding whether there were any circumstances in which goods sent to be worked upon in an enemy country and returned to their neutral owners would be exempt from condemnation:

Held, that on the facts of this case there were no grounds shown for the contention of the claimants, and that the wool was good and lawful prize.

Decision of Evans, P. (14 *Asp. Mar. Law Cas.* 150; 117 *L. T. Rep.* 412: (1917) *P.* 234) *affirmed.*

APPEAL from a judgment of Sir Samuel Evans, P., reported 14 Asp. Mar. Law Cas. 150; 117 L. T. Rep. 412; (1917) P. 234.

The appeal was by the claimants, a neutral firm in Sweden, against the condemnation, as having an enemy destination of certain parcels of wool (absolute contraband).

Sir *Erle Richards*, K.C. and *Le Quesne* for the appellants.

Sir *Ernest Pollock* (S.-G.) and *Theobald Mathew* for the Procurator-General.

The judgment of the board was delivered by:

Lord SUMNER.—This appeal, with a very small exception to be mentioned shortly, raises only questions of fact, and after considering the evidence with care, and with the great assistance of counsel for the appellants, their Lordships have come to the conclusion that there is no reason to differ from the conclusions at which the learned President arrived. They do not consider it necessary to review all the steps by which he reached that conclusion, nor do they affirm their own agreement with all the propositions of fact that he mentions in his judgment, but not only do they think that there was evidence upon which he could conclude that the wool in question had a German destination, and being absolute contraband whould therefore be condemned, but, for reasons to be shortly given, they have arrived at the same conclusion themselves. It seems to them clear that, as regards the wool purchased from Messrs. Staudt, there was an intention on the part of the claimants, clearly arrived at in Nov. of 1915, that it should be sent to Germany or Austria to be combed. It is quite true that a purchase from Messrs. Hardt had taken place earlier, and no such letters had passed with Messrs. Hardt as passed in the case of Messrs. Staudt, but the way in which the matter is dealt with by Mr. Engberg draws no sufficient difference between the two consignments, and there is no reason except his statement to suppose that the intention formed with regard to Messrs. Staudt's wool did not equally apply, as naturally it would under the circumstances, to the wool purchased from Messrs. Hardt.

The intention is clearly proved, because the action taken by the appellants in increasing the quantity, which they purchased upon the direct suggestion of Messrs. Staudt, is consistent only with their making provision for what was represented to them as a satisfactory commercial transaction, namely, sending their wool to Germany to be combed upon the understanding that certain waste portions of it, which would be retained, would be paid for. There are circumstances spoken to by Mr. Engberg, which shortly before the seizure of the two consignments might have explained a change of intention, but their Lordships think that his account of the letter, and the transaction with Messrs. Staudt, if not uncandid—for probably he endeavoured to be candid—was at any rate an understatement of his firm's position, and, on closely examining the reasons he gives for saying that no such intention existed at the time of the seizure, their Lordships are unable to suppose that the intention had been changed. There were no doubt some facilities for having wool combed in Sweden, which had previously not existed, and there is an arrangement with the Norrkoping Company made by the appellant company for availing themselves of those facilities, but the affidavits dispose rather too summarily of the suggestion that it would still have suited the appellants business to carry out their former intention of sending the wool to Germany to be combed. Although it is possible that the appellants' business might have been carried on without sending the wool to Germany, one would have expected much more detail and much more firm ground in the affidavit before concluding that what had been a satisfactory arrangement in November had been abandoned in May or June of the following year. If that is so, the conclusion follows that at the time when the wool was seized on both vessels those who were the owners of it—and their Lordships think the appellant company were the owners—and who certainly had full control over it, intended for the purpose of their business, and not in any way wrongly, to send it to Germany to be combed, and part of it to be retained.

So much for the question of fact. It is then suggested that on two points the wool, which on those facts would be absolute contraband, would

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

not be subject to seizure, because first of all it was intended to be sent to Germany for a temporary purpose only, and secondly because, as is contended, it was to be sent to Germany for the purpose of being returned to Sweden after treatment, under such a binding engagement between the German Government and the Swedish Government as would constitute a clog upon the German Government's power to requisition or detain it, and would ensure that it would never augment the resources of the enemy or form part of the German stock of wool.

It is to be observed with regard to the first point that we do not know how long the combing of the wool would involve its remaining in Germany, but it is clear that it is a process of some elaboration and some time. It would involve unbaling it, passing it through the combing machinery, and repacking both the combed wool and the waste wool, and therefore, although it might be a temporary matter in the sense that some wool was ultimately to be returned, it is not a question of mere passing through the enemy country, or of a sojourn clearly shown to be unimportant or short. Their Lordships do not feel called upon to decide one way or the other whether there are any circumstances in which the temporary character of the stay of the supposed contraband goods in the enemy country would prevent the goods from being contraband, and would therefore deprive a belligerent of the right to seize them, but they are clearly of opinion—and no authority whatever was cited to the contrary—that, where wool is to be sent into the enemy's territory for treatment like this, during a considerable stay, and with no small amount of alteration of identity, it is impossible to say that the temporary character of the proceeding, such as it is, distinguishes the case from that of goods permanently sent into enemy territory with the intention that they should there remain or be consumed.

With regard to the other question, whether such an international agreement as is suggested would of itself prevent goods, which were otherwise condemnable as contraband, from being condemned, upon the ground that faith must be given to the solemn promise of the other belligerent, and therefore that the goods are not going to augment his stock—it is unnecessary to express any opinion, because the facts do no raise it. On a close examination of the affidavit of the one deponent, who speaks to this matter, it is clear that, although the Swedish Government at the time in question required that the Swedish exporter should, as a condition of obtaining a licence to export, give his promise to bring the wool back, there was no proof of a promise on the part of the German Government either to the Government of Sweden or to the individual Swedish exporters to ensure this return. The evidence as to the German Government's arrangements stops short with that given by Messrs. Staudt in Nov. of 1915, the gist of which was that the German Government would only insist upon the retention of the waste wool, and even this was to be without engagement, and as a matter of what is called "exceptional obligingness."

Their Lordships therefore think that on these grounds, which have been sufficiently outlined and need not be further developed, the conclusion at which the learned President has arrived was the right conclusion and is justified by the evidence. They will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*.
Solicitors for the respondent, *Treasury Solicitor*.

Jan. 20 21, *and March* 16, 1921.

(Present: Lords SUMNER, PARMOOR, and Sir ARTHUR CHANNELL.)

THE NORNE. (*a*)

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

Contraband—Enemy destination—Onus of proof—Order in Council of the 29th Oct. 1914.

When goods declared conditional contraband are seized proof of an intention to submit the goods to public auction in the neutral country to which they are shipped does not necessarily discharge the onus upon the claimants of establishing that they were not destined for an enemy Government or an enemy base of supply.

Judgment of the Prize Court affirmed.

APPEAL by neutral claimants against a judgment of the President (Sir Henry Duke) condemning consignments of oranges by the steamship *Norne* and other ships on the ground that the claimants had failed to establish that the goods, which were conditional contraband, were not destined for an enemy base of supply.

Sir *Erle Richards*, K.C. and *Darby* for the appellants.

Sir *Ernest Pollock* (S.-G.) and Sir *Harold Smith* (Sir *Gordon Hewart* (A.-G.) with them) for the respondent, the Procurator-General.

The considered opinion of their Lordships was delivered by

Lord PARMOOR.—The appellants are an import and export company claiming on behalf of Enrique Rubio, who was the shipper and consignor of certain boxes of Valentia oranges seized on the Norwegian steamships *Norne*, *Grove*, and *Hardanger*, during Dec. 1915, while on voyages from Valentia, in Spain, to Rotterdam, in Holland. The amount involved is not considerable, but it was stated that the case had been selected as a test case which would govern a number of other cases.

The first point raised on behalf of the appellants is that the ship's papers in each case disclose a consignee who has the real control of the goods, and that, therefore, the seizure comes within the protective provisions of the Order in Council of the 29th Oct. 1914. If this contention can be maintained the appellants would succeed. The consignee named in the bill of lading covering the oranges shipped on the *Norne* was J. de Graaf, and the consignee named in the other two bills of lading, covering the oranges shipped on the *Grove* and *Hardanger*, was Van Hoeckel. Both consignees were members of a syndicate composed of dealers at Rotterdam with the intention of importing fruit direct from Spain. The operations of this syndicate were controlled by an agreement of Sept. 1915, but in the view of their Lordships it is not necessary to express any opinion on the relationship created by the agreement between the syndicate and the constituent members whose

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

names were inserted as consignees in the bills of lading. In any event the syndicate is not the consignee named in the bills of lading, and therefore cannot be regarded as the consignee within the Order in Council of the 29th Oct. 1914. The true position of the parties appears to be accurately stated in the affidavit of Rubio sworn on the 13th July 1918. He states that Schrevel and Co. were to arrange freight, space and insurance, and that the fruit shipped by him was to be sold on his behalf at Rotterdam by Schrevel and Co. on a commission of 5 per cent., that the bills of lading were signed by Enberg and Co., duly representing the captain of each ship, and that, by indication of Manuel Mas, who at that date was acting as agent for the syndicate in Valentia, they were endorsed to order of de Graaf and Van Hoeckel, genuine Dutch fruit firms associated with Schrevel and Co. for selling fruit on his account, and that all fruit shipped in the three steamers was the property of the Spanish fruit exporters, no cases being sold to anybody, but being consigned on their account to be sold by auction at Rotterdam. The effect of this statement is that the boxes of oranges in question were consigned to sale agents in Rotterdam, whose authority—apart from any special provision—was revocable at any time by the consignor and shipper. Sale agents, whose authority is revocable by the consignor, are not consignees who have a real control of the goods consigned within the terms of the Order in Council of the 29th Oct. 1914: (*The Urna*, 15 Asp. Mar. Law Cas.; 123 L. T. Rep. 481; (1920) A. C. 899). The result is that the contention of the appellants under the first head cannot be maintained.

At the date of the seizure the oranges had been declared conditional contraband. It is therefore for the appellants to prove that they were not destined for an enemy government or an enemy base of supply. The question to be determined is whether they have satisfactorily discharged the burden which rests upon them.

It was suggested in the affidavit filed on behalf of the respondent that Enrique Rubio was not in reality a fruit dealer or exporter, but a shipping clerk in the branch house of a German firm. In his affidavit in reply of the 24th Nov. 1919, Enrique Rubio swears that he is not and never has been a shipping clerk, or employed as such, but that he had carried on business as a fruit merchant at Sagunto, in the province of Valentia, since 1908. The learned President was satisfied that Enrique Rubio was a fruit grower and dealer, or a fruit grower only, and that there was a mistake in the suggestion that he was a mere pretended or invented owner of fruit who had come out of some mercantile office in order to figure as a consignor. There appears to be no ground to differ from this finding, and the respondent on the hearing of the appeal did not allege that Enrique Rubio was a pretended or invented owner of fruit.

It is not sufficient for the appellants to establish that Enrique Rubio was a Spanish fruit exporter who had no intention of sending his goods either to an enemy government or to any enemy base of supply. The voyage is not limited to that which a shipper of goods sets in motion. Whether goods in any particular instance are contraband, by application of the doctrine of continuous voyage, is a question of fact. Under the terms of the Order in Council the appellants must discharge the burden of proving that the destination, if the voyage had not been interrupted, would have been innocent. When an exporter ships goods under such conditions, that he does not retain control of their disposal after arrival at the port of delivery, and the control but for their interception and seizure would have passed into the hands of some other persons, who had the intention either to sell them to an enemy Government or to send them to an enemy base of supply, then the doctrine of continuous voyage becomes applicable, and the goods on capture are liable to condemnation as contraband. The case for the respondent is that the cases of oranges on arrival at Rotterdam would have passed under the control of Lutten and Sohn, of Hamburg, whose intention it was to send them to the enemy base of supply at Hamburg. The next question, therefore, to consider is whether this contention is established.

The learned President has found as a fact that Lutten and Sohn, of Hamburg, had a substantial part in the control of the business which was being carried on and a substantial interest in the transactions involved, which went beyond a mere commission of 10 cents per case upon oranges which might be forwarded; but the issue remains to be determined whether this interest was sufficient to give them control over the disposal of the cases of oranges and to determine Hamburg as the place of destination.

There seems to be no reason for not accepting the evidence, given on behalf of the appellants, as to the conditions under which the syndicate, referred to in the case as Schrevel and Co., was started. In 1913 a ring of fruit dealers interested in the fruit trade between Valentia and Rotterdam had a contract with the Royal Nederlands Steam Navigation Company, under which the ring were entitled to all the space for fruit on the ships of that company, which owned the only direct line by which perishable goods could be carried direct from Spain to Holland. The syndicate, composed of fruit growers, was formed in Feb. 1913 to fight the ring, and with the intention of breaking the monopoly of the ring. In 1914 the syndicate endeavoured to import oranges into Rotterdam *via* London, but, owing to the perishable character of the fruit, it was not successful, and the syndicate ceased to operate in Jan. 1915. In the summer of 1915 the syndicate was reformed with the intention of importing fruit direct from Spain to Holland, and the operations of the syndicate were regulated under articles of partnership signed at Rotterdam on the 13th Sept. 1915. As early as Aug. 1915 the steamship *Norne* had been chartered for the purposes of the syndicate, and it is material to observe that this charter was arranged some time before Lutten took any part in the business. After the formation of the syndicate, Van Ronnen was sent out as agent of the syndicate to Spain. Subsequently this agency was terminated, and Manuel Mas was appointed in his place, who had acted for many years as agent for Lutten. There are a number of cablegrams which show that Van Ronnen objected to the transfer of the agency to Manuel Mas, but finally the matter was arranged. In Sept. 1915 Lutten had an interview with Hechterman at the town of Bentheim, in Germany. Manuel Mas was also present. No document containing any record of the meeting was found, but Mr. Lutten, on behalf of Lutten and Sohn, made proposals with regard to fruit import from Spain

to Holland, and to the chartering for this purpose of a series of ships. The learned President accepts the statement of Mr. Hechterman that he did not bind himself at this interview to Mr. Lutten, and that whatever expectation Mr. Lutten may have formed, Mr. Hechterman kept himself free. At this time there were negotiations with the British Government on behalf of the syndicate that the vessels chartered by them and carrying fruit should be allowed to proceed direct to Holland with their cargoes. In Oct. the British Government refused this request, and negotiations were resumed between Mr. Hechterman and Mr. Lutten. When Mr. Lutten was unable to import into Hamburg, owing to the war, he had a valuable connection in Valentia. The case of the appellants is that he sold his goodwill and agencies to the syndicate for a consideration, and that there was no arrangement which placed the oranges in the control of Mr. Lutten at Rotterdam so as to enable him to direct that they should be forwarded to Hamburg The facts are stated in the second affidavit of Mr. Hechterman sworn on the 18th July 1919. He says that one of his company's German relations, Messrs. Lutten and Sohn, of Hamburg, were large importers of oranges, &c., but that owing to the war their business had been entirely brought to a standstill, and that their interest was to prevent their competitors from getting hold of their relations such as agents, growers, &c. On the other hand he states that it was to the advantage of the company to obtain control of a well-founded organisation, as this would place them in a position to oppose the ring with greater success, that accordingly an agreement was arrived at between the company and Lutten and Sohn that so long as the latter would be unable to resume business, his company should take over their agents on its own account and employ them for its own business, that in this way his company established relations in Spain and that those persons who had previously been in the employment of Lutten and Sohn became the employees of his company, and have since 1915 been working as agents of his company. Mr. Hechterman further states that under this agreement Manuel Mas became the agent of his company, and that telegrams and letters exhibited to his former affidavit sworn herein on the 4th Dec. 1918, relate to his employment, and that it was the business of Mas to find persons willing to consign their goods to his company. No doubt the exact nature of the arrangement may not be capable of accurate ascertainment, and, owing to the capture, there is no evidence how the arrangement would have been carried through had the oranges arrived at the port of Rotterdam in the ordinary course of business. It is sufficient to say that their Lordships can find no evidence to support affirmatively the contention that Lutten and Sohn would have had the control of the destination of the oranges after their arrival at Rotterdam or that it would have been within their competency to order that the oranges should be sent from Rotterdam to Hamburg.

The question still remains whether having regard to all the facts the appellants have discharged the onus which the Order in Council places upon them of establishing that, at the time when the oranges were intercepted and seized, their destination was not an enemy base of supply. The contention of the appellants is that the destination of the voyage was Rotterdam, and that if the voyage had been carried through without interruption the oranges would in the ordinary course of business have been offered to local dealers at public auction, thereby becoming part of the common stock of a neutral country, to whatever consumers they might ultimately be sold. It was said that if this contention is not accepted, and it is held that the anticipation that a large proportion of the oranges may go for consumption in Germany is sufficient to make them contraband, the consequence is that goods within the category of conditional contraband would be liable to seizure and condemnation wherever there was anticipation that they might be largely sold to enemy customers. The answer is that the anticipation of a large sale to enemy customers is not sufficient to make goods liable as articles of contraband, but that there must be anticipation of sale either to an enemy Government or an enemy base of supply. For instance, in the present case there must be anticipation that a large number of oranges sold would find their way to Hamburg, which has already been held in many cases to be an enemy base of supply. Whether the appellants have negatived the suggestion that the destination of the voyage was Hamburg must be determined on the documents and oral evidence produced at the trial. Their Lordships are unable to hold that the mere fact that goods will be offered for sale by auction at the port of arrival is in itself conclusive of the innocency of their destination. It would appear to them to be too wide a generalisation that whatever the special conditions may be, the goods could never be condemned as contraband if once it is established that they would be offered at public auction in a neutral market. It is no doubt necessary to draw a distinction between a case of contraband which depends on destination to an enemy government, or enemy base of supply, and a case under the Reprisals Order in which a destination to an enemy country is sufficient. It appears from the judgment of the learned President that an argument was brought forward in the Prize Court that if the contention that the oranges were contraband could not be established, nevertheless it could be established that they were destined for an enemy country, and were therefore goods which should be stopped under the Reprisals Order, to be dealt with at the expiration of the war. The learned President expressed the opinion that if the case of the respondent failed in Prize, they could not succeed under the Reprisals Order, and no alternative claim under that order was brought before their Lordships on the appeal. It appears, however, to be evident in the present case that if the destination of the voyage was Germany, the place of destination was Hamburg, and oranges destined for Hamburg would undoubtedly be liable to condemnation as contraband.

The learned President, after examining the documentary evidence with great care, and after hearing the important oral evidence of Mr. Hechterman, found that Lutten and Sohn at Hamburg had a substantial interest in the business of importing oranges from Valentia, carried on through the syndicate under this interest, and that this interest went beyond their interest as agents in respect of which they were paid a commission of 10 cents per case of oranges forwarded. He further found that the interest of Lutten and Sohn was not to sell oranges in Holland, but to make the trade a part of the Hamburg trade, which they had carried on before the outbreak of the war. The learned

President further found, on evidence which was sufficient to warrant such a finding, that a scheme was arrived at between Hechterman and Lutten, prospectively in September and definitively early in November, of which Mr. Hechterman gave him an inadequate and uncandid account. He thought it clear that the object of this scheme was to give Lutten an interest and a share in the business, such as would result from a common desire that the oranges should proceed to and reach Hamburg. It was for Mr. Hechterman to displace the possibility of any such destination being reconciled with the contemplated auction in Rotterdam, not for the court to speculate by what means (of which there are obviously several) an auction might be made to play a part in the transmission of the cargo to a predetermined destination in Hamburg. The President held that Mr. Hechterman, whom he had seen and heard, had failed to discharge the burden of proof in this matter.

Their Lordships having examined the documentary and oral evidence, with the assistance of counsel, are not prepared to differ from the learned President on these questions of fact, or to differ from him in the conclusion that the appellants have not discharged the onus placed upon them of proving that the oranges were not destined for an enemy base of supply. Moreover, the learned President has found that the appellant syndicate withheld from the Prize Court the fact of the existence of a substantial foreign interest which it was their duty to disclose, and for the non-disclosure of which they must accept all consequent liability. On the whole, their Lordships are of opinion that the appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

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

Solicitor for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 24, 25, *and Dec.* 20, 1920.

(Before BANKES, ATKIN, and YOUNGER, L.JJ.)

MANN, MACNEIL, AND STEEVES LIMITED *v.* CAPITAL AND COUNTIES INSURANCE COMPANY LIMITED; SAME *v.* GENERAL MARINE UNDERWRITERS LIMITED. (*a*)

APPEALS FROM THE KING'S BENCH DIVISION.

Insurance upon hull and machinery—Dangerous cargo — Material circumstances—Disclosure of—Waiver—Marine Insurance Act 1906 (6 *Edw.* 7, c. 41), *s.* 18.

Sect. 18, *sub-sect.* 1, *of the Marine Insurance Act* 1906, *provides:* "*Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract.*" *Sub-sect.* 2: "*Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. Sub.-sect.* 3: "*In the absence of inquiry the following circumstances need not be disclosed, namely:*— . . . (b) *Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;* (c) *Any circumstance as to which information is waived by the insurer.*"

Policies of insurance were effected upon the hull and machinery of the vessel E. R. *at and from ports in the United States to ports in France and back to ports in the United States. The* E. R. *was an American wooden four-masted motor schooner, built in* 1918, *of* 784 *tons gross and* 695 *tons net registered tonnage, and of* 1461 *dead-weight capacity. Her certificate of registry described her as a gas screw auxiliary schooner. At the date of the insurance the owners had contracted for the vessel to carry* 100,000 *gallons of petrol in* 2500 *iron drums from New Orleans to Bordeaux; but the owners did not disclose this circumstance to the insurers. She had also on board large quantities of oil fuel for her own use. The cargo was carried safely to Bordeaux where it was discharged; but on the voyage back to the United States the ship was totally lost by a peril insured against. Petrol in drums is a frequent cargo for vessels crossing the Atlantic. The insurers pleaded that the policies were voidable by reason of the non-disclosure of the contract to carry the* 2500 *drums of petrol.*

Held, that the insurers could not avoid the policies because under the circumstances they had waived disclosure of the freight contract by not making inquiry.

Query, whether on the facts of the case the freight contract was a material circumstance requiring disclosure.

Judgment of Greer, J. reversed.

APPEAL by the plaintiffs from the judgment of Greer, J., sitting without a jury.

In Feb. 1919, the plaintiffs, Mann, MacNeil, and Steeves Limited, a firm of insurance brokers, effected with the defendants, the Capital and Counties Insurance Company Limited, an insurance to the amount of 1500*l.* (and subsequently a second insurance for 974*l.*) at a premium of 5*l.* per cent. upon the auxiliary schooner *Elmir Roberts.* The insurance was subsequently embodied in a policy dated the 17th April 1919, which declared it to be an insurance lost or not lost at and from "any port and/or ports, place and/or places in the United States Atlantic and/or Gulf to any port and/or ports place and/or places in France while there and thence return to port and/or ports in the United States Atlantic and/or Gulf with privilege to use ports *en route.*" It was also agreed that the subject-matter of the policy should be "Hull and machinery, &c., valued at $175,000. Subject to Institute Time clauses attached. Hulls (internal engines) combustion form as original." The perils insured against included perils of the seas, fire, "and all other perils, losses, and misfortunes that have come or shall come to the hurt, detriment, or damage of the aforesaid subject

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

matter of the insurance of any part thereof." The Institute Time clauses included the following clause: "Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing provided notice be given and any additional premium required be agreed immediately after receipt of advice."

The plaintiffs effected a third insurance with the defendants, the General Marine Underwriters Limited, for 2000*l.* upon similar terms.

The plaintiffs sued both defendants upon their respective policies, and the actions were tried together.

The *Elmir Roberts* was an American wooden four-masted motor schooner, built in 1918, of 784 tons gross and 695 tons net registered tonnage and of 1461 tons dead-weight capacity. Her certificate of registry described her as a gas screw auxiliary schooner. On the 24th Jan. 1919, her owners had engaged her to carry from New Orleans to Bordeaux for the Michelin Tyre Company 2500 drums of gasolene, an explosive substance and very dangerous when exposed to the air. On or about the 22nd Feb. the vessel started on her voyage having loaded the 2500 iron drums, each drum containing about 40 gallons of gasolene. She also carried barrel staves, called French claret staves, to the number of 103,245 under deck and 47,841 on deck. She had also on board for fuel 540 gallons of gasolene in iron drums, 450 gallons of oil in barrels, 330 gallons of crude oil in tanks, and 330 gallons of kerosene. She arrived at Bordeaux on the 25th May and there discharged her cargo.

On the 23rd July she was chartered to the United States Government. Under this charter-party she loaded a cargo of empty shells and mixed ammunition and sailed from Bordeaux for New York on the 26th July. On the 22nd Aug., while she was on this voyage, a kerosene lamp burst in the hands of an engineer. The engine-room floor caught fire, then the fuel oil. The fire then spread to the rest of the vessel which was abandoned by the crew and, after burning for some hours, exploded and was totally lost.

The defendants pleaded that at the time when the insurances were effected the plaintiffs wrongfully concealed from the defendants the material fact then known to the plaintiffs and unknown to the defendants that the owners of the *Elmir Roberts* had entered into the freight engagement with the Michelin Tyre Company for the carriage of the 2500 drums of gasolene to Bordeaux.

Greer, J. held that the fact that this freight engagement had been made was a material circumstance within the meaning of sect. 18, sub-sect. 1 and 2, of the Marine Insurance Act 1906, and that it was not one of those material circumstances which under sub-sect. 3 need not be disclosed. He therefore gave judgment for the defendants in each case.

The plaintiffs appealed.

MacKinnon, K.C. and *Simey* for the appellants, referred to:

Halsbury's Laws of England, Title Insurance, vol. 17, s. 801, p. 410;
Boyd v. *Dubois*, 1811, 3 Campb. 133;
Carter v. *Boehm*, 1766, 3 Burr. 1905;
Beckwith v. *Sydebotham*, 1807, 1 Campb. 116;
Fort v. *Lee*, 1811, 3 Taunt. 381;
Freeland v. *Glover*, 1806, 7 East. 457;
Arnould on Marine Insurance, s. 618 (5), 9th edit. (1914);
Duer on Marine Insurance, vol. 2, s. 13, sub-ss. 40, 41, p. 444;
Asfar v. *Blundell*, 8 Asp, Mar. Law Cas. 40, 106; 73 L. T. Rep. 648; (1896) 1 Q. B. 123.

Raeburn, K.C. and *Van den Berg* for the Capital and Counties Insurance Company, referred to:

Scottish Shire Line v. *London and Provincial Insurance Company*, 12 Asp. Mar. Law Cas. 253; 107 L. T. Rep. 46; (1912) 3 K. B. 70.

Stuart Bevan, K.C. and *James Dickinson* for the General Marine Underwriters.

Cur. adv. vult.

Dec. 20, 1920, the following judgments were read:

Bankes, L.J.—The claims in these actions, which were tried together, were upon two policies of marine insurance both dated the 17th April 1919, upon the hull and machinery of the auxiliary schooner *Elmir Roberts* for a voyage from places in the United States and elsewhere to places in France and back again. The vessel completed her voyage from the United States to Bordeaux safely, but was totally destoyed by fire on the return voyage to the United States. The claims were for a total loss. The defences included a plea of concealment of a material fact—namely, that the owners of the *Elmir Roberts* had, before the insurance was effected, entered into a freight engagement for the carriage in the said vessel of 2500 drums of gasolene from the United States to Bordeaux. Greer, J., who tried the actions, held that the plea of concealment of a material fact was made out, and he gave judgment for the defendants. All parties called evidence at the trial. The question for this court is whether the learned judge came to a correct conclusion upon the evidence. With regard to the vessel herself there was no dispute. She was one of a class built in America during the war. She was a wooden vessel of about 690 tons net register tonnage with auxiliary motor engines. The engines of such a vessel are run with fuel oil, and a considerable quantity of petrol is carried in tanks in the engine room, for the purpose of heating the hot bulb of the engines, and for working the small petrol engines which drive the winches. The quantity of petrol so carried by this vessel would probably be from 300 to 400 gallons.

It is conceded by all parties that this class of vessel is regarded as an extremely hazardous risk, owing to the use of petrol under the above circumstances. Quite a number of witnesses said that they would not take a line on such a vessel, whatever her cargo might be. The gasolene, or petrol as it is called in England, which formed part of the cargo of this vessel was contained in 2500 iron drums. Each drum contained about 40 gallons, so the total quantity carried was about 100,000 gallons. The owners of the vessel had entered into a contract to carry these drums before the proposal for the insurance was made. Petrol contained in iron drums was proved to be quite ordinary and common form of merchandise to be included as part of a general cargo to be carried across the Atlantic.

The plaintiffs' case was that in the case of an insurance upon hull it was no part of the duty of the assured to make any disclosure to the under

writer with reference to the cargo. but that it was the underwriter's business, if he wished to know anything as to the nature of the cargo, to make the necessary inquiries. The defendants' case, on the other hand, was that even in the case of an insurance upon hull it was the duty of the assured to make full disclosure of every material circumstance connected with the cargo to be carried. In cross-examination the witnesses for both parties had to modify the general proposition contained in these contentions. For instance, the plaintiffs' first witness admitted that he could not contend that there would not be a duty to disclose the fact that dynamite formed part of a cargo, or that an entire cargo consisted of petrol; and several of the defendants' witnesses admitted that if quite small quantities of such articles as matches or cotton formed part of a cargo there would be no duty to disclose that fact, though there would be a duty to disclose the fact if considerable quantities of either were to form part of a cargo.

It appears to me to follow from this evidence that so far as the present case is concerned it must be accepted that the question whether disclosure must be made or not is one of degree, depending upon the circumstances of each particular case. Certainly upon the evidence given in this case it would appear that no rule can be laid down that under no circumstances where the insurance is one upon hull is there any duty upon the assured to make any disclosure as to the nature of the cargo. It does, however, appear from the evidence that the general rule prevailing in reference to insurances upon hull is that no disclosure in reference to the nature of the cargo to be carried is either made by the assured, or expected by the underwriter. This appears to be quite in accordance with what Lord Ellenborough conceived should be the rule: (see *Boyd* v. *Dubois*, 3 Camp. 133; *Lubbock* v. *Potts*, 1806, 7 East. 449); and it seems to me from the nature of things that no other practice could be expected to prevail. The duty, if duty there be, to make any disclosure can only be a duty to disclose some matter in relation to cargo already fixed or undertaken to be carried. In order, therefore, to qualify himself to make a valid contract of insurance the broker must keep himself posted as to what freight engagements have been entered into up to the moment of making the contract of insurance, and he must have sufficient information as to the exact nature and quantities of each parcel covered by those engagements to to enable him to decide what disclosure he should make. The inconvenience, not to say practical impossibility, of carrying on this class of business under such conditions, particularly where a broker is acting for a client abroad, convinces me that some such general rule as that spoken to by the plaintiffs' witnesses must be in existence. This conclusion is strongly supported by the fact that no reported case can be found in which the suggested duty to make the disclosure contended for by the defendants has been held to exist.

In deciding this case the learned judge had to apply sect. 18 of the Marine Insurance Act 1906 to the facts before him. He decided that the fact that a freight engagement had been entered into for the carriage of this very considerable quantity of gasolene upon this particular vessel before the proposal for insurance was made was a circumstance which was material as being likely to influence the judgment of a prudent underwriter in fixing the premium, or determining whether he would take the risk. I cannot say that he was wrong in so deciding. It becomes necessary, therefore, to consider the second branch of the learned judge's finding in reference to the question whether the assured was excused from making any disclosure of this material circumstance under sub-sect. 3 of sect. 18, either because the insurer must be presumed to have known it, or because under the circumstances he must be taken to have waived it. The learned judge has not dealt with the question of waiver, presumably because the point was not made in argument before him, and he has held that though the insurer must be presumed to have known that some portion of the cargo of this vessel would very possibly consist of drums of gasolene, he did not know, and must not be presumed to have known, that 2500 drums had actually been fixed at the time that he entered into the contract of insurance. This fine distinction leads one to doubt the soundness of the view that the circumstance of these drums being actually fixed was a material circumstance; but as I have already said I do not think it is possible upon the evidence to interfere with that part of the judge's judgment.

I do, however, consider that the appellants are entitled to succeed upon either of two grounds with which the learned judge does not deal. In the first place, I think that the evidence as to the practice in relation to the non-disclosure of the character of cargo when effecting a policy on hull does not only justify, but requires, the court to hold that an underwriter waives any information in relation to what may be fairly described as a parcel of ordinary cargo of lawful merchandise, which this parcel was. In the second place, I think that the plea of waiver can be supported on the ground indicated by Lord Esher, M.R. in *Asfar* v. *Blundell* (8 Asp. Mar. Law Cas. 40, 106; 73 L. T. Rep. 648; (1896) 1 Q. B. 129), where in dealing with the question of concealment he says: "But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he"—the assured—"is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it." In my opinion the disclosure in the present case that this vessel was a wooden vessel with auxiliary motor engines was a disclosure of the fact that it was proposed to carry cargo from the United States to France in a vessel specially and dangerously liable to fire damage, and that such a disclosure was, within Lord Esher's language, a sufficient disclosure to put the underwriter on inquiry. Having regard to the language of the material section of the Marine Insurance Act 1906, in which the law relating to concealment is now contained, the conclusion is rather that disclosure had been waived than that it had not been made; but the result is the same, so far as the appellants' case is concerned.

On these grounds I think that the appeal succeeds and that the judgment entered for the defendants must be set aside and judgment entered for the plaintiffs for the amount claimed with interest, with costs here and below.

Atkin, L.J.—The subject of insurance in this case was the schooner *Elmir Roberts*, a wooden ship built in 1918 having auxiliary internal combustion engines. Her net register tonnage was 695, and

her dead-weight capacity 1461 tons. She was insured on hull with the defendants. The plaintiffs who effected the insurance in their own names as well as for whom it might concern, are a firm of Liverpool insurance brokers who were acting for the American owners. The ship was insured at and from any port or ports in the United States of America to any port or ports in France, whilst there, and thence returning to any port or ports in the United States of America. The vessel was lost by fire and explosion consequent thereon on her return voyage from Bordeaux to New York. The defendants rely on concealment by the plaintiffs of the fact that at the time the contract of insurance was made the owners had made a freight engagement whereby the vessel was bound to carry on her outward voyage from the United States of America to France a part cargo of gasolene in drums, which they allege was a dangerous cargo. In fact the vessel did carry this cargo in safety to France. I mention the fact to discard it, for it appears irrelevant to the question whether the existing contract to carry the cargo was a material fact which ought to have been disclosed.

The law upon the matter is to be found in sect. 18 of the Marine Insurance Act 1906. The learned judge had found that the freight engagement was a material circumstance within the definition in sub-sect. 2, for he thinks that it would have influenced the mind of a prudent insurer both in fixing the premium and in determining whether he would take the risk. I am not sure that I should have come to the same conclusion, in view of the fact that this small wooden cargo vessel possessed auxiliary internal combustion engines and therefore had to carry in the engine-room a store both of crude oil and of petrol, facts which were known to the insurers and would seem to indicate more peril than the cargo in question. But there certainly was evidence upon which the judge could so find, and I am not at all prepared to say that I am satisfied that the finding was wrong.

The question remains whether the assured was excused from disclosure by the provisions of sub-sect. 3. I have come to the conclusion that this was a circumstance as to which information was waived by the insurer, and, therefore, under sub-sect. 3 (*c*) it did not need to be disclosed. It is a remarkable fact that in the long history of the English law of marine insurance in which the doctrine of concealment has played a prominent part, there is no record of any decided case in which an underwriter on hull has ever successfully relied on a concealment with reference to the kind of cargo contracted to be carried. In spite of some suggestion to the contrary, the evidence in this case, especially that of Mr. Ashley, the only independent underwriter called for the defendants, satisfies me that in ordinary practice the assured does not give, nor does the insurer demand, information on this topic. This would correspond, I am convinced, with the general experience of those engaged in marine insurance work. One of the reasons no doubt is that insurance on hull is frequently, perhaps usually, effected before particular freight engagements are made, or, at any rate, are completed; and in insurances for time, often before any forecast could be made of the nature of such engagements. The insurer knows that cargo will be carried and he is prepared to take the chance of what the cargo will be. Another reason probably is that from the nature of the business any complete disclosure is from a business point of view impossible. Marine insurances are effected in ordinary course by agents, insurance brokers, whose knowledge and duty to disclose is in substance deemed to be co-extensive with that of their principals. Shipowners and others interested in hull would have to prepare and hand over to their brokers full particulars of freight engagements, including in the case of a general ship possibly hundreds of items lest one of them should in nature and extent be capable of being deemed a material circumstance; these particulars or the doubtful items would have to be shown by a prudent broker when offering the note to each underwriter. Whether the doctrine of waiver be based on a collateral contract expressed or implied, or upon a representation express or implied acted upon by the person to whom it is addressed, it appears to me that the nature of the business relations between the respective parties leads necessarily to the inference that the insurer waives disclosure of the nature of the cargo contracted to be carried. He is presumed to know matters of common knowledge and matters which an insurer in the ordinary course of his business as such ought to know. Amongst such matters would be, in the present case, that the vessel insured was a cargo vessel, that she would be carrying cargo from the United States of America to France, and that the cargo might consist of petrol in drums. If he objects to insuring such a cargo he can protect himself by making an inquiry, or by insisting on a warranty against such cargo. If he does not, it appears to me that the nature of the transaction demands the inference that he must be deemed to represent to the assured that the nature of the cargo need not be stated. Greer, J. says with force that while the insurer may be prepared to risk the chance of a hazardous cargo, he must not be taken to be prepared to incur the certainty of a hazardous cargo. I feel the weight of this, but I think the answer is that included in the risk he takes is the risk that there is an already concluded engagement for hazardous cargo, just as there is the countervailing possibility that he runs no risk of a hazardous cargo at all, by reason of an absolutely safe cargo having been agreed. In truth this view seems to be disposed of by authority. If an insurer insures a private warship from port to port he need not have disclosed to him the special adventure, "because he knows some expedition must be in view; and from the nature of the contract, without being told, he waives the information": per Lord Mansfield, in *Carter* v. *Boehm* (3 Burr. 1911). If he insures a ship "at and from" a foreign port he need not have disclosed to him the fact that the ship has needed in that port substantial repair, for he knows that such a circumstance is probable: *Beckwith* v. *Sydebotham* (1 Campb. 116). So on a similar insurance "lost or not lost" the assured need not disclose that the ship at the date of the insurance has left the port on the insured voyage for some considerable period: *Fort* v. *Lee* (3 Taunt. 381), a decision of the court of Common Pleas when Sir James Mansfield was Chief Justice and Sir Souldan Lawrence one of the judges. The period in that case was twenty-four days. In all the above cases disclosure was held unnecessary, though in all of them the circumstance appears to have been material, and to be a fact known to the assured at the time of making the contract. I do not think that the reasons I have given for

this decision necessarily apply to the case of a cargo which is unusual and of exceptionally hazardous character, such as the case put in argument of a cargo of dynamite. I should like to consider the circumstances of such a case when it arises. In the present case, though I always hesitate before differing from the learned judge, I have formed the opinion that he should have given judgment for the plaintiffs, and I think that the appeal should be allowed.

YOUNGER, L.J.—We are here concerned with insurances upon the hull of an oil-driven auxiliary wooden schooner, the *Elmir Roberts*, on a round voyage from any port or ports in the United States to any port or ports in France, there, and back. At the date of insurance a freight engagement had been made, by virtue of which the vessel was to carry as part of her cargo on her outward voyage some 2500 drums of gasolene said by the defendant underwriters in these proceedings to be dangerous merchandise. No mention of this engagement was made to the underwriters by the plaintiffs, the brokers effecting the insurance; they were in truth themselves ignorant of the transaction at the time, although that fact is not in the circumstances relevant or material. The respondents seek by reason of the non-disclosure to escape liability from the claims made against them in these actions in respect of the subsequent loss of the schooner on her return voyage. Greer, J. has held that they are entitled to relief, and the plaintiffs appeal to this court.

The learned judge found that there was in the circumstances stated a concealment by the brokers of a fact that was material, and that the non-disclosure was not excused by any circumstance known or presumed to be known to the underwriters. His judgment goes no further. He did not in it consider or discuss the question fully canvassed before us—namely, whether the circumstance relied on was not one as to which information was waived by the defendants. That topic was not, I gather, definitely raised before him in argument.

With reference to the matters with which the learned judge did deal in his judgment, while I express the opinion with much diffidence, I do gravely doubt whether the reasoning by which he reached his conclusion that the non-disclosure of this freight engagement was so material as he held it to be really had regard to the true criterion by reference to which in relation to this marine risk the issue of materiality falls, as I think, to be determined. The learned judge, as I read his judgment on this issue, is not influenced directly or otherwise by the character and construction of the vessel on which the drums of gasolene were to be carried, and on whose hull the insurances were effected, the most material circumstance, as it seems to me, in the case. He has, so to speak, labelled this gasolene as dangerous cargo in the abstract, as merchandise which when included in a general cargo from America by any vessel open to carry such cargo, substantially increases the risk of an insurance upon her hull, as goods so attended with hazard beyond the common that their certain inclusion as part of cargo to be carried deprives the insurer of this useful chance that nothing so dangerous to the safety of the ship will be on board during the voyage insured. Not that the learned judge was not well entitled to deal with this question as he did; much of the evidence given before him seemed plainly to convey that everything that could be said against these gasolene drums on a steel or iron ship would *a fortiori* apply to them when on a wooden ship, and perhaps most of all on an auxiliary wooden vessel like the *Elmir Roberts*. But a careful consideration of all the evidence in the case, the testimony from all sides, impresses me with the conviction that the only aspect of the matter with reference to which the statements just referred to are well-founded has little, if any, relevance to the question of materiality in relation to this particular risk when looked at from what I conceive, upon the whole evidence, to be the only proper standpoint. For while it is undoubtedly true that the presence of such a cargo, whether on a well-found iron or steel ship or on a wooden sailing, steam, or auxiliary oil vessel, may seal the fate of the vessel should the gasolene caught by the fire explode, and doubtless will with greater certainty in the case of a wooden vessel than in the case of one otherwise constructed, the relevant distinction for present purposes between the well-found iron or steel ship, and such a vessel as the *Elmir Roberts* is that the first class of ship need not, in the event of fire, be at risk of destruction at all, apart from the presence of the gasolene amongst her general cargo, while in the case of a vessel like the *Elmir Roberts* it approaches certainty that in the event of a fire breaking out sufficiently serious to reach, if unimpeded, the drums in the hold, her fate would be irrevocably sealed, long before the flames got so far, by the intermediate burning of her own stores of oil fuel and of any other general cargo—in the present case, for instance, the 600 tons of claret staves stowed in the near hold and on deck—more immediately inflammable than gasolene itself and equally effective to bring about the total destruction of this vessel. In other words, the evidence I think clearly shows that if the vessel was to be lost at all by fire it would be only in the remotest contingency that these gasolene drums, stowed away in her hold as they were, would play any effective or other part in bringing about her destruction. That this is so appears, as it seems to me, from a consideration of the evidence both with reference to this type of vessel and with regard to the nature of these gasolene drums.

Bankes, L.J. has just described the *Elmir Roberts* type of vessel, an American product of the war. I will not repeat his description. The evidence with reference to these vessels demonstrates, as I think, their faulty construction, their grave liability to destruction from fire breaking out in the engine-room, the danger spot, saturated in its woodwork with oil, and the extreme difficulty of preventing the spread of such a fire if it once established itself. The story of the *Elmir Roberts's* final destruction recorded in the correspondence supplies a striking corroboration of these conclusions, which were so strongly held by many underwriters that they would take no line on such vessels at all, their record of loss, apart from all questions of cargo, being during the war abnormally high; and the great bulk of the evidence went also to show that it was the oil carried by these vessels for their own purposes that constituted their principal danger. The *Elmir Roberts* herself on her outward voyage carried 540 gallons of gasolene, 450 gallons of oil in barrels, 330 gallons of crude oil in tanks, and 330 gallons of kerosene for use in her engines and pumps, seriously imperilling her safety by

reason of regular recourse being had to it for use. Gasolene as cargo in iron drums, on the other hand, was, it appears from the evidence, carried across the Atlantic during the war in great quantities as ordinary merchandise in these as well as in other vessels. No disaster traceable to it is on record, very possibly due to the fact deposed to by Mr. Harry Gray that the drums containing the gasolene are substantial things, welded and not riveted, and strengthened against crushing by stiff rims, with the hole for filling fitted with a screw tap, and jointed and tightened up so that no gasolene can leak out. The drums, moreover, were, Mr. Gray says, usually tested and stamped. It further appears clearly from the evidence that gasolene is in the normal course of events quite innocuous while contained in the drums. Mr. Gray's opinion was that with these drums containing it stowed in the hold there was about them no particular danger, while Mr. Shore, a director of the plaintiff company, said, and so far as I can see, said with good reason justified by experience, that so enclosed the gasolene was a perfectly safe article for carriage

Now in all these circumstances it is important to note the exact findings of the learned judge. It seemed to him quite clear that the existence of the engagement to carry the 2500 drums of gasolene was a material fact, and that the insurers could not be presumed to know it. What he held they must be presumed to know was that the vessel would be open to carry that quantity if she had not been already fixed, but not that she was already fixed to carry it, and he proceeds as follows: "It seems to me that the fact that she was then definitely fixed to carry these dangerous goods makes all the difference, because any insurer who was told that would know at the time definitely that he was not going to get a cargo which may be partly composed of other goods, and that he was being asked to make an insurance on a cargo which had been definitely fixed to the extent of 2500 drums of this dangerous material." In this passage the learned judge adopts the suggestion made to us by Mr. Van den Berg in his very able argument. I think it fails on the facts. This cargo may in the abstract be properly described as dangerous. So far I am content to accept the learned judge's finding. In relation to this adventure, however, the result of the evidence is, I think, clearly to show that as a part of any normal average general cargo from America, it cannot be so described. In my view, in this connection, it was probably less and certainly not more dangerous than were the claret staves to which, it was admitted, no objection could have been taken if even they, like the gasolene, had been at the date of insurance the subject of an agreement for carriage on this outward voyage.

Speaking for myself, therefore, I should for these reasons be prepared to allow the appeal on the ground that, as the defendants must be presumed to know that the vessel would be open to carry the gasolene in question, the additional fact that a contract to carry these drums had been entered into made no material difference to the risk they are presumed to have undertaken. But if I be wrong so far, the considerations already stated add further force to the circumstances immediately relevant on the question of waiver, with which Atkin, L.J. has just dealt so fully. I have had the advantage of reading his judgment, and if I may say so, I concur entirely with it on this point, both in its reasoning and in its conclusions. I would only, for myself, venture to add one further word upon it. I do not conceive that the conclusions reached both by my Lord and Atkin, L.J. on this question of waiver have the effect of weakening the governing statutory principle that a contract of marine insurance is a contract based upon the utmost good faith. I do not doubt that the courts must be at all times instant to see that this essential principle is never impinged upon. The views now expressed are, however, called for not only by the practice but by the necessities of marine insurance business as now conducted; they do little more than extend to voyage policies principles which must *ex necessitate rei* obtain in connection with time policies, and they are so far justified not only by the absence from the books of any decision to the contrary of them, but by the existence in America, if we may judge from the passage from Duer cited by Mr. Mackinnon (Vol. II., sect. 13, s. 41, p. 446), of an absolute rule there to the same effect. Nor, as it seems to me, is the principle adopted in these judgments, while necessary for the due conduct of business, injurious to any interest that requires protection even under these contracts *uberrimæ fidei*. Every nervous or sceptical underwriter can always protect himself by a clause of warranty or by inquiry; and if there be on the part of the insuring broker, even in such a matter as we are here dealing with, any fraudulent concealment, the underwriter will, of course, be relieved unless the fraudulent broker discharges the very heavy burden of establishing affirmatively that the fraud which he perpetrated for the purpose of influencing the underwriter's judgment was in fact in no way effective to lead him to accept the risk on the terms agreed.

In my judgment these appeals should be allowed.

Appeals allowed.

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

Solicitors for Capital and Counties Insurance Company Limited, *Ballantyne, Clifford,* and *Co.*

Solicitors for the General Marine Underwriters Limited, *Thomas Cooper* and *Son.*

Feb. 4 *and* 8, 1921.

(Before Bankes, Warrington, and Atkin, L.JJ.)

Owners of Steamship Magnhild *v.* McIntyre Brothers and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Cesser of hire—"Or other accident preventing the working of the steamer"—Ejusdem generis rule—"Shallow harbours, rivers, or ports, where there are bars"—Liability of charterers for hire.

A steamer was chartered to load at Sunderland and to discharge at a French port. The French Government ordered the steamer to discharge at Marans, which was a safe port within the meaning of the charter-party. She arrived at Marans Roads at 6 p.m. on the 16th Oct. 1916, *and got aground on soft clay while going up the river. She remained aground till* 1 *p.m. on the 24th Oct. and was damaged in consequence of the grounding. Repairs*

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

began about the 8th Nov. and took a considerable time. There was no bar in the harbour, river or port. By clause 12 the charter-party provided: "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; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." The umpire found that hire ceased (a) *as from* 6 *p.m. on the* 16*th Oct.* 1916 *till* 1 *p.m. on the* 24*th Oct.;* (b) *during the time occupied for repairing the damage done to the steamer. McCardie, J. affirmed the award.*

Held, that the ejusdem generis *rule was not applicable to the words "or other accident" in the first part of clause* 12*, and that those words included any accident to the vessel preventing her from working for more than twenty-four consecutive hours. Judgment of McCardie, J. affirmed on this point. But held that the words "where there are bars" in the latter part of clause* 12 *applied only to ports, and not to shallow harbours or rivers, and that as the grounding which caused the detention occurred when the vessel was trading to a river, the time lost was for charterers' account.*

Judgment of McCardie, J. (15 *Asp. Mar. Law Cas.* 107; 124 *L. T. Rep.* 160; (1920) 3 *K. B.* 321) *reversed.*

APPEAL by the owners from the judgment of McCardie, J., upon an award stated in the form of a special case.

The charter-party was dated the 7th Aug. 1916, and contained, *inter alia*, the following clauses:

Clause 1. The said owners agree to let, and the said charterers agree to hire the said steamer for the term of six calendar months fifteen days more or less from the time . . . the said steamer is delivered and placed at the disposal of the charterers ready to load . . . to be employed in lawful trades . . . between good and safe ports or places within the following limits—United Kingdom, Continent, Calais-Sicily limits—where she can always safely lie afloat or safe aground as charterers or their agents shall direct.

Clause 12. 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; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account.

Clause 16. The steamer shall not be ordered to any port where fever or pestilence is prevalent or any ports blockaded or where hostilities are being carried on or any ice-bound port or any ports where lights or light-ships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall steamer be obliged to force ice. Should the steamer be detained by any of the above causes such detention shall be for charterers' account. Nevertheless, if on account of ice captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and/or damaged, he shall have liberty (but not be obliged) to sail to a convenient open place and await charterers' fresh instructions.

The facts as found by the umpire were shortly as follows: The steamer loaded at Sunderland and was fixed by the charterers to discharge at La Rochelle, La Pallice, Rochefort, or Tournay Charante in France. By the instructions of the French Government the steamer was ordered to proceed to the Ile d'Aix for orders. She was then ordered by the French Government to discharge at Marans, which was situated up a river. She arrived at Marans Roads at 6 p.m. on the 16th Oct. 1916, and she got aground on soft clay whilst proceeding up the river at a little bend between two buoys. She remained so aground till 1 p.m. on the 24th Oct. 1916. She then got off. She was damaged by the occurrence. Repairs commenced on or about the 8th Nov. and they occupied a substantial time. Marans was a safe port within the meaning of the charter-party. There was no bar in the harbour, river, or port which caused detention through grounding or otherwise. The arbitrator awarded that hire ceased, (*a*) as from 6 p.m. on the 16th Oct. 1916, till 1 p.m. on the 24th Oct. 1916, while the steamer was aground as aforesaid, and (*b*) during the time occupied while the damage to the steamer, consequent upon such grounding, was being repaired; and he awarded that the owners should pay to the charterers as return of hire a certain sum.

The question for the opinion of the court was whether the umpire was right in his award. If the court should be of opinion that he was wrong, then he awarded that the charterers should pay to the owners a certain sum.

McCardie, J. held (affirming the award) that the *ejusdem generis* rule was not applicable to the words "or other accident" in the first part of clause 12; and that those words included any accident to the steamer which prevented her from working for more than twenty-four consecutive hours.

The owners appealed.

Leck, K.C. and *W. A. Jowitt* for the appellants.

Stuart Bevan, K.C. and *Claughton Scott* for the respondents, the charterers.

Cur. adv. vult.

BANKES, L.J.—This is an appeal from the judgment of McCardie, J., who affirmed the view of the umpire in an arbitration as to the proper construction of a clause in a time charter. The charter was dated the 7th Aug. 1916, whereby the charterers hired the vessel for a period of six calendar months at the rate of 3400*l.* per month. [The Lord Justice stated the facts as found by the umpire.] The question in dispute between the parties is whether, during the time when the vessel was aground and in dock undergoing repairs occasioned by the grounding, hire ceased under the terms of the charter-party, or whether the charterers still remained liable to pay hire.

The question depends upon the proper construction of clause 12 of the charter-party, which is in the nature of an exception clause, and deals with

cesser of hire. The first part deals with the circumstances under which, if there is loss of time, the hire shall cease; and the second part, which to some extent is an exception upon the exception, enumerates circumstances in which time lost shall be for charterers' account. The first part of the clause is in these terms: "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." Three matters are there specifically mentioned which may occasion loss of time: Deficiency of men or owners' stores, breakdown of machinery, damage to hull; and then there is added "or other accident." The judgment of McCardie, J. is entirely devoted to a consideration of the question whether the *ejusdem generis* rule applies to that language, and whether the particular accident which befell this vessel, the grounding in the river, was an "other accident" within the meaning of the first part of this clause. He held that the *ejusdem generis* rule did not apply, and for that reason he considered that the loss of time fell upon the shipowners. He gave his reasons at length and referred to a number of cases, and at the end of his judgment he gives this as one of the reasons for so holding: "The latter part of clause 12, I also think, seems to assume a wide meaning of the first part." To my mind it is clear that the *ejusdem generis* rule cannot be applied, partly because of the language of the first part of the clause, and partly also for the above-mentioned reason given by McCardie, J.

The learned judge does not refer to what seems to me to be the material part of this clause, the proper construction of which has caused me personally great difficulty. It certainly is not very happily worded; and does not clearly express what was the intention of the parties. The second part of the clause is an enumeration of the circumstances under which a loss of time is to be for charterers' account. It runs: "But should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." It is plain from that language that it is to some extent, but only to some extent, an exception upon exception, because it includes some matters which do not come within the first part of the clause. It is therefore not only an exception upon an exception, but it is an express enumeration of events, as to which presumably it was thought that some question might rise unless it was made plain that they were all for charterers' account. The circumstances are very diverse in character. "Should the steamer be driven into port, or to anchorage by" certain events, then "time so lost and expenses incurred (other than repairs) shall be for charterers' account." Those events are stress of weather or any accident to the cargo. Then follow the words which cause so much difficulty. There are two possible constructions of those words. One is to read them as meaning that if the vessel trades to shallow harbours, rivers, or ports in any of which places there are bars causing detention to the steamer through grounding or otherwise, then time so lost and expenses incurred shall be for charterers' account. The other is to read them as providing that, in the event of the steamer trading to either of these three classes of places, (*a*) shallow harbours, (*b*) rivers, or (*c*) ports where there are bars, and the trading there causes detention through grounding or otherwise, time so lost and expenses incurred shall be for charterers' account. One must try to give a meaning to all the words used, so as to realise the intention of the parties in inserting the clause. Having regard to the language used, it seems to me that the meaning of the parties may properly be taken to be that, in the event of the detention of the steamer through grounding or other similar accident owing to the charterers ordering her to trade to a shallow harbour, or to a river, or to a port where there is a bar, time so lost and expenses incurred shall be for charterers' account. I think that is what the parties must have intended by using this language, and I think their intention is sufficiently indicated if one gives a meaning to all the parts of the clause. I infer from the form of the umpire's finding that he read the clause as though, in order to give the owners the benefit of this part of the clause, there must have been a grounding upon some bar; and I assume that McCardie, J. took that view also, although he does not mention it in his judgment. In my opinion, that view does not give any meaning to the expression "shallow harbours." There was no need to use the word "shallow" in reference to "harbours" if what was contemplated was merely a grounding upon a bar. I think the meaning of the clause is that which I have already stated.

It is unnecessary to decide what meaning ought to be attached to those very general words "or otherwise" which follow "grounding." It is sufficient to say that my present opinion is that the *ejusdem generis* rule should be strictly applied to those words. We have, however, only to deal with a grounding, and giving my best consideration to this clause it appears to me that this grounding in the river causing detention to the steamer and occurring when the steamer was trading to the river, comes within the second part of clause 12, and the time so lost and expenses incurred (other than repairs) are to be for charterers' account.

For these reasons the appeal must be allowed, and the answer to the question in the special case must be in accordance with my judgment.

Warrington, L.J.—I agree. The question turns on the construction of one clause in a time charter—namely, "In the event of loss of time from deficiency of men or owners' stores," which is one thing, "breakdown of machinery," which is a second, "or damage to hull," which is a third, "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." I think the construction of that clause so far is fairly plain, and I agree with the extremely elaborate judgment of McCardie, J. on that point, though I think the result might have been obtained in a shorter and more direct way. The words on which so much discussion turned are "or other accident preventing the working of the steamer."

I think that there is no difficulty in construing those words, and that they cover any accident which prevents the working of the steamer. So far I agree with the judgment of the learned judge, and had there been nothing more in the clause the grounding of the vessel in the river to which she was directed to go would have been, within the meaning of that part of it, an "accident preventing the working of the steamer." But that exception from the time which is to be paid for by the charterers is qualified by the words which follow, which begin in this way, "but should the steamer." It seems to me that the mode in which that clause commences clearly shows that it is intended as a qualification of the wide provision contained in the previous words. The clause reads, "but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." The events there referred to as causing detention are, first, the steamer being driven into port or to anchorage by stress of weather or from any accident to the cargo. With those we are not concerned. We are only concerned with the second class of events referred to—namely, "or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars" causing detention through grounding. We are not concerned with anything but the detention caused by grounding.

The first thing to be determined is, what is the meaning of the words "trading to shallow harbours, rivers, or ports where there are bars." The umpire has clearly taken the view that the words "where there are bars" qualify "shallow harbours, rivers, or ports"—that is, all three of the places mentioned; and it was so contended before us on the part of the charterers. In my opinion, that is not the grammatical construction of this part of the clause. I think the place of the word "or" indicates that there are three categories of places all put under the same conditions, and those are "shallow harbours," "rivers," and "ports where there are bars." All those places are treated by the parties as places where detention may be caused to a ship trading thereto. In shallow harbours the detention may be caused by the ship getting aground in the harbour; in rivers by the ship having to go in a shallow channel, or in a narrow channel round what the umpire has described as "a little bend" in the river; in ports where there are bars the detention may be caused by the ship going aground on the bar, or, possibly having to wait until there is sufficient water for her to cross the bar. I think, therefore, that the word "rivers" is not qualified by the subsequent expression "where there are bars." That being so, we have still to consider what it is that is described as "causing detention," and I agree with Bankes, L.J. that what is there referred to as "causing detention to the steamer through grounding" is the fact of her trading to one or other of the three categories of places described. If she is ordered to trade to a river, and the result of her being so ordered is that detention is caused through grounding, then the charterers are to be the parties who are to suffer by the detention so caused.

For these reasons I think that the appeal ought to be allowed.

Atkin, L.J.—I agree, though I have had great difficulty in putting a reasonable construction upon this clause, which seems to me so framed as to give rise to very serious difficulty in the way of construction. As to the first part, on which McCardie, J. concentrated his judgment, I do not find it necessary to say anything. I think it is sufficient to assume that the words "other accidents" there are words of large import and need not necessarily be construed with reference to the preceding words upon the *ejusdem generis* doctrine, as to which I find it quite unnecessary to speak with any kind of disrespect.

To my mind the real difficulty arises out of the second part of the clause, and it is unfortunate that we have not been assisted in that difficulty by the opinion of the learned judge. The words of the second part are intended to be an exception to the first part of the clause, but only in part, because it is plain to my mind that they go beyond the scope of a mere exception, and, for extra caution no doubt, provide that in certain events detention shall be for charterers' account, even though there is no previous provision excepting such accidents from being for charterers' account. The second part of the clause begins as follows: "Should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo"—then the form of language changes—"or in the event of the steamer trading," &c., to the antecedent, "Should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo," the consequence is "time so lost and expenses incurred (other than repairs) shall be for charterers' account." So far that clause, it seems to me, has no reference to grounding. "Or in the event of the steamer," &c. How is the event defined in that part of the clause? It has been read by the umpire and McCardie, J. presumably as being this, that if a steamer trades to shallow harbours where there are bars causing detention to the steamer, or to rivers where there are bars causing detention to the steamer, or to ports where there are bars causing detention to the steamer, then time so lost shall be for charterers' account. Now that does not seem to me to be a reasonable construction, because a reference to a shallow harbour having a bar is something which would never have occurred to anyone to provide against specially, and I find it very difficult to picture what could be meant by such a combination as that even by persons who are well versed in nautical matters. There certainly is nothing before us to show that there was some special class of shallow harbour with a bar which the parties would have been likely to guard against. On the contrary, I think that what the parties are guarding against is not the bar of a shallow harbour, but the shallowness of the harbour; and if that is so, then the qualifying words, "where there are bars," must be read, not as applying to shallow harbours or to rivers—though in many cases a river has a bar—but as applying only to ports. Therefore the clause would read grammatically in this way: "In the event of the steamer trading to shallow harbours causing detention to the steamer through grounding or otherwise, or in the event of the steamer trading to rivers causing detention to the steamer through grounding or otherwise, or in the event of the steamer trading to ports where there are bars

causing detention to the steamer through grounding or otherwise." In all those cases there is a common differentia in respect of each of the subjects enumerated, namely, an increased peril of grounding either by reason of the shallowness of the harbour, or by reason of the well-known attribute of tidal rivers where there is at any rate a narrow channel, or by reason of the fact that there is a bar; and it appears to me that the object of the clause must have been to protect the owners from the extra risk involved by the ship being ordered to such places as are mentioned. Where there is that extra risk I think it is meant that the charterers should take it.

I am confirmed in this view by reference to clause 16, which again is not a well-constructed clause, because it begins by excluding certain ports: "The steamer shall not be ordered to any port where fever or pestilence is prevalent or any ports blockaded or where hostilities are being carried on or any icebound port or any ports where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall steamer be obliged to force ice." Then the clause continues: "Should the steamer be detained by any of the above causes such detention shall be for charterers' account." That is a provision that might very well have been brought into the clause which is an exception to the cesser of hire clause, but it is put into clause 16 and it makes it plain that, in the case of those ports where there is an extra risk to the ship, in the first place the ship is not to go there at all, but if the ship does go there the detention is to be for charterers' account.

In my view, therefore, the latter part of clause 12 means that in the event of the steamer trading to shallow harbours time lost and expenses incurred by reason of such trading to a shallow harbour causing detention to the steamer through grounding or otherwise shall be for charterers' account, and so as to rivers, and so as to ports where there are bars. That construction gives full effect to the clause and to every word in it; it does not strain the grammatical meaning; and it avoids a meaning which it appears to me the words are incapable of bearing, namely, making "where there are bars" apply to shallow harbours. On these grounds it seems to me that in this case the award was wrong. The question for the opinion of the court put by the umpire is "whether I am right in my award." The answer, I think, should be that the court is of opinion that the umpire is wrong, and upon that answer the umpire has proceeded to make this alternative award, and that award will take effect.

Appeal allowed.

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

Solicitors for charterers, *William A. Crump* and *Son*.

Tuesday, March 8, 1921.

(Before Lord Sterndale, M.R., Scrutton and Younger, L.JJ.)

The City of Edinburgh. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Limitation of liability—Dock owners—Dock owners also ship repairers—Damage to ship under repair in dock—Dock not owned by ship repairers—Limitation claimed on repairers' dock—Merchant Shipping (Limitation of Shipowners and Others) Act 1900 (63 *&* 64 *Vict. c.* 32), *s.* 2.

The plaintiffs were ship repairers and also owned a dock at Garston. The defendants were the owners of the steamship C. *and of her cargo, and all other persons claiming to have sustained damage by reason of a fire which occurred on the* C. *on the* 27*th June* 1918, *owing to the negligence of the plaintiffs' servants. The fire occurred while the* C. *was lying in a Liverpool dock not belonging to the plaintiffs, and was being fitted by the plaintiffs with mine-defence apparatus. The plaintiffs brought this limitation of liability action under sect.* 2 *of the Merchant Shipping Act* 1900, *which provides that: "The owners of any dock or canal or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act* 1894, *shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . performs any duty or exercises any power." The plaintiffs sought to limit their liability to* 30,281*l.*, *which was the aggregate amount at* 8*l. a ton on the tonnage of the* B., *which was the largest registered British ship which within the period mentioned in the section had been within the area over which they performed any duty or exercised any power. Hill, J. held that the plaintiffs had incurred liability as ship repairers and not as dock owners, and not within any dock over which they exercised any power, and that they were not protected by the section merely because they owned a dock elsewhere. The plaintiffs appealed.*

Held, that, as the plaintiffs' liability was not connected with the fact that they were dock owners, they were not entitled to a decree of limitation of liability.

Judgment of Hill, J. (infrà; (1921) *P.* 70) *affirmed.*

Appeal by the plaintiffs from a judgment of Hill, J. in an action brought by shipowners to limit their liability under sect. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900.

The plaintiffs were H. and C. Grayson Limited. The defendants were the Ellerman Lines Limited, the owners of the steamship *City of Edinburgh*, and others.

In June 1918 the *City of Edinburgh* was lying in the Hornby Dock, owned by the Mersey Docks and Harbour Board, where the plaintiffs, a firm of ship repairers, were engaged in work upon her. While so lying in dock, the vessel and her cargo sustained damage by fire, owing to the negligence of the

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

plaintiffs' servants. In an action instituted by the Ellerman Lines Limited the plaintiffs were held liable for the damage. The plaintiffs, who are the owners of a dry dock at Garston, brought the present action under sect. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act of 1900, claiming to limit their liability to 30,281*l.* 13*s.* 8*d.*, being the aggregate amount of 8*l.* per ton of each ton of the tonnage of the largest registered British ship which at the time of the damage in question was, or within the period of five years previous thereto had been, within the area over which they performed any duty or exercised any power, that is to say, in their dock at Garston.

The defence was that sect. 2 only applied where the damage was caused within a dock or area over which the plaintiffs claiming relief performed any duty or exercised any power; and that the plaintiffs had incurred liability as ship repairers and not as dock owners.

Butler Aspinall, K.C., *Greaves-Lord*, K.C., and *Lewis Noad* for the plaintiffs.

A. T. Miller, K.C. and *James Dickinson* for the defendants.

Hill, J.—This is a novel application for limitation of liability. I do not mean novel merely because it is brought by somebody not a shipowner, and under sect. 2 of the Merchant Shipping Act 1900; but novel because of the extraordinary results which would follow if I accepted the plaintiffs' contentions.

The steamship *City of Edinburgh* was lying in the Hornby Dock, Liverpool, which belongs to the Mersey Docks and Harbour Board, and is several miles from Garston. The plaintiffs were engaged in work upon the *City of Edinburgh* as she lay in the Hornby Dock. By the negligence of their servants the *City of Edinburgh* was set on fire, and it has been finally determined by the House of Lords (*Grayson (H. and C.) Limited* v. *Ellerman Lines Limited*, 14 Asp. Mar. Law Cas. 605; 123 L. T. Rep. 65; (1920) A. C. 466) that the plaintiffs are liable for the damage so caused. The plaintiffs are Messrs. H. and C. Grayson Limited, the very well-known firm of ship repairers, who had received their instructions to do the work upon the *City of Edinburgh*—instructions addressed to their North End Works. They also have works at Birkenhead, and at Garston, and at Garston they have a dry dock.

By this action they seek to limit their liability for damages caused by negligence for which they are responsible—negligence happening in the Hornby Dock. They seek to limit that liability by saying that they are entitled to the benefit of sect. 2 of the Act of 1900, which limits the liability of, among other people, dock owners, to damages ascertained on the basis of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which the dock owner "performs any duty or exercises any power." The contention for the plaintiffs is that the words of the section are plain; that, however absurd the results of the construction they contend for, it is not for the court to disregard the plain meaning of the words; it is for Parliament to set them right.

Sub-sect. 1 of the section is as follows: "The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner, harbour authority, or conservancy authority, performs any duty or exercises any power." Then there are some words which apply only to harbour authorities and conservancy authorities. By sub-sect. 4, the term "dock" is to include "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-places, and jetties." And by sub-sect. 5, the term "owners of a dock or canal" shall include "any person or authority having the control and management of any dock or canal, as the case may be."

There is no doubt that Messrs. Grayson Limited own a dock within the meaning of sub-sect. 1, because they own and have the management of a graving dock. But are they, under this sub-section, entitled to the limitation of liability prescribed by the sub-section in respect of liability which they have incurred, not at or near or in any way connected with their graving dock, but while they were performing work as ship repairers upon a ship several miles away from their graving dock? If the plaintiffs' contention is right, if Messrs. Grayson were doing ship repairs to a ship at Pernambuco or at Singapore, they would be equally entitled to the limitation of liability which they claim. And, indeed, if instead of owning a graving dock at Garston they owned a slip, or even a jetty, they would be entitled to a limitation based upon the tonnage of the largest registered British ship which had ever been on that slip or at that jetty. It would be a very economic form of insurance against liability for anybody who was connected with ships and likely by himself or his servants ever to do any damage to those ships to maintain a jetty or a slip at which "the largest registered British ship" should be of the least possible tonnage; he would reduce his liability under this sub-section to a minimum. The result of the contention for the plaintiffs is so absurd that, unless I am absolutely forced by words that I cannot evade, I refuse to suppose or to hold that Parliament ever intended anything of the kind.

I start with this: that this sub-section, like all other statutes of limitation, limits a common law right of an injured person, and therefore the statute is to be construed strictly against the person who sets it up, in this sense, that it is to be carried no further than the plain words of the sub-section necessarily require. For that I refer to *Gale* v. *Laurie* (5 B. & C. 156), which was a case under another Merchant Shipping Act. Do the words of the sub-section necessarily import that which the plaintiffs contend? The sub-section deals with liability and limits it, liability of dock owners, canal owners, and so on. In fixing that liability, it has regard to an area, namely, the area over which the dock owner "performs any duty or exercises any power." I see nothing in the sub-section to compel me to say that a man who becomes liable, not because he is a dock owner, or because the ship

is at the time in the area of his dock or at or near the dock—the place in which he "performs any duty or exercises any power"—is entitled to limit his liability on the mere ground that he happens to own also a dock or quay or a pier or a jetty. It would seem to me to be reducing the Act to an absurdity if I were so to hold. The liability is one which Messrs. Grayson incurred as ship repairers, not as dock owners, nor at or near or anywhere about their dock. It is a mere accident *quâ* that liability that they happen to own a dock. I am satisfied that no interpretation of the sub-section forces me to the conclusion that, because they happened to own a dock at the same time as that at which they incurred a liability neither as dock owners nor at the dock, they are entitled to limit their liability.

I therefore dismiss the action with costs.

The plaintiffs appealed.

Butler Aspinall, K.C., *Greaves-Lord*, K.C., and *L. Noad* for the appellants.

A. T. Miller, K.C. and *James Dickinson*, for the respondents, the defendants, were not called upon.

Lord Sterndale, M.R.—I think this appeal should be dismissed.

It is an appeal from Hill, J. in an action brought by the plaintiffs to limit their liability in respect of injury done to the steamship *City of Edinburgh*, upon which they were doing repairs. The ship was being repaired in the Hornby Dock, Liverpool. The plaintiffs, a well-known firm of ship repairers in Liverpool, had a dry dock at Garston, not under the control of the Mersey Docks and Harbour Board, but situated a long way up the river, about ten miles from the place where the repairs were being done. According to the plaintiffs' contention, it does not matter, however, if it is ten miles or 10,000 miles distant; the work may be in the course of being done anywhere, and the plaintiffs would still be entitled to the protection of the statute.

What happened was this: a boy in the employ of the plaintiffs stumbled and accidentally dropped a red-hot rivet into one of the holds of the *City of Edinburgh*, causing a very disastrous fire. Litigation ensued, which went to the House of Lords (*Grayson* (*H. and C.*) *Limited* v. *Ellerman Lines Limited* (*sup.*), and the present plaintiffs were held responsible for the damage. They now come to this court and ask for a limitation of their liability under sect. 2 of the Merchant Shipping Act 1900, which provides that: [The Master of the Rolls read sub-sect. 1 of sect. 2, and continued:] Sub-sect. 4 of the same section defines the term "dock." It is to "include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-stages, and jetties."

The contention of the plaintiffs is that sect. 2 enables the dock owner to limit his liability for any damage done to a vessel, however caused and wherever caused, because he happens to be the owner of a dock, and, as Hill, J. points out, inasmuch as a dock is defined as including a slip or jetty, it would be a very easy method of insurance to become possessed of a very small slip or jetty to which only a very small vessel could come. No liability could then accrue for any injury done by the owners of the slip or jetty to a vessel or goods on board a vessel beyond 8*l.* on a tonnage of perhaps five or ten tons, according to the size of the small vessel which could get or had got to their jetty. I am prepared to say that such a result would be absurd. I agree that if Parliament has chosen directly in so many words to produce an absurd result, then that absurd result must be produced, but the court is entitled and indeed bound to look at a statute from this point of view, that if there is a reasonable and sensible construction of it and also an absurd one, the court should lean to the sensible construction.

Under these circumstances I should have said, without the assistance I am going to refer to in a moment, that the section must refer to a limitation of liability, as one of my learned brothers has suggested, of the dock owner as such—*i.e.*, in respect of something in some way connected with his dock. I do not attempt to define everything to which it does apply; I have only to decide for the moment to what it does not apply. I should have said that it must be limited in the way suggested, and Mr. Aspinall has helped me to that conclusion by referring to the previous legislation, and by suggesting that the intention was to put the dock owner in the same position, or, at any rate, in as responsible a position, as the shipowner who limits his liability under the Merchant Shipping Act. Now the shipowner only gets a decree of limitation of liability in respect of some injury or damage caused by other persons in some way relating to his ship; the damage must be to somebody or something in the ship or damage caused by the ship. I do not know that it is necessary to put it as narrowly as that with regard to the dock owner, but when a shipowner gets a decree of limitation it is in respect of something connected with his ship, and I think a dock owner should only get a decree in respect of damage in some way connected with his dock. The losses in this case were in no way connected with the plaintiffs' dock. The decision of Hill, J. that the plaintiffs are not entitled to the decree of limitation claimed in this action was quite right, and the appeal must be dismissed with costs.

Scrutton, L.J.—But for hearing the argument addressed to us I should have thought that this case was unarguable; having heard it I remain of the opinion that it was unarguable. It is one of those cases where Parliament has used very wide words which interpreted in their widest sense lead to absurdity, and interpreted in their limited sense are reasonable. It appears to me that to read these words as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity. The repairs in the Hornby Dock had nothing to do with the ownership of a dock at Garston, and for that reason the Garston dock owners cannot limit their liability for what their boy did in the Hornby Dock ten miles off.

Younger, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*, for *Weightman*, *Pedder*, and *Co.*, Liverpool.

Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Hill*, *Dickinson*, and *Co.*, Liverpool.

Jan. 31 *and March* 21, 1921.

(Before Lord Sterndale, M.R., Warrington and Younger, L.JJ.)

The Ibis VI. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Costs—Party and party costs—Witnesses—Seafaring witness detained on shore pending trial—Order LXV., r. 27.

Where a seafaring witness has been detained on shore pending trial, the amount which he would otherwise probably have earned on a voyage is a guide to, but is not the sole basis of, determining what allowance for his attendance should be made on a party and party taxation, especially in the case where the voyage contemplated was risky or speculative in its nature. Reasonable compensation should be allowed, regard being had (inter alia) *to the wages which a person of his class was earning at the time, to the value of his evidence, and to the question whether it could properly have been taken on commission. The fact that the witness could have been called to attend on subpœna and paid only a nominal sum should not be wholly ignored.*

Appeal from a decision of Duke, P. affirming an order of the assistant registrar.

On the 5th Jan. 1916 a steam trawler of the plaintiffs' came into collision with the defendants' trawler, the *Ibis VI.* The plaintiffs sued the defendants to judgment, damages being agreed at 300*l.* Arthur Burton, who was mate of the plaintiffs' trawler at the date of the collision, had afterwards become mate of a Belgian trawler, whose owners consented that he should give evidence at the trial of the collision action, which was fixed for the 27th Nov. 1918. The Belgian trawler went on a trawling trip from the 9th Nov. until the 3rd Dec. 1918; and Burton's substitute's share of the earnings was 280*l.* 11*s.* 5*d.* The plaintiffs paid that amount to Burton as being the amount he would have earned if he had gone on the trip. On two previous trips Burton's earnings had been nearly 100*l.* a week. The assistant registrar on the party and party taxation allowed 280*l.* 11*s.* 5*d.* against the defendants in respect of compensation to Burton.

Duke, P. dismissed an appeal, but gave leave to appeal.

The defendants appealed.

Stranger for the appellants.—The amount allowed in respect of Burton was so large as to be unreasonable. It is not a question of quantum, but of principle. The normal earnings of a mate should be considered, and not exceptional earnings. If the earnings of witnesses in exceptional circumstances were allowed, the costs might enormously exceed the sum at issue in an action. A mate's large earnings at that period was in proportion to the risk, and due to the high price of fish. By staying on shore Burton escaped war risks. Roscoe's Admiralty Practice (4th edit., p. 424) says: "If a witness is necessarily taken out of a ship he is entitled to a reasonable sum during the time that he is detained from his regular employment." Burton could have been subpœnaed, and paid a mere nominal sum. The taxing master applied a wrong principle.

Dumas for the respondents.—Under Order LXV., r. 27, the plaintiffs were entitled in respect of Burton to just and reasonable charges and expenses. It was a matter for the registrar's discretion. A witness should be paid what he could reasonably have been expected to earn:

Turnbull v. *Janson*, 26 W. Rep. 815; 3 C. P. Div. 264.

What Burton would have earned is not a matter of guesswork, but of practical certainty. The plaintiffs were justified in paying Burton the earnings which he lost by giving evidence, and can recover them from the defendants.

Stranger in reply.

Order LXV., r. 27, provides:

The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature: . . . (9) As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

Cur. adv. vult.

March 21.—The following judgments were read:—

Lord Sterndale, M.R. stated the facts, and continued:—The allowances to other witnesses were as follows: The steward was allowed 13*l.* 9*s.* for eleven days' detention; the master was allowed 21*l.* for three days; the chief engineer was allowed 23*l.* 14*s.* 10*d.* for twenty-seven days; and the deck hand was allowed 3*l.* for three days. These amounts work out approximately at the following daily rates: the steward, 25*s.*; the mate, 11*l.* 4*s.*; the master, 7*l.*; the chief engineer, 17*s.* 6*d.*; the deck hand, 1*l.* It will be noticed that the mate is enormously higher than anybody else. The amount paid to this witness, as compared with the amount of the damages, is no doubt startling, but to a certain extent it is due to the startling gains which were made by some persons during the progress and by reason of the war. The witness had taken an engagement as mate of a Belgian trawler, and was to be paid, as masters and mates of trawlers often are, by a share of the catch. One consequence of the war was that the value of the catch had appreciated enormously, and it was proved, by evidence which satisfied the assistant registrar and the President, that persons paid by shares of the catch were at the material time earning remuneration far out of proportion to anything they had earned before the war. It was also proved to the satisfaction of the assistant registrar and the President that the witness, if not detained for the purposes of the trial, would have sailed on the 9th Nov. 1918 as mate of the trawler *J. Baels Maurieux*; that in consequence of his being detained and unable to sail, another mate was engaged in his place on the same terms, and that the share received by that mate was the sum of 280*l.* 11*s.* 5*d.* The witness therefore, in fact, lost that sum, and other questions which arise are: (1) Were the plaintiffs bound to pay him that sum? (2) If so, can they charge it against the defendants as part of the costs of the action? I think we must accept the facts as proved before the assistant registrar and the President, and indeed they were not challenged before us.

The question of the detention of witnesses for the purpose of giving evidence is of greater importance in the Admiralty Division than in any other division of the High Court, although the rule upon

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

the matter, Order LXV., r. 27, applies to all divisions, and expert nautical witnesses have always been treated rather differently from others. In the other divisions the witnesses are generally in this country, and can return to or remain in their ordinary avocations until a short time before the trial, when they can be summoned by notice or subpœna, and are readily available. There is also a scale of allowances to witnesses which, modified by the discretion allowed to the taxing master, works on the whole quite well, although not always to the satisfaction of the witnesses. In the Admiralty Division the position is different. If nautical witnesses are allowed to join their ships and resume their ordinary avocations, the chances of their being able to be present at a trial on a date to be fixed in the future are small, and it has, therefore, always been held permissible to detain them on shore, and to pay them proper compensation for such detention; and the amount of the compensation has been considered as an expense in the costs of the action. This was laid down as long ago as 1857 in the case of *The Olive* (1857, Swabey, 292), where Dr. Lushington pointed out that the rules of other courts as to witnesses did not apply to such a detention. It has always been considered that the rate of wages which the witness was earning at the time is an important factor in ascertaining the proper amount of compensation, and generally the course is taken of paying him for the period of detention at the rate of his wages: (see Roscoe's Admiralty Practice, 4th edit., p. 424). The rate of wages, however, is not an absolute measure, but a valuable guide. The actual amount of compensation is fixed by the registrar, and I think this long continued practice raises an implied contract on the part of the litigant who detains a witness without further bargain to pay the compensation fixed by the registrar. It was argued in this case that the plaintiffs ought to have made a special bargain with the witness, but I am not at all satisfied that they could have made such a bargain, at any rate to pay a less sum than the registrar might fix. The plaintiffs cannot charge against the defendants more than they themselves were bound to pay to the witness. I think the circumstances of the payment in this case might throw some doubt on the payment being made in consequence of such a liability, but I take that as decided in the plaintiffs' favour by the assistant registrar, a decision which we must accept.

Whether the litigant paying that sum can recover it as costs from his defeated opponent depends on one or two considerations. The witness must be one, I think, whom it was necessary to produce in person at the trial, and whom it was not reasonable to expect the litigant to examine on commission. It was decided as long ago as the case of *The Karla* (1865, 13 W. Rep. 295; Br. & Lush. 367), before Dr. Lushington, that a litigant cannot in all circumstances, and could not in those of that case, be obliged to examine a witness beforehand, and is in those circumstances entitled to call him personally at the trial. But when he seeks to charge his opponent with the expense of doing so, I do not think that authority precludes the question whether he acted reasonably in incurring the expense. The answer to that question must depend upon the importance of enabling the court to hear the witness give evidence in person, the nature and importance of his evidence, and the expense incurred as compared with the importance of the case, which is not necessarily measured solely by the amount of money involved. In this case no such question was raised before the assistant registrar or the President, or indeed by the appellants before us, although I think I suggested the possibility of it during the argument; and I think we must take it, for the purposes of this appeal, that it was reasonable for the plaintiffs to detain this witness for the trial. In that case, for the reasons I have given, I think the plaintiffs are entitled to charge the proper expense of such detention against the defendants, and the only question remaining is whether the assistant registrar has allowed an unreasonable amount to the witness.

Speaking generally, this is a matter for the discretion of the registrar, and the court will not interfere, unless he has proceeded on a wrong principle. The assistant registrar's answer in this case to the objections was as follows: "In my opinion the basis upon which a witness necessarily detained for a trial should be remunerated is the amount he would have earned during the period of detention, if he had not been detained. There is nothing in the quotation from Mr. Roscoe's book to which reference is made in the objections to controvert this proposition. The evidence was perfectly clear in this case (1) that the witness was necessarily prevented from taking part in the voyage in question (this is not now questioned), and (2) that in consequence of his detention the witness lost the amount which I have allowed. In my opinion the contention put forward in the objections that in cases of detention a witness is not to be remunerated on the basis of what he has lost, but upon some other fictitious basis, is unsound. Of course it may be necessary in some cases where the precise amount of the loss cannot be ascertained to make an allowance based upon average earnings, but where, as here, the actual loss can be accurately determined it should be allowed." I cannot assent to this as accurate. I do not think the compensation can depend upon the actual result of an adventure undertaken during the time of the detention. To adopt such a rule would be to involve the litigants and the witness in the results of an adventure possibly speculative. In this particular case the trawler might have been lost on the voyage, and no catch secured, and in that case the witness—apart from the question of insurance—could have earned nothing; and, if the assistant registrar's principle be logically applied, would be entitled to no compensation, because he had suffered no loss. I do not think the actual loss in a particular period can be said to be necessarily the measure of compensation, and I think the only direction that can be given is that the assistant registrar must award the reasonable compensation to a person of the class of the witness, taking into account all the circumstances, and considering the wages which the witness was earning about the time of detention, not as an absolute measure, but as an important indication and guide to what is fair. The fact that all persons are under an obligation to give evidence when called upon should also not be ignored. As I cannot consider the principle appled by the assistant registrar to be correct, I think the case must go back to him to award compensation to the witness and costs to the plaintiffs on the principles I have stated above.

The appellants argued that the witness should only be paid conduct money with a subpœna, or,

at the outside, only such charges as are contained in the scales of charges as witnesses' allowances. This, I think, ignores the special conditions I have mentioned as to nautical witnesses, such as give evidence in the Admiralty Division, and is incorrect. They also argued that, at the outside, he should only be allowed the wages paid to men of his class, and that the engineer of the trawler was the man nearest to his class, and probably superior to him in education and skill. Therefore they contended the witness should not be paid more than the wages paid to the engineer according to the articles. I think there is no foundation for this argument. I do not feel myself capable of comparing the education, skill, and attainments of the engineer of a trawler with those of a mate, and I am not satisfied that it is conclusively established that anywhere the amount of payment is always in strict proportion to the merits of the payee. But I think the short answer is that a mate is not an engineer, and an engineer is not a mate, nor are a mate and an engineer in the same class of employees. Without considering which is superior, it is enough to say that they are different. Their duties are different; they are paid not only different amounts, but by a different method; and, in inquiring into compensation to a mate, it is a mate's wages, and not an engineer's, which are a guide. The authorities on the subject are discussed in the judgment to be delivered by Younger, L.J., and I do not propose to repeat the discussion.

The appellants must have the costs of the appeal, and of the hearing before the President. The costs of the past and future hearings before the assistant registrar should be dealt with by him.

Warrington, L.J. requests me to say that he agrees with this judgment.

Younger, L.J.—I entirely concur in the order just intimated by my Lord, and I would for myself add nothing to the judgment he has delivered were it not that I find, in the grounds given by the learned assistant registrar for allowing this large sum of 280*l.* 11*s.* 3*d.*, as the expenses of a single seafaring witness in this comparatively trifling case, grave reason for the apprehension that allowances of an amount equal to, and in many cases indefinitely exceeding, that impugned on this appeal may, in the Admiralty Division, come to be made on a party and party taxation, almost as a matter of course, unless some attempt be made here and now to recapture and restate from the authorities upon the subject some of the principles with reference to which the wide discretion of the registrars in these matters ought to be exercised. It would, in my judgment, be a grave misfortune if an excessive liberality in the matter of such allowances were to become normal in any division of the High Court. The true attitude with regard to them is, I think, that described by Bovill, C.J. in *Potter* v. *Rankin* (1870, 22 L. T. Rep. 347; L. Rep. 5 C. P. 521) with reference to just such an allowance as that now in question. It may be salutary to recall it: "It is the duty," the Chief Justice says, "of the master to watch most jealously and exercise the most scrupulous care in dealing with such a claim." In the same connection I would recall the observations taken from the judgment in *Smith* v. *Buller* (1875, 31 L. T. Rep. 873; L. Rep. 19 Eq. 475), as enunciating a sound principle, especially valuable in these times of pervading financial stress: "It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. . . . I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more coveniently may be called luxuries, and must be paid by the party incurring them." These warnings are as applicable to proceedings in the Admiralty Division as in any other division of the High Court. True it is that special considerations are, and, so far as I can find, always have been, applicable to the remuneration of seafaring witnesses detained to give evidence in courts of justice; and it is of course a trite observation that the testimony of such witnesses constitutes the bulk of that adduced in Admiralty, so that the question of the proper allowances to be chargeable on taxation in respect of their attendance arises far more frequently than that in any other division.

But what is a proper allowance for such a witness must depend upon similar considerations, whatever be the court in which he testifies, and it will not, in this connection, be forgotten that the only existing rule upon the matter is expressly applicable to every branch of the Supreme Court. [His Lordship read Order LXV., r. 27 (9).] That is the rule which governs the present question, and the relevant circumstances which raise it may now be shortly stated. [His Lordship stated the facts of the case, and continued:] The amount charged in respect of the attendance at the one day's trial of a single witness in such a suit as this, and that witness a mate in a steam trawler, is sufficiently startling. It represents almost as much as the whole amount involved in the action, and more than half of the plaintiffs' entire costs of suit from beginning to end, extending as it did from Trinity 1917 to Hilary 1920. The assistant registrar has allowed the claim in full, and he has given the following reasons for so doing. [His Lordship read them.] The ominous features of that finding consist, to my mind, in this: that the assistant registrar expresses it in general terms, as embodying a principle applicable to every class of seafaring witness, irrespective of his status or condition; nor is there any reference, at least in terms, to the vital distinction between the remuneration which a litigant may, if he chooses, agree to pay a witness whom he calls and the sum with which, in respect of that witness's attendance, he may properly charge his opponent. The learned President did not feel himself at liberty to interfere with that finding, but to my mind, if such be its purport and effect, it has, as I think, no true warrant either in principle or authority; while if unchallenged or accepted, it would, in my judgment, carry with it the seeds of much future mischief.

I agree, however, with my Lord that, so far as the actual determination of this appeal is concerned, there are at least two very relevant considerations normally applicable to such a case, which, although not in terms referred to by the assistant registrar, were, we must assume, duly weighed by him, and resolved in a sense favourable to the plaintiffs. Accordingly, if I refer to them now before discussing the questions which are open to us, it is not because they affect our present decision, but because I desire to emphasise their

importance in all such cases when they arise, and I do not desire it to be supposed that they have here been overlooked.

The first is that although this sum of 280*l.* 11*s.* 5*d.* would presumably have been receivable by Burton had he sailed on the *J. Baels Maurieux* at some date shortly after the conclusion of the fishing voyage on the 3rd Dec. 1918, no payment was made to him by the plaintiffs in respect of it until nearly nineteen months later, and on the eve of taxation. Now the rule in this matter, as between a witness and a party calling him, is well settled. The reasonable expenses of a witness, whether intended to be charged against the other side or not, ought to be tendered to him when he is served with the subpœna, and if he is to be remunerated for loss of time, such remuneration ought also then to be tendered to him. The witness's remuneration in the present case, having regard to the basis on which it is arrived at, could not of course have been tendered with his subpœna, but if it was to be paid at all, it should, in the ordinary course, have been paid at the earliest moment after its amount had been ascertained. It was not so paid. Now arrangements in connection with such a payment as this, similar to that so severely animadverted upon in *Hale* v. *Bates* (1858, 6 B. & E. 575; 13 W. Rep. 295), are, I suspect, not yet uncommon. A payment on the eve of taxation is made on an understanding that so much of it as is disallowed shall be returned. Of course, I do not in the least suggest that anything of the kind happened here. On the contrary, I assume that the assistant registrar satisfied himself that it did not. I allude to the matter, as I have said, by reason of its extreme importance in all such cases. A suitor claiming to charge such a sum against his defeated opponent should be required to establish as an indispensable preliminary that he has irrevocably himself made the payment, or that he is liable to make it. This, in my judgment, to use Bovill, C.J.'s words, is one matter which every taxing officer should watch most narrowly.

The second matter to which I desire to refer is this. No application was, in the present case, made by the plaintiffs to have this potentially most expensive witness examined on commission before the trial. To my mind this is a consideration which should always be most carefully weighed by a taxing master before he allows a charge for that witness's attendance so disproportionate as the present charge is, whatever be the angle from which it is regarded. I am disposed to think that in the Admiralty Court the importance of this aspect of the question at issue has become somewhat obscured by reason of the statement attributed to Dr. Lushington by the headnote in *The Karla* (1865, 13 W. Rep. 295; Br. & Lush. 367), and from there transferred to the books of practice: (see Roscoe's Admiralty Practice, 4th edit., p. 424). The statement is, "A party is not bound to examine a witness before the trial." But if that case be examined, it will be found that Dr. Lushington's actual statement on this subject is much more guarded than that, so attributed to him. Dealing with the facts of that case, what he said was this (Br. & Lush. 369): "I cannot conceive that it is ever incumbent upon the owner of a vessel, who is defendant in the cause, to proceed to the examination of foreign witnesses by affidavit, or by commission or oral examination, before the petition is examined upon, or, in other words, before the witnesses for the plaintiff have been examined"—I desire to emphasise those words—"He is not bound to pursue such a course." These words are, it will be noted, carefully guarded, and fall short of the statement compendiously imputed to Dr. Lushington, and that in two respects not here applicable, which are of real importance in matters relating to the attendance and examination of witnesses. The first is that the witnesses there were the defendant's witnesses, the other that they were foreigners, whose further attendance the court might be quite powerless to enforce.

But the importance of this matter in the general aspect of it is dealt with in other cases. I will only mention two. In *Temperley* v. *Scott* (1832, 8 Bing. 392), where a claim was made by the plaintiff in respect of the detention, as a witness, of a master of a ship at the rate of 10*l.* a month, on the ground that he had, by reason of his detention, lost profitable employment, the taxing master allowed 8*l.* It was proved that the plaintiff had offered beforehand to have the master examined on interrogatories; the defendant had refused. The defendant appealed from the allowance of 8*l.*, and argued the general principle, to which I shall refer later, that he could not be charged with any sum in respect of the witness's loss of time. But Tindal, C.J. said (8 Bing. 393): "It is unnecessary in this case to agitate the general principle as to the allowance of costs for loss of time; for, in the first place, the sum which has been allowed in this case for subsistence is not extravagant very little, if any at all, more than was necessary for the board and lodging of a witness in Grewcock's station; and then an offer was made to the adverse party to examine the witness on interrogatories, and warning was given of the expense that would attend his refusal. Perhaps he made a prudent election; but it reduces the case to a bargain between the two parties, which precludes the necessity of any interference on the part of the court." The second case is *Evans* v. *Watson* (1846, 3 C. B. 327). There a claim was made of 10*s.* a day in respect of loss of time of a captain witness for 300 days; 7*s.* for 300 days was allowed. In that case Tindal, C.J. said (3 C. B. 329): "This action is brought to recover a large sum of money; and, after having obtained an order for the postponement of the trial on the ground of the absence of material witnesses, the defendants have thought fit to pay the sum demanded, and now complain that the plaintiff has done all that he reasonably could and ought to have done to insure success. The postponement of the trial was a favour to the defendants; it was for them to ascertain, when they asked it, whether the price at which they purchased that favour was not too great. If the witness had been wantonly and unnecessarily kept here by the plaintiff, the case would have been very different. But I am of opinion he was, under the circumstances: very properly detained for examination *viva voce*, in consequence of the intimation from the defendants that they meant to impugn his conduct." Maule, J. said (3 C. B. 330): "I also think the allowance of subsistence money to the witness in this case was properly made. It cannot be laid down as a general rule, that, in all cases where a witness may be examined on interrogatories, the party for whom he is to be called may at his option detain him for examination *viva voce*. But still he must be allowed a reasonable

exercise of discretion; and, where the matter is doubtful, I think the party detaining him should have the benefit of the doubt." And, to my mind, it stands to reason that in many cases this consideration should be decisive against the right of a party to make upon his opponent on taxation such a claim as the present. Unless the presence of the witness at the trial is of really serious importance to the plaintiffs' case, such entirely disproportionate expense as is here involved in detaining him, and not examining him on commission, is surely a luxury, for which, *primâ facie*, the plaintiff should himself pay, unless on application made to the defendant the latter has objected to the witness being so examined. If due regard be paid, in proper cases, to this consideration, such difficulties as emerge in the present case will, I am satisfied, rarely arise. Here, however, I again assume that this matter has been sufficiently considered by the learned assistant registrar, although on the assumption which I fully make, that this claim is a genuine claim, I must say that I can myself see no ground, nor was any suggested, beyond the statement imputed to Dr. Lushington, why this witness Burton should not have been examined at any time during what we were told was his long stay ashore prior to the 8th Nov. 1918.

I come now to the real ground upon which the issue of the appeal must turn. Has the learned assistant registrar, when he allowed this claim, proceeded on a wrong principle? As I have said, I think he has. The question at issue has a long history. We may take as a convenient starting point the principle enunciated in *Collins* v. *Godefroy* (1831, 1 B. & Ad. 950)—a principle still the law of the court, although its application has been softened by later rules of procedure—namely, that there being a duty imposed by law upon a person regularly subpœnaed to attend from time to time and give his evidence, a promise to give him remuneration for loss of time incurred in such attendance is a promise without consideration, and the fact that allowances are given as between party and party in respect of the attendance of professional witnesses does not alter the law. Remuneration for loss of time by professional witnesses was apparently, as is recognised in *Collins* v. *Godefroy* (*sup.*), always an exception to the general rule laid down in that case. It would also appear that seafaring witnesses at all times held a similar position of advantage, for reasons which may conveniently be taken from the judgment in *Berry* v. *Pratt* (1 B. & C. 276): "Upon principle, the master was justified in allowing the subsistence money in question. Although the witness was an Englishman, yet he was a seafaring man; and, unless detained for the purpose of giving evidence, might again have gone to sea, and then the parties might have been put to a far greater expense by the postponement of the trial, on account of his absence. There would also have been some danger of his evidence being altogether lost by the various casualties to which seafaring men are exposed."

Moreover, it is, I think, true to say that as regards a seaman, as was stated in *The Olive* (Swabey, 292), the rate of wages is a fair criterion on which the allowance to him may be based, presumably because the normal wages of an ordinary seaman are no more than a decent living wage. But there is no warrant contained in any of the authorities I have been able to find for the proposition that this statement is true of captains, or other lower grade officers; any more than for the proposition that, in the case of professional witnesses, it is ever applicable so as to justify an allowance to one in excess of that made to another because his business was more prosperous, or because his absence from business involved him in greater loss. On the contrary, it will be found in *Stewart* v. *Steele* (1842, 4 M. & G. 669), to take one instance of a captain of a ship, that remuneration of 400*l.* in respect of a detention of 370 days was only allowed in respect of his attendance as a witness, although the evidence was that the earnings of which he had been deprived by his detention were 1000*l.* a year, exclusive of board and lodging. Again in *Evans* v. *Watson* (1842, 5 Scott N. R. 517; 3 C. B. 327; M. & G. 669), another captain's case, where a claim of 150*l.* in respect of 300 days' detention was made, but only 97*l.* 14*s.* 2*d.*—7*s.* a day—for the 300 days was allowed.

For the principle adopted by the learned assistant registrar—ignored, if it existed, in these cases—I can find no warrant anywhere; and, on consideration of its general character, it stands, in my judgment, self-condemned. Take the present case. There its application would, according to the event, have justified an allowance of thousands of pounds, or one reduced to nothing at all. If the fishing trip, which, as it was, extended for five days after the trial, had been prolonged for five weeks, the defendants would, I presume, have been necessarily chargeable on this principle with the further profits earned by Burton's substitute during that extended period, had no other employment been found by Burton in the interval. In other cases the application of the principle might necessitate an examination of books and accounts yielding results purely arbitrary in relation to a witness's importance as such. And these consequences are not imaginary, because the truth is that the supposed principle is untenable, in that it ignores entirely the initial obligation of every citizen and every sojourner within reach of the court's process to give evidence in the courts of this country when duly summoned for the purpose; it ignores the fact that the provisions of the rules of court, under which compensation may be charged against the opponents of those who require his attendance, are, on the basis of a strictly reasonable allowance, made on the footing that the witness's obligation to testify, while it remains an obligation, never becomes a sacrifice on the one hand, or a profit on the other. It would, in my judgment, be *pessimi exempli* if this principle enunciated by the learned assistant registrar, now that it has been challenged, were held by this court to be tenable. If it were so held, the result would be that to the uncertainty of litigation in its issue would inevitably be added increased uncertainty as to its cost, necessarily involving such a risk to many a plaintiff with a good cause of action and to many a defendant with a good defence as would deter them from further prosecution or resistance, and so in effect bring about a denial of justice in their cases.

In my judgment, the initial obligation on the part of a witness duly summoned to attend, and, in the interests of parties, give evidence, should never be forgotten in fixing on a party and party taxation any payment in excess of his actual expenses chargeable in respect of his attendance

against the defeated party. It is no part of the duty of the court to minimise or ignore that obligation; rather is it the privilege of the court to proclaim it and insist upon its observance. If in matters of taxation it be forgotten, the results must, in all cases, not absolutely normal, be arbitrary; in most, excessive; in some, extravagant. And while remuneration for his loss of time may, in respect of a seafaring witness, be now, as always, properly allowed by the registrar on taxation, and while, in the case of an ordinary seaman, his wages may still supply a fair criterion on which the allowance may be based, that criterion has not, as has been seen, any necessary application to other ratings; nor can it be applied, as it seems to me, so as to extend either for better or for worse to the purely speculative share of profits of a fishing voyage from the prosecution of which the witness was, by his attendance at the trial, detained, but the necessary risks or hardships of which he was not called upon to undergo.

It is not within my capacity, nor if I possessed the wit would it appear to me to be right, to suggest any formula for the governance of a taxing officer in such a case as this. His discretion is and ought to be wide; any attempt to fetter it in advance would be mischievous. But this much I feel that I may say after an examination of the cases, and bearing in mind the proper attitude of the registrar towards all such claims. Little objection, in the bulk of such cases, could, I think, be raised to an allowance for the detention of a necessary seafaring witness, if that allowance be based upon a reasonable subsistence payment, suitable to a person in his station of life, while not exceeding any loss actually incurred by him by reason of his detention, or any real remuneration which, but for that detention, the witness would have earned, or of which by reason thereof he may have been deprived. If the witness is to receive more, he may be left to get it from the party who detained him. Even that party is, on the principle of *Collins* v. *Godefroy* (1 B. & Ad. 950), liable for no more. If he thinks fit to pay more, he does so as a luxury of litigation in which it has pleased him to indulge.

For these reasons, I concur in the view that this appeal should be allowed, and this item in the plaintiffs bill of costs be referred back to the learned assistant registrar for reconsideration.

Appeal allowed.

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

Solicitors for the respondents, *Nicholson, Graham,* and *Jones,* for *J. R. Gaulter,* Fleetwood.

House of Lords.

Friday, Nov. 26, 1920.

(Before Lords Birkenhead, L.C., Finlay, Shaw, Moulton, and Sumner.)

Owners of Steamship Larenberg *v.* Owners of Steamship Gothland.

A ship guilty of initial negligence is bound to do everything she can to prevent the consequences of that negligence, and the burden upon her is to show that she has done so before she can claim that the negligence of another ship is the sole cause of an accident.

Per Lord Moulton.—There is great danger of misapplying the doctrine for which *Radley* v. *London and North-Western Railway Company* (1876, 1 App. Cas. 754) is quoted as an authority. The language sometimes used by the courts on this point would seem to imply that a ship guilty of the initial negligence is relieved from all responsibility, and that the other ship alone has to bear that task of avoiding the consequences, and that if she could have done so by proper navigation she is solely to blame. This is not the true rule. The ship guilty of the initial negligence remains bound to do everything that she can to prevent the consequences of that negligence, and the burden upon her is to show that she has done so before she can claim that the negligence of the other ship is the sole cause of the accident. Otherwise, we should be putting a premium on taking the initiative in negligence. In the present case, the *Gothland* continued to be negligent until the moment of the collision with the *Larenberg,* and thereby aggravated if she did not wholly cause the danger, and although the *Larenberg* was also negligent, she must share the blame.

Note.—The full report of the above will be found at p. 122 of vol. XV. of Aspinall.—Ed.

Jan. 18 *and March* 3, 1921.

(Before Lords Haldane, Finlay, Atkinson, Wrenbury, and Phillimore, with Nautical Assessors.)

Owners of the Steamship Mendip Range *v.* Radcliffe. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

"*Not under command*"—*Keeping course and speed*—*Regulations for Preventing Collisions at Sea* 1897, *arts.* 4, 21—*Concurrent findings.*

A cruiser not under normal effective control, and with a useless whistle, exhibited two black shapes to indicate that she was from an accident "not under command." She collided with a steamship approaching at a speed of about ten knots on a crossing course, whose duty under ordinary circumstances of navigation would have been to keep course and speed. The steamship saw the cruiser's signal. If the cruiser had been under effective control it would have been her duty to keep out of the way of the steamship.

Held, (Lord Wrenbury and Lord Phillimore dissenting) that the steamship should have kept out of the way as the cruiser was in fact in such a condition

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

owing to an accident that she could only get out of the way of the steamship after great and unusual delay, and that she was "not under command" within the meaning of art. 4 of the Regulations for Prevention of Collisions at Sea, and that the duty cast upon the officer navigating the cruiser was no more than a common law duty to navigate with such care, caution and skill as was reasonable under the circumstances.

Held also, (Lord Wrenbury and Lord Phillimore dissenting) that even though the question whether the cruiser was guilty of negligence leading to the collision was one of extreme difficulty, the facts facts were not clear enough to justify the House in disregarding the advice of their nautical assessors and setting aside the concurrent judgments of two courts which had each of them the assistance of nautical assessors.

The P. Caland (7 *Asp. Mar. Law Cas.* 82, 206, 317; 68 *L. T. Rep.* 469; (1893) *A. C.* 207, 212; The Beryl (5 *Asp. Mar. Law Cas.* 193, 321; 51 *L. T. Rep.* 554; (1884) 9 *P. D.* 137, 144); The Ceto (6 *Asp. Mar. Law Cas.* 479; 62 *L. T. Rep.* 1; (1889) 14 *App. Cas.* 670) *considered.*

Decision of the Court of Appeal (14 *Asp. Mar. Law Cas.* 554; 122 *L. T. Rep.* 505: (1919) *P.* 362) *affirmed.*

APPEAL by the plaintiffs from an order of the Court of Appeal, reported 14 Asp. Mar. Law Cas. 554; 122 L. T. Rep. 505; (1919) P. 362, which affirmed a judgment of Roche, J.

The plaintiffs were the owners of the steamship *Mendip Range*. The defendant was Captain Stephen H. Radcliffe, R.N., commanding His Majesty's Ship *Drake*.

The litigation arose out of a collision between the *Mendip Range* and H.M.S. *Drake* about 11 a.m. on the 2nd Oct. 1917 near Rathlin Island. On the morning of the collision the *Drake* had been torpedoed and seriously damaged, and she was making for a place of safety. 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, while 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 or 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 a-port, 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. found that neither ship was to blame for the collision, with the result that he gave judgment for the defendant, each party to bear their own costs.

The plaintiffs' appeal to the Court of Appeal was dismissed on the ground that the evidence established that the case was one of inevitable accident, and that the judgment of Roche, J. was therefore right.

The Regulations for Preventing Collisions 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 therefore cannot 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.

The plaintiffs appealed.

Laing, K.C. and *Lewis Noad* for the appellants.

Butler Aspinall, K.C. and *Dunlop*, K.C. for the respondent.

The following cases were referred to:

The Hawthornbank, 9 Asp. Mar. Law Cas. 535; 90 L. T. Rep 293; (1904) P. 120;

The P. Caland, 7 Asp. Mar. Law Cas. 82, 206, 317; 68 L. T. Rep. 469; (1893) A. C. 207;

The Beryl, 5 Asp. Mar. Law Cas. 193, 321; 51 L. T. Rep. 554; (1884) 9 P. Div. 137;

The Ceto, 6 Asp. Mar. Law Cas. 479; 62 L. T. Rep. 1; 14 App. Cas. 670;

The Theodor H. Rand, 6 Asp. Mar. Law Cas. 122; 56 L. T. Rep. 343; 12 App. Cas. 247.

The House, having taken time to consider, gave judgment dismissing the appeal, Lords Wrenbury and Phillimore dissenting.

Viscount HALDANE.—The evidence in this case shows that the *Drake*, the cruiser commanded by the respondent, came round the northern side of Rathlin Island, and was compelled, as the result of the damage done by the torpedo which struck

her, to abandon her original intention to try to proceed on a south-east course to Belfast. It was finally determined to take her round the island at its southern point, and to bring her to anchor in shoal water in Church Bay, on the west side of the island. This the cruiser endeavoured to do, first turning round, east or south-east of the island, under starboard helm, so as to get into position, and thereafter being navigated under port helm. Her condition was bad. Two of her boiler rooms were out of action and full of water, and her speed had been reduced by a half. The steam steering gear had been carried away, as had been also the telephonic communication to the hand steering gear, which was in the after-part of the ship, below the water line. The steering orders from the bridge had consequently to be given by transmission through a row of men, probably about twelve, and the management of the helm was, therefore, slow and ineffective. She had also a list to starboard, and was not under anything approaching to normal effective control, but had a tendency to yaw. The captain seems to have decided that he must somehow get her round the southern point of the island, which is known as Rue Point. Her syren or whistle had been rendered useless by the explosion. She was kept under port helm as soon as she was got into position, and she continued to be so kept, the helm being about 20 degrees to port. She was thus approaching Rue Point slowly, at a speed of about seven knots. As she was so approaching the point she exhibited two black shapes, to indicate that she was not under control or command, and these were seen by those on board the *Mendip Range*, which was approaching to near Rue Point from the other side of the island. At this time the *Mendip Range* was about three miles distant from the *Drake*. This was on the 2nd Oct. 1917. In the end a collision took place between two ships somewhere between 10.25 and eleven in the forenoon of that day.

The *Mendip Range* was directing her course so as to pass between Rue Point and the Mainland of Ireland, which was about two miles off. The scene of the collision was somewhere midway between the island and the mainland, possibly nearer to the former. The *Mendip Range*, which had been among a group of vessels which the *Drake* had convoyed until they were near Rathlin Island, was proceeding westwards at a speed of about ten knots. It was prudent for her to go at this speed because there was reason to suppose that more German submarines might be in the vicinity. The courses of the *Drake* and the *Mendip Range* were in the first instance respectively roughly south-west and south-east. The collision took place at about right angles, the ram of the *Drake* striking the starboard side of the other vessel. By this time the *Drake* was veering in her direction to a little north of north-west, and the *Mendip Range* to about north-east.

The action was brought by the appellants as owners of the *Mendip Range*, against the respondent as officer in charge of H.M.S. *Drake*, for damages caused by his negligent navigation. The defence was no negligence on his part, but negligence on the part of those on board the *Mendip Range*. The trial judge (Roche, J.) held that there was no negligence in the navigation of either ship, so that neither was to blame. The Court of Appeal took the same view. There was no counter-claim, for an obvious reason. The captain of the *Drake*, who could only be sued personally, had suffered no damage individually. There could, therefore, be no cross-appeal as to the finding of Roche, J. that the *Mendip Range* was not to blame. Having regard to the form of the proceedings and of the judgment, I do not think that this causes any difficulty. The only point which the respondent has to establish is that he was not to blame, and he is not estopped, in my opinion, from raising any argument which is relevant to this point, even though it may involve some reproach to those on board the other ship. However, no such question, in the view which I take, arises.

It must be assumed that those on board the *Mendip Range*, having seen the special signal, knew that the *Drake* was not under control or command, and that an obligation, therefore, rested on themselves to keep out of her way. I think that if the special signal was justified by the condition of the *Drake*, it exempted her captain from the duty of carrying out the provisions of the collision regulations as to ships on crossing courses. That the facts warranted the giving of the signal I entertain no doubt. The state of the steering gear and of the shattered cruiser generally was such that the captain was warranted in thinking that he could at least do little more than get round the Point before she was in danger of foundering. His control over her course had ceased to be effective. I think that, as a consequence, his duty was no more than the common law duty of care in navigating his ship in the condition in which it was.

The case made against the *Drake* was that the master of the *Mendip Range* observed her to be so heading that it was not safe to attempt to pass across her bows, and that in order to pass astern of her he starboarded his helm. It is said that after he had so starboarded for an appreciable time, two or three minutes, the *Drake* suddenly ported her helm, with the result that she rammed the other ship.

Both of the courts below have found the facts differently from this. The view they took was that the *Drake* had been, since the time when she was first sighted, continuously under a port helm without alteration, and was keeping her course. She could steer only imperfectly, and she was not in a position to alter her helm rapidly. Her object was, by keeping a port helm, to manage to get round the Point to the bay, taking care, as she could not deflect her course, excepting very slowly, and might yaw, not to approach too closely to the land. Her case is, in short, that such as her course was, it was one already adopted when she was first sighted by the *Mendip Range*, and that from this course she never deviated. Roche, J. found that she did not, after the *Mendip Range* had committed herself in the final minutes to a starboard helm, herself turn her helm to port. If her direction altered at all at the last moment, and this is not clear, it was not as the result of a change of helm, but would, if it happened, be due to uncontrollable yawing.

This is a concurrent finding, and even if I felt myself free to dissent from it, there is nothing in the evidence which inclines me to do so. I think further that the fact so found is a cardinal one, which disposes of the real foundation of the argument of the appellants. Those on board the *Mendip Range* may have been justified in taking the steps they did just before the collision, although

they did not succeed in averting the collision. But those on board the *Drake* were not shown to have been in any way to blame.

I am, therefore, of opinion that the appeal fails.

Viscount FINLAY.—In this case a collision took place on the 2nd Oct. 1917, in Rathlin Sound, between the steamship *Mendip Range* and H.M.S. *Drake*. An action was brought by the owners of the *Mendip Range* to recover damages on the allegation that the collision was caused by the negligence of those in charge of the *Drake*, the commanding officer being the nominal defendant. The defendant denied negligence on the part of the *Drake*, and pleaded that the collision was caused solely by the negligence of those on board the *Mendip Range*.

The case was tried before Roche, J. with the Elder Brethren, and it was found by him that there was no negligence in the navigation of either of the vessels. His decision was affirmed in the Court of Appeal. The present appeal is brought by the owners of the *Mendip Range* to have it decided that the collision was caused by negligence in the navigation of the *Drake*. There was no appeal against the decision that the *Mendip Range* was not to blame. The counsel for the respondent, whilst submitting that he was at liberty to attack for the purposes of this appeal the finding that there was no negligence in the navigation of the *Mendip Range*, disclaimed doing so.

The collision took place at a point distant from half a mile to a mile in a southerly direction from Rue Point in Rathlin, an island off the north-east coast of Ireland. The *Mendip Range* was bound for Glasgow from Philadelphia, and was on a course of S.E. ¼ E. magnetic, making about ten knots, when she sighted the *Drake* distant about three miles on the port bow, and with her starboard side open to the *Mendip Range*. In this position it would ordinarily have been the duty of the *Drake* to keep out of the way, and the duty of the *Mendip Range* to keep her course (arts. 19 and 21 of the Regulations for Preventing Collisions at Sea), but the *Drake*, after sighting the *Mendip Range*, displayed two black balls or shapes, which, under art. 4 of these regulations, are required to be carried by a vessel which from any accident is not under command. The *Drake* was a cruiser of 14,000 tons displacement and about 500ft. in length, and, together with some destroyers, had been escorting a convoy of vessels proceeding eastward by the north side of Rathlin Island. About 9 a.m. on the 2nd Oct. she was torpedoed about five miles westward of Altacarry Head. The damage done by the torpedo was very considerable. The *Drake* took a list to starboard, the steam-steering gear was put out of action and the telephonic communication was broken, so that the vessel had to be steered by means of a hand wheel, which could be worked only with great slowness and with the help of twelve men, while the orders had to be transmitted through a number of other men stationed at intervals between the bridge and the hand wheel. It was contended for the *Drake* that she was "not under command" within the meaning of art. 4, and bound to hoist the black balls, and that it was therefore the duty of the *Mendip Range* to keep out of her way.

After being torpedoed, Captain Radcliffe, who was in command of the *Drake*, determined to take her to Belfast, and she proceeded on her course for Belfast in a south-east direction from Altacarry Head. But on the report of the engineer commander that the vessel could not hold out so far as Belfast, Captain Radcliffe determined to take her round Rue Point into Church Bay. For some unexplained reason (possibly on account of the suspected presence of hostile submarines) the captain brought the vessel round to her new course, not by porting but by starboarding and coming round the greater part of a circle, an operation which is said to have taken forty minutes. When this turning was completed and the vessel was steadied on her new course she is stated to have been at a point three miles distant from Altacarry Head in a south-east direction. She proceeded for some time on her new course and afterwards ported for the purpose of rounding Rue Point and so getting into Church Bay.

The *Mendip Range* and the *Drake* sighted one another at a distance of some three miles. The Preliminary Act, on behalf of the *Mendip Range*, stated the distance of the other vessel when first seen as about three miles and the bearing as about three points on the port bow, while the Act on behalf of the *Drake* put the *Mendip Range* at about three or four miles distant and about six points on the starboard bow; these statements may be taken as approximately correct. The *Mendip Range* was making about ten knots, and the *Drake* about seven. The *Mendip Range* starboarded intending to pass under the stern of the *Drake*, sounding two short blasts, but the *Drake* came round under the port helm with the result that the two vessels converged, the ram of the *Drake* striking the starboard side of the *Mendip Range*. The evidence for the *Mendip Range* was that the *Drake* suddenly ported, thereby bringing about the catastrophe. On behalf of the *Drake*, it was contended that there had been no such sudden porting, and it was asserted that the *Drake* had been for some considerable time under the port helm, and had been gradually coming round.

It is admitted that the *Mendip Range* was not to blame for starboarding, as those on board of her might not have been able at the distance to see that the *Drake* was then coming round under the port helm. The question of the navigation of the *Drake* is, to my mind, a very difficult one. According to the oral evidence from the *Mendip Range*, which is strongly corroborated by the photographs taken at the time of the collision by the young man Potts on board the *Mendip Range*, the *Drake* came suddenly round under the port helm directly before the collision. Roche, J. found that the order for port helm action was given on board the *Drake* before there was any alteration on board the *Mendip Range*, by which I understand the learned judge to mean before the *Mendip Range* had come round under her starboard helm. He adds that he is 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." Roche, J. stated his conclusion as follows: "In these circumstances, I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass and would be able to pass clear of her on her port side and to the southward of her, and I do not find the course taken, not for the *Mendip*

Range, but for the general purposes of the *Drake*, a negligent or improper course."

Earlier in his judgment the learned judge described the situation thus: "Therefore 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 of the *Mendip Range*; that the *Mendip Range* thereupon starboarded, and the port helm of the *Drake* was adhered to, and that the one vessel so starboarding, and the other vessel so porting, the collision was brought about in the manner previously described."

The finding of Roche, J. acquitting the *Drake* of negligence was affirmed in the Court of Appeal. Bankes, L.J., after referring to the terms of the judgment given in the court below, says: "I think the general conclusion which I draw from the learned judge's judgment is that he did intend to decide, and did decide, this very material question as to whether the *Drake* took port helm action after the *Mendip Range* had starboarded; he intended to decide that in favour of the *Drake*. It is suggested, no doubt, that the action of the *Drake* under her port helm was more marked; she turned more rapidly, or she moved more rapidly under her port helm at the last than she had done at an earlier stage, in the time during which she had been in sight of the *Mendip Range*, but I do not think that he 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 in charge of the *Drake* gave any fresh helm orders. That is the conclusion at which I have arrived upon this evidence, and, in my opinion, the view taken by the learned judge, as I understand his view, as expressed by him, was right, and I think that the *Mendip Range* cannot be charged in this case with having in any way contributed to the accident, and I think those in charge of the *Drake* were not negligent and were not to blame. The case is one in so far as she is concerned of inevitable accident. I think the judgment of the learned judge below was right."

The judgment of Scrutton, L.J. is devoted chiefly to the examination of the question whether the *Drake* was justified in hoisting the "not under command" signal, and I think the only passage in his judgment which is relevant to the point which I am now considering is the following: "The judge has found that the *Drake*, before the *Mendip Range* altered her course, and when the *Drake* hoisted her two black balls, had an order for 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 injured, she was taking the course necessary to save herself from injury. That, in my view, was a perfectly proper course for the ship to take even though she had hoisted two black balls, to try and save herself, even though her means of saving herself were unreliable, and it was under those circumstances the exact course she should pursue when she tried to save herself in that way. Now, 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 round, out of the Altacarry Head and Rue Point, one looks at the course of the *Mendip Range* heading towards 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 an irresistible conclusion that the *Drake* seen at this place and being known to be 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* is carrying out the course necessary to save herself, and the *Mendip Range* has misunderstood it. I agree with the finding that under the peculiar circumstances the *Mendip Range* is not to blame, but I also agree with the judge's finding that the *Drake* was entitled to hoist the two black balls showing she was out of command and 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, not through negligence, to avoid the collision, but because there was no step that she could have properly taken in the short time that elapsed between the two periods, each observing what the other was doing."

The third member of the Court of Appeal, Eve, J., said that he was not prepared to say that he would have come to the same conclusion as the trial judge, but that, whatever his own leaning, the learned judge's decision was as likely to be right as a finding the other way.

It therefore appears that in deciding this part of the case the decision of Roche, J. and that of the Court of Appeal amount to concurrent findings upon a question of fact substantially on the same grounds.

Our nautical assessors take strongly the view that the *Drake* was in no way to blame. This is, of course, a most important factor in our consideration of a question of navigation. I should, however, add that I think that this opinion was to some extent influenced by the view of the assessors that the *Mendip Range* ought to have been found to blame for starboarding.

The question whether the *Drake* was guilty of negligence leading to the collision is, to my mind, one of extreme difficulty. It does not, however, come before us as if we were a court of first instance. We have to deal with the concurrent findings by Roche, J. and the Court of Appeal on a matter of fact. I do not think that the facts are clear enough to justify us in disregarding the advice of our nautical assessors and setting aside the concurrent judgments of two courts which had, each of them, the assistance of nautical assessors. In my opinion, therefore, the appeal against the acquittal of the *Drake* for negligence in navigation should fail.

There remains for consideration the question whether the *Drake* was justified in hoisting the signal that she was "not under command."

The fourth article of the Regulations so far as applicable to the present case is as follows:

"(*a*) A vessel which from any accident is not under command . . . 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 . . . 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."

It was contended for the *Mendip Range* that the *Drake* was in fact under command and that the signal of the two shapes was therefore improper and misleading. Art. 4 requires that a vessel which from any accident is not under command shall exhibit the signal. The test is the condition of the vessel in point of fact. Is she or is she not under command?

Two views have been taken of the construction of the article on this point. They are stated by Lord Herschell in *The P. Caland* (7 Asp. Mar. Law Cas. 317, at p. 318: 68 L. T. Rep. 469; (1893) A. C. 207, at p. 212-3) as follows:

"In the Court of Appeal the Master of the Rolls expressed himself as follows: 'Now looking at the words of the statute, at the first part of the clause, which speaks of her not being under command, and the second part her not being under command so that she cannot keep out of the way—taking those two together, it seems to me that the real construction of the rules is that she must, through some accident, be in such a position that she is not under command in this sense, that she could not keep out of the way of another vessel coming near her. But if she can be steered, and 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) to be in a few moments out of command does not show that she is out of command at the moment spoken of.' And the other learned judges concurred in this view. I cannot but think that this construction is somewhat too narrow. Suppose the vessel, though having steerage way on her and capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that if an occasion for doing so should arise she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. And suppose, though she can stop and reverse, she can only do so after great and unusual delay. I am not satisfied that in either of these cases she might not be properly described as not under command, and not able to keep out of the way of other vessels. It is not necessary to dwell upon the point, as it has no application to the present case, but I wish to guard against being supposed to assent to so narrow a construction as appears to me to have been adopted by the court below."

It was not necessary for Lord Herschell in that case to decide this question of construction, but he clearly indicated the inclination of his opinion. It is now necessary that we should decide the point, as on the construction depends the answer to the question whether the *Drake* was "not under command."

I think that the view indicated by Lord Herschell in the passage which I have quoted is correct. If a vessel is in such a condition owing to an accident that she can only get out of the way of another after great and unusual delay I think she must be considered as "not under command" for the purpose of art. 4. She is not able to behave as those on board other vessels meeting her would reasonably expect. Both courts below, with the assistance of their nautical assessors, arrived at the conclusion that the *Drake* was in such a condition. We have consulted our own nautical assessors on the point and they take the same view, and entertain no doubt whatever that this vessel was in such a state that the signal ought to have been hoisted. The construction of the rule is, of course, not for the assessors but for the House. But when that construction has been ascertained the question whether on the facts the disability which the accident entailed on the vessel was such as to put her out of command is one of fact; in most cases it is largely a matter of degree.

In my opinion the *Drake* was not under command within the meaning of art. 4 and the signal was properly hoisted.

It was also argued on behalf of the *Drake* that, whether she was in fact out of command or not, those in control of her in good faith and on reasonable grounds believed that she was, and that this justified the hoisting of the signal.

Reference was made in support of this contention of the respondent to what was said by Lord Bowen in *The Beryl* (5 Asp. Mar. Law Cas. 321, at p. 325: 51 L. T. Rep. 554; (1884) 9 P. Div. 137, at p. 144) in considering the effect of the old art. 18 (now art. 23) as to the duty, "if necessary," to stop and reverse. Lord Bowen said it might be a matter for consideration whether "if necessary" meant if it is actually necessary or only if the captain should reasonably think the necessity had arisen, and in the subsequent case of *The Ceto* (6 Asp. Mar. Law Cas. 479, at p. 487; 62 L. T. Rep. 1; (1889) 14 App. Cas. 670, pp. 693-4) Lord Herschell said with reference to this article that he agreed "that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge he possesses at the time."

The doctrine so laid down by Lord Herschell appears to me not relevant to the construction of art. 4. It is quite reasonable to construe a direction to stop and reverse if necessary as having reference to the facts as apparent at the time, and it would be unreasonable to hold the captain in fault because it appears by the light of facts afterwards ascertained that another course would have been better. But such considerations are not applicable to an article which prescribes that if the vessel is not under command a certain signal shall be hoisted. The question is of the condition of the vessel in point of fact and if she is out of control the signal is to be hoisted. Those in control of the vessel are in the best position for knowing whether she is under command or not. If they come to a wrong conclusion on the question of fact the action taken thereon is not justified. That they acted *bonâ fide* and on reasonable grounds may affect the question of blame to be attributed to their action or inaction; it has no bearing on the question whether under art. 4 the proper course was taken. The question whether the signal should be made is one between the vessel and other vessels, and their rights *inter se* depend on the language of the article coupled with the facts as they exist. It is a question not whether there was negligence, but whether the signal was required by the article.

In the present case indeed this point of the respondent's is not very intelligible. All the facts as to the condition of the *Drake* were perfectly well known to those on board of her. The real charge made against her by the *Mendip Range* was that she acted in hoisting the signal "not under command" on the view of the meaning of the article taken by Lord Herschell and not on the narrower view of its effect which had been adopted in *The Ceto* (*sup.*) by the Court of Appeal. If a rule has been misconstrued, it is immaterial to inquire whether there was good faith or reasonable ground for the misconstruction. In fact, the article was rightly construed by the captain of the *Drake*.

In my opinion this appeal should be dismissed with costs.

Lord ATKINSON.—During the course of the argument in this case, three questions have emerged for decision by your Lordships. First, whether the ship-of-war, the *Drake*, from the time she was torpedoed up to the time of her collision with the *Mendip Range*, was, by reason of an accident, out of control within the meaning of art. 4 of the Regulations for Preventing Collisions at Sea, which came into force on the 1st July 1897. Second, whether the respondent was guilty of negligence in hoisting on his ship the signals prescribed by that article as soon as he had sighted the *Mendip Range*. Third, whether the respondent was guilty of negligence in rapidly turning his ship to starboard while the *Mendip Range* was acting under her starboard helm, so as to make it impossible for the *Mendip Range* to clear her. Each of these questions is a question of fact. It is, in my opinion, absolutely clear that there was abundant evidence given before the learned judge, Roche, J., who tried the case, to justify his finding in favour of the respondent on each of the issues of fact thus raised. The second and third questions may readily, for all practical purposes, be condensed into one, namely, did the respondent on this occasion navigate and manage his ship, even if not under command, in such a faulty, unseamanlike, and improper manner as amounted under the then existing circumstances to the negligent management and navigation of her. Mr. Laing, on behalf of the appellant, urged in reply, if not before, that there were not concurrent findings in the courts below on each of these three questions of fact. It is not necessary that the decision of a judge on any question of fact should be couched in any particular form of words. It appears to me to be quite enough if he uses language which clearly conveys the meaning that he decides the question one way or the other; and in my view a judge equally finds upon an issue of fact if he clearly expresses his concurrence with the decision of another judge who has decided that issue.

In his judgment Roche, J. says: "I am unable to find the person responsible for the navigation of the *Drake* guilty of negligence, because he has taken the view he did and has hoisted the two black balls. Therefore I arrive at the negative conclusion that I am unable to find, and do not find, the captain of the *Drake* or the navigating officer guilty of negligence for hoisting the 'not under command' signals. Had I found that she was wrongly exhibiting the non-command signals I should have found that it contributed" [to the collision he evidently means]. "Mr. Aspinall argues that it did not, but I should have so found because I think it was the cause of the other vessel starboarding." This last statement would appear to me to amount to a clear expression of opinion that the *Drake* was not under command. He then goes on to deal with what he calls the main charge against the *Drake*, "namely, that she failed to keep her course and speed, that is to say, that she improperly ported her helm and allowed her head to go off to starboard. . . . In these circumstances I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass, and would be able to pass, clear of her on her port side and to the southward of her, and I so find the course taken, not for the *Mendip Range*, but for the general purposes of the *Drake*, a negligent or improper course." By the words, "general purposes of the *Drake*," the learned judge meant the purpose of the *Drake* to get into shoal water where she might anchor in safety.

It is in my mind clear that, by these passages from the judgment which I have cited, the learned judge conveyed, and meant to convey, that he intended to decide, and did then decide, each of the three questions of fact I have mentioned in favour of the respondent. It is next contended that Bankes, L.J. did not express himself in such a way as to indicate that he concurred with Roche, J. in the decisions on each of those questions of fact. I think that that contention is as unsustainable as the other. He says it appeared to him that there was amply sufficient evidence to justify a finding that the vessel was not under control; that he himself should so find. That he then asked of his assessors the question whether, having regard to the injuries to the *Drake*, did they consider the hoisting of the out of command signals was justified? That they answered "Yes," and that he entirely agreed with them, adding that it was unnecessary he should add anything more on the question raised by Mr. Laing as to whether the vessel was or was not under control within the meaning of art. 4.

He then adds: "Mr. Laing seems to draw a distinction between the fact of whether she was not under command and whether those in charge of her were justified in considering that she was not under command, but, personally, I cannot see any real distinction. If this court, or any other court, were of opinion that the vessel was not in such a condition as to be properly described as not under command, they would not come to the conclusion that those on board were justified in considering that she was in that condition. The court comes 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."

This passage makes it plain, I think, that the learned Lord Justice concurred with Roche, J.'s findings on the first and second questions of fact. He then proceeds to deal with the third question of fact, and after criticising Roche, J.'s words, says that he does not think that the learned judge intended to find that there was any alteration of the helm of the *Drake* in the sense that anyone in charge of the *Drake* gave port helm orders, and then says that those in charge of the *Drake* were not negligent and were not to blame, that the case was one so far as the *Drake* was concerned of inevitable accident, and that he

thought the judgment appealed from was right. It was not suggested even that Scrutton, L.J. did not come on these three questions to conclusions practically identical with those arrived at by Roche, J. The case, therefore, is one in which there are concurrent findings on the three decisive questions of fact. The principle which should guide your Lordships in dealing with such a case is laid down by Lord Herschell with his accustomed clearness and precision in the case of *The P. Caland* (*sup.*) in these words: "I quite agree with what has been said in previous cases as to the importance of not disturbing a finding of fact in which both the courts below have concurred. I think such a step ought only to be taken where it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the courts below. I can lay hold on nothing as turning the balance decisively one way or the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocably inclines in the opposite direction to that indicated in the judgment of the court below that this House would be justified in reversing the judgment appealed from. Lord Watson concurred." I think the passage applies strongly to the present case. Even if I felt, which I certainly do not, that if I had been in the place of Roche, J. or of that of the learned judges in the Court of Appeal I might have come to conclusions different from those at which they arrived, I should, on these three questions of fact, applying the principle so laid down by Lord Herschell, have felt myself bound not to concur in reversing the judgment appealed from.

In *The Ceto* case (*sup.*) Lord Herschell lays down another principle which, in my opinion, is particularly applicable to the present case. He said: "I quite agree with the Master of the Rolls that rigorous accuracy is not to be expected in the evidence of seamen in cases of this description (*i.e.*, collision cases). It would be a mistake to tie them down to the letter of their evidence, to the exact number of points that are mentioned, either in relation to the bearing of other vessels or to the alteration of their courses. I think one must deal with the matter broadly." If that principle be applicable even where duty requires that such matters as those mentioned should be accurately ascertained, how much more forcibly must it apply where accuracy in respect of them is comparatively immaterial. For instance, how can it possibly affect this case whether the *Drake* turned Altacarry Head at a distance from it of three miles or five miles, or whether when she completed her large circle and steadied momentarily she steered a course of S. or S.E. or S.S.E.? She was steered to turn Rue Point and seek for safety in shallow Church Bay, and care was taken by those in charge of her that, owing to her condition, she should not approach the shore of Rathlin Island too closely. The broad fact is that all her officers and others who were examined on her behalf swore that her helm was ordered to be put 20 degrees to port, and that she came slowly to starboard continuously. It is true that no person was examined to prove that this order was actually carried out, but these witnesses cannot be mistaken as to whether their ship was slowly turning to starboard as if on a port helm, all along from the time she had completed her large circle, steadied, and made for Church Bay up to the collision. That is an entirely different thing from fixing distances or bearings, or measuring time. If their evidence on this point be untrue, then they must be deliberately forswearing themselves. No judge who has considered this case has accepted this latter theory, and, speaking for myself, I do not accept it. Again, it was suggested that if the *Drake* was slowly coming to starboard, during all the time deposed to, she must have gone aground on Rathlin Island or been much nearer to the coast of that island than the place of collision. The place of collision would appear to depend very much on the distance, eastward of this island, of the spot where the *Drake* finished her long circle. There was no object to be gained at the time by fixing the distance of that point from the shore with accuracy.

Of course once the *Mendip Range* was sighted the captain and crew of the *Drake* were bound to navigate their ship with such care, caution, and skill as was reasonable under the circumstances, despite terrors and apprehensions and anxieties which must have beset them in their perilous endeavour to reach a place of safety.

The captain and crew of the *Drake* were, I have no doubt, like all their fellows in the Royal Navy, cool and courageous men; but they were, after all, human beings, and to most, if not all, human beings life is sweet; and it is in my view not only unjust to them but misleading to ignore the special circumstances under which they acted and treat them as having no perils to encounter, save those which attend in peaceful times ordinary navigation. Yet it appears to me that the argument for the appellants has proceeded very much upon these latter lines.

Mr. Laing insisted very strenuously that a ship to come within art. 4 must, in fact, be out of command and not merely out of command according to the opinion and *bonâ fide* belief of her captain, even though in forming that opinion and belief he should have made all reasonable inquiry and examination to ascertain the true condition of his ship, and brought to bear upon the facts so ascertained all the skill and knowledge of a fully competent seaman, so that his opinion and belief were in the result based upon reasonable grounds.

It is obvious that the captain must act on the facts he has ascertained in the manner mentioned, and not on facts not known to him, and hoist the signals prescribed by art. 4. He cannot send for experts to examine his ship and advise him if his diagnosis of her condition is sound and right or erroneous. If the captain's diagnosis was right he would be held justified in putting up the authorised signals and treating his ship as not bound to keep out of the way of a crossing ship. If his diagnosis of his ship's condition at the time should possibly twelve months afterwards be in a judicial inquiry proved by the evidence of experts to have been erroneous, then his action, based on the assumption it was not erroneous, would necessarily be held to be wrong and blameable notwithstanding that he acted on a belief and opinion carefully formed and based on reasonable grounds. For instance, in the present case

one of the matters upon which he based his opinion of his ship's condition, was that as her bulkheads were leaking they might under pressure give way, when his ship would sink or turn turtle, as she afterwards did. But according to the argument, if the *Drake* reached Belfast and, on being examined in dock by the dock's experts, they disagreed with the captain as to the dangerous and threatening condition of the bulkheads of his ship, he must be held in a court which tried the question and accepted the expert's evidence, to have acted wrongly in hoisting the prescribed signals.

Again, I am not quite sure whether Mr. Laing contended that the captain's culpability must be judged by the facts as they appeared to him at the time he acted or by some new facts subsequently disclosed. Some light may be indirectly thrown upon this latter point if not upon the preceding one by the provisions of art. 23 of these same regulations, and the judgment of this House in the *Ceto* case (*sup.*). This art. 23 provides that "Every steam vessel which is directed to keep out of the way of another vessel shall, on approaching that other, if necessary, slacken her speed, or stop, or reverse." The regulation corresponds with the art. 18 of the regulation of 1884. A question was raised upon the construction of this latter article as to who was to be the judge of "the necessity of doing one or more of these things." In the case of the *Beryl* (*sup.*) Bowen, L.J., as he then was, said: "It may therefore be a matter of construction whether 'if necessary' is to be construed as meaning 'if it is actually necessary,' or only if the captain should reasonably think that a necessity has arisen, but even if we were to take the latter as the construction most favourable to the master of the *Beryl*, the answer of our assessors to the question put to them, which the Master of the Rolls has already referred to puts him clearly in the wrong and obliges us to hold that the *Beryl* was also to blame for the collision." Fry, L.J., at p. 145, says: "It has been argued that the necessity is to be estimated by the event and not by the judgment of a seaman acting reasonably under the circumstances. It is not necessary to decide this point, for from the latter point of view the answer of our assessors shows that the captain of the *Beryl* broke the rule."

In Marsden on Collisions the decision of the House of Lords in the case of the *Ceto* is treated as having decided this question, and held that the rule was to be construed as bearing the latter of these two meanings.

Lord Halsbury, in that case, said: "The question, shortly stated, is whether two vessels approaching each other and knowing that they were approaching each other, in a dense fog through which it was impossible to see lights or signals or any part of the vessels by either of them were not both to blame for not stopping and reversing until they had ascertained more distinctly their respective courses. I quite agree that the solution of that question must not depend on the state of facts afterwards ascertained unless there was enough to tell both parties at the time what the condition of facts was. . . . Each of them was aware or ought to have been aware, that this approach did involve risk of collision, and the question is whether the facts were such in the knowledge of each that as prudent and reasonable persons those responsible for the navigation of the ship should have stopped and reversed."

Lord Watson said: "Whether it was in a reasonable sense necessary for the master of the *Ceto* to stop and reverse her engines before the *Lebanon* hove in sight is a question not of law but of fact. His duty in that respect must depend not upon the result of the whole facts now disclosed in evidence, but upon his own observation of the *Lebanon* fog signals, and the indications of the position and course of the *Lebanon* relatively to his own vessel, which those observations ought to have conveyed to a prudent seaman of ordinary skill."

Lord Herschell said: "The sole question is whether the *Ceto* should be held to blame in respect of having disobeyed the requirements of art. 18 . . . This resolves itself into the further question whether under the circumstances, in a dense fog with the indications which the master of the *Ceto* had of the position of the other vessel he ought, by the exercise of reasonable care and prudence, to have known that it was necessary to stop. For I agree that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence, with the knowledge which he possesses at the time."

In the case of the *Beryl* (*sup.*), Lord Esher said: "But when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known at the time. You cannot regulate the conduct of people by unknown circumstances. When you instruct people you instruct them as to what they ought to do under circumstances which are or ought to be before them." This statement of the law was approved by Lord Herschell in the *Theodor H. Rand* (*sup.*). Having regard to this decision, I confess I have difficulty in seeing on what principle, if the captain of a ship injured by accident comes, after due and reasonable examination and inquiry to the conclusion that the facts then by him ascertained constitute reasonable grounds for the belief and opinion that his ship is not under command, he would not be held justified for having hoisted the appointed signals, at all events if the court before which the question comes for decision concurs with him in thinking that the facts at the time so discovered do afford reasonable grounds for the opinion he has formed, even though facts should subsequently be discovered which would show that the supposed facts upon which he forms his opinion were erroneous, it may well be that the captain's protection is still wider than this and that under the circumstances mentioned he should be held justified in his action, although the court should hold that the fact known to him at the time he hoisted these signals did not in fact afford reasonable grounds for his act.

It is not necessary to decide either of these questions in the present case, inasmuch as I not only think that the concurrent finding of the courts below on the three questions of fact I have already mentioned ought not to be disturbed, but in addition because I am of opinion that each and every one of these findings was right, I need hardly say that I thoroughly concur in the opinions expressed by Lords Herschell and Watson in the case of the *P. Caland* (*sup.*), as to the proper construction of art. 5 of the regulations. Too much reliance was, I think, placed by the appellants on the

enlargements produced of two photographs taken by an apprentice on board the *Mendip Range*, named Potts, as proof of the charge made by the appellants that the *Drake* just before the collision rapidly turned to starboard and made it impossible for the *Mendip Range* by porting to clear her. The sequence of the events stated by Captain Thacker was not accepted by any of the learned judges who dealt with the case. The suggestion that this turning movement was made deliberately by the *Drake* was rejected by all of them. Had it been made deliberately by order it would not only have been wrong and reckless, but in my view almost insane in character on the part of those in charge of the *Drake*; and if it took place without any change of helm it proves all the more conclusively that the *Drake* was not under command, else why would she answer her unaltered helm so irregularly. Roche, J. endeavoured to reconcile the evidence of the officers of the *Drake* with the statement made by the captain of the *Mendip Range* by suggesting that the porting of the *Drake* was not so effective in the early part of her progress as at the end of it, that most of the effect of the porting took place at the end; and that the effect of the porting at the earlier stage was not so marked as was or ought to have been apparent to those on board the *Mendip Range*. I cannot say that I regard this explanation as very satisfactory. I do not know if the learned Lords Justices did so. The story of the apprentice was most extraordinary. If it be true, it is not to be wondered at that many ships were lost. The *Mendip Range* carried a gun, or guns, presumably to protect herself against hostile attack by submarines amongst other craft. Potts was one of the crew of one of the guns. John Gemmel was the foreman gunner. His business apparently was to watch for submarines, and presumably to help to fire on them if they appeared. In reply to a question he said he "was supposed to be looking after submarines." He assumed when he saw the *Drake* that she had been torpedoed. "She was," he says, "on the *Mendip's* starboard bow and appeared to be turning, and then other members of the gun's crew cried out 'She is turning; there is going to be a collision,' and then the chief gunner made the remark 'you will catch her on "the turn,"'" but neither the demands of duty, nor the danger of being torpedoed and sunk by one of the submarines he was employed to shoot at, nor the danger of his ship being sunk in a collision, could chill his devotion to the photographic art. The only effect of these dangers upon him was to make him think that it would be an interesting thing to take a snapshot of this torpedoed cruiser coming round. The *Drake*, he says, was about three miles away when he first saw her bearing about three points on the *Mendip's* port bow, but was not under a port helm (in this he contradicts all the officers of the *Drake* with, at most, one exception). She was about 2800ft. away—a little over a quarter of a mile, not quite half a mile—when the chief gunner shouted the *Drake* was a mile away. But the most important point of all is that no evidence is given as to the time which elapsed between the taking of the photos. The witness is asked: "How long an interval would be between the two photographs, do you think?" That question is never answered. But the witness is asked: "Is the churning up of the water in the second photograph due to the reversing of the engines?" He replies: "I do not know." Then he is asked: "It looks like it, does it not? You know more about the photographs than I do?" And he replies: "It is hard to say because it probably may have been made by the ship meeting up against the water as we were under a starboard helm." But the *Drake* herself was under a port helm. How the starboard helm of the *Mendip Range* would cause the churning shown at the stern of the *Drake* is a mystery to me. Now the *Drake*, the witness says, was about a quarter of a mile away when he took the first photo. At the rate of seven knots per hour, which is the speed of the *Drake*, as found by Roche, J., she would traverse one mile in $8\frac{4}{7}$ minutes and a quarter of a mile in $2\frac{1}{7}$ minutes. If the two ships were approaching each other end on, *i.e.*, at seventeen knots per hour, as the *Mendip Range's* speed was ten knots they would traverse a mile in $3\frac{6}{17}$ minutes, a little more than $3\frac{1}{2}$ minutes, and a quarter of a mile in 52 seconds. Of course they were not approaching end on, but they were approaching to some extent sideways, and the inference I draw from these figures is that the second photo was taken in the very jaws of the collision after the *Drake* and the *Mendip Range* had each reversed their engines and gone full speed astern and the relative positions of the two ships had completely changed. Neither Gemmel nor any of the members of the crew who made the alleged remark to Potts were examined. Neither Roche, J. nor the Lords Justices in the Court of Appeal appear to have attached any importance to these photographs. I think they were right in taking that course. For these reasons I think the appeal fails and should be dismissed with costs.

Lord WRENBURY.—The construction of the rules relevant to this case is important for its decision, and I shall at the outset express my opinion upon it. Art. 19 provides that where steam vessels are crossing, so as to involve the 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 provides that "Where by any of these rules one or two vessels is to keep out of the way the other shall keep her course and speed." These rules govern the movements of the keep-out-of-the-way (or giving-way) ship, and of the course and speed (or stand-on) ship. Art. 4 provides for the case of a ship "which from any accident is not under command." She is to indicate her condition by certain signals, and (d) other vessels are to accept them as signals showing them that she is "not under command and cannot therefore get out of the way." The whole effect of art. 4 is to relieve the ship not under command if she be the giving-way ship from the obligation of keeping out of the way. The rules say nothing as to any obligation then arising in the other ship to keep out of the way, but as a matter of seamanship if the one vessel is not able to get out of the way it is the duty of the other to do so. She is not, however, one which "by any of these rules is to keep out of the way" within art. 21. She owes a duty to keep out of the way of a ship which (being not under command) "cannot therefore get out of the way" within art. 4, but her duty in that respect arises not from anything in the rules, but from the duty of good seamanship and from the common law duty of not being negligent.

Then what is the duty of the ship not under command? She (if she was the keep-out-of-the-way or giving-way ship) is relieved from the duty

of keeping out of the way (art. 4). But there is nothing in the rules to provide that she is to keep her course and speed—or, in other words, to become the stand-on ship. In the nature of things it would be unreasonable that the rules should provide that she should keep her course and speed, when *ex hypothesi* she is not under command and may not be in a position so to do. So far as the rules are concerned her duty also is undefined. Her duty arises apart from the rules, and is a duty not to be negligent, to use good seamanship, to do nothing to foil the other vessel in doing the duty which she, as above stated, now owes to keep out of the way.

To apply these observations to the present case. The *Mendip Range*, when she saw the two black balls of the *Drake*, was bound to know that the *Drake* was relieved of the obligation to keep out of the way, and that she (the *Mendip Range*) had to accept the responsibility of becoming that which otherwise she was not, namely, the keep out-of-the-way ship. The *Drake*, for her part, did not become a stand-on ship, but owed a duty which, so far as the rules are concerned, was not defined, but which was the duty of good seamanship and of not being negligent. She owed the duty not to do anything to obviate or annul or render dangerous the manœuvre, which the *Mendip Range* now owed the duty to make, to keep out of the way.

Importance was attached below to the question whether the *Drake* was really out of command—whether she acted rightly in hoisting the two black balls. It is a question which has no bearing in forming a judgment upon the manœuvres of the *Mendip Range*. By hoisting the signal the *Drake* had said that she was—and the *Mendip Range* was entitled and bound to assume that she was—not under command. As between the two ships the *Drake* must be taken to be that which she said she was. She was bound to play the part of the character which she had assumed. Her duty was not to foil the manœuvres of the *Mendip Range*.

It has been decided (and it is a cardinal fact in the case) that the *Mendip Range* was not to blame, the contention was technically open to the respondent, and he has not waived it. I have to start therefore with the established fact that the *Mendip Range* was right in starboarding, was right in continuing to starboard, and was right in being where she was and as she was when the collision took place. The whole question, therefore, is whether the *Drake* was to blame for so acting that she was at the moment of the collision found at the same place.

Roche, J. found that the *Drake* was not under effective port helm for anything like ten minutes before the collision. He does not, it is true, find affirmatively that she had during those ten minutes altered her helm, but he does find that "it was impossible that there could have been an effective porting for anything like the long period alleged." He finds that "at the time the vessels were at a distance of about a mile there had been no effective porting of the *Drake* from a course of south-west such as would be, was or ought to have been, apparent to those on board the *Mendip Range*. Our assessors tell us that looking at photograph No. 1 and judging by the apparent size of the *Drake* she was about a mile away when that photograph was taken. Up to that time, therefore, according to the learned judge's finding, there had been no effective porting on the part of the *Drake*. Our assessors also tell us that looking at photograph No. 2 and having regard to the speed, the time that must have elapsed between the two photographs must have been about a minute and a half. In photo No. 1 the funnels of the *Drake* are closed and from the *Mendip Range* they are seen in a continuous line showing their port sides. The motion of the *Mendip Range* would tend to keep the funnels closed and to cause them to tend to show their starboard sides. In other words the motion of the *Mendip Range* would tend to counteract the opening of the funnels showing their port sides. Notwithstanding this the *Drake* in (say) a minute and a half so altered her heading that the funnels were entirely open, showing their port sides. She had gone round to starboard through a right angle or a little more. This must have been a most effective port helm."

Bankes, L.J. does not find the same facts as Roche, J. He agrees with him that the action of the *Drake* under her port helm was not so appreciable as to throw any blame upon 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. In other words he finds that the *Drake* was not in the earlier stage turning to starboard at anything like the rate at which she was turning in the last minute and a half. He also finds that there was no alteration in the helm of the *Drake* in the sense that anyone in charge of her gave any fresh helm orders. But he does not agree with the trial judge as to the *Drake* not being under effective port helm for ten minutes before the collision unless the word effective is to be understood as used for vindicating the *Mendip Range* rather than for indicating his view as to the action of the *Drake*. In my judgment Roche, J. plainly meant, as indeed he said, that the *Drake* had been discontinuously acting under port helm and that her story of an effective porting for anything like the time alleged was impossible. Bankes, L.J. believed and Roche, J. did not believe the *Drake's* story of a continuous circuit under a port helm to round Rue Point.

In this state of circumstances the question to be answered is whether the *Drake* so acted as to foil a proper manœuvre of the *Mendip Range*. It is a possible view of the matter that when a ship has declared herself to be not under command the other ship must be prepared for any extravagant and dangerous action on the part of the ship not under command for that she ought to contemplate that possibly the disabled ship cannot control her movements, and from the necessity of the case may do anything extraordinary. If this were so it might result that the *Mendip Range* ought to have contemplated that the *Drake* either because she could not control her helm or because she was in a sinking condition might be compelled to hug the shore, and that she (the *Mendip Range*) must act accordingly. But this consideration is not open. It is a consideration which if well founded would go to show the *Mendip Range* to be to blame, and she has been held not to blame, and no one has contended the contrary before us. What then caused the collision?—the answer must be that it was caused by the *Drake* porting to a ship which she knew was starboarding. That she knew it is not disputed. She did not, it is true, hear the

sound signal given by the *Mendip Range*, but she saw the two whiffs of steam as the whistle was blown. Her helm was such as to cause her to go round through at least a right angle to starboard in the last minute and a half. Had her helm been even amidships when the first photograph was taken, there would have been no collision.

The question whether the *Drake* was right in declaring herself not to be under command is, as I have said, immaterial in my opinion in judging the *Mendip Range*. It is not necessarily immaterial in judging the *Drake*. She knew in what respects and to what extent she was not under command. She knew that she had an effective helm, but that it took time to give orders to the helm. She knew that she had the power, and she was using the power to take a course which she thought expedient, namely, a course to starboard to run round Rue Point into Church Bay. But by her signal of "not under command" she had told the *Mendip Range* that she was not a vessel who could command herself. The rules do not leave wholly undefined the meaning of "not under command," for those words are followed by the words "and cannot therefore get out of the way." The fact was that the *Drake* could and did command her course. She unfortunately so commanded it as to produce a collision by porting and continuing to port to a vessel which she knew was starboarding. She was misleading the *Mendip Range* by telling her that she (the *Drake*) could not command her course, while all the time she was commanding it. The appellant's case may be briefly stated thus: "You (the *Drake*) told me you were not under command. But your case is that you were under command in the material particular, that you could and did command your helm and deliberately steered a starboard course to round the Rue Point and get into Church Bay. By so doing you foiled my manœuvre to pass under your stern and so caused the collision." I do not see the answer to this contention.

I think the appeal should be allowed and the *Drake* held to blame.

Lord PHILLIMORE.—The first matter to be determined is whether or not H.M.S. *Drake* was right in hoisting the two black shapes as a signal that she was out of command and could not get out of the way.

On this point I feel in some difficulty. The primary step to be taken to get out of the way is to use your helm to turn the course of your ship; and this ship could, slowly perhaps, but still effectively, use her helm, as is shown by the fact that between the time of sighting the *Mendip Range* and the collision, she turned eight points or a right angle. Having regard to this fact and what was said by Lord Herschell with the approval of Lord Watson in the case of the *P. Caland* (68 L. T. Rep. 469; (1893) A. C. 207), if I were to act on my unguided judgment, I should say that this vessel was under command, but the great majority of nautical assessors who have advised the three tribunals, is of an opposite opinion, and the judges in the courts below have concurred with them; and this being so, I hesitate to advise your Lordships to act upon my uncorroborated opinion. Before, however, I pass from this point, I have to say that, with all respect for those who maintain the contrary, I cannot accept the contention which makes the test of the right and duty to hoist the black shapes, not the very truth of the case, but the opinion which the officer in charge of the damaged ship may form. Here it is to be observed that the rule does not give a licence or permission of which the officer in charge may or may not avail himself, but imposes a duty. If the ship is by any accident out of command, the officer must hoist the black shapes, and must thereby signal to other vessels that he cannot keep out of their way. The language of the rule is express that the condition of hoisting the black shapes is the fact and not the opinion of the fact, and this is the way that this very point was dealt with by the noble Lords who gave their opinion in the *P. Caland*. The opinion of the experienced nautical man that his ship was out of command is an element to be considered in arriving at the conclusion whether she was or was not, but has no further importance.

With these preliminary observations I propose to accept for the purpose of my opinion, the position that the *Drake* was right in hoisting the two black shapes. Perhaps I do so the more easily because it appears to me comparatively immaterial whether she was right or wrong in so doing. If she was right in intimating that she was a vessel out of command, she had to behave as such.

Now it has been said that with regard to the rest of the case, it is wholly a question of fact, as to which there have been concurrent findings in the two courts below, and therefore one upon which your Lordships would be exceedingly slow to form a different opinion. To me it is not a question of fact, but one of law.

For the purpose of deciding this case I am content to take as the only necessary materials (1) the agreed facts, (2) the evidence of the captain of the *Drake*, qualified only by the conclusions to be drawn from the photographs and the place of the collision, (3) coupled with the findings of both courts below that the *Mendip Range* was not to blame, and (4) the reasons for holding her not to blame.

Now the captain of the *Drake*, after describing how he had been torpedoed, and the injuries which he had received, and his original idea of going to Belfast, and his giving that up, says that he made a large sweep, nearly a circle under a starboard helm, thus bringing him heading to the southward. When he had finished this sweep under a starboard helm, he does not specifically state where he was with regard to Rue Point, but he must have been to the eastward of Rathlin Island, in the sense that he was not as far south as Rue Point; and this is confirmed by the evidence from the *Martin*, who picked the *Drake* up just east of Rue Point and found that she was at that time already heading south; and by the captain's own idea, though it is admittedly an incorrect one, of the place of the collision. He would therefore have to head for a time to the southward, till he got sufficiently south to clear the point and to be enabled to port to round it, and accordingly he says as one would expect, that after starboarding, he steadied as near as he could on a starboard course. He adds that when he first saw the *Mendip Range* his heading was south or south by west true. If therefore at that moment he was under a port helm he can only just have begun to be under it, because he was at that moment approximately on the course on which he steadied.

Parenthetically it may be observed that this heading which he gives for himself at that moment is the heading which the *Mendip Range* attributes to him when she first saw him, and that the distances and bearings as given by the two ships work out in substantial harmony.

Being thus heading approximately south by west and having only just begun, if at all, to swing under his port helm after he had steadied on a southerly course, he continues, generally speaking, under a port helm till the collision, and turns a right-angle. I have said "generally speaking," because Roche, J. thinks that it cannot have been a continuous port helm, but only such a port helm as would make that which the captain describes himself as wishing to make a wide sweep round Rue Point, so as to get into Church Bay, a manœuvre which, at any rate with a sound ship, would not be accomplished by a continuous port helm, but would require a porting, an easing, a porting, an easing, and so forth action. On the other hand, the Court of Appeal has accepted his statement to the effect that there was one order to port 20 degrees, never varied or checked till just the moment before the collision, when the helm was put amidships. I am, though sceptical, even prepared to accept this statement, only it must be coupled with the agreed facts, which are that in the quarter of an hour or twenty minutes which the captain says elapsed from first sighting the *Mendip Range* to the collision she had not turned more than a right-angle, and had not turned so short as to defeat her intention of rounding the Point, but came into collision almost due south of the Point, and at least half a mile, if not more, from it, and that, as the photographs show, the alteration at the last was rapid and considerable. leaving, therefore, comparatively little alteration to be made in the first stages. I may add that on the findings of both courts, and the statement by counsel for the respondent before your Lordships, that he was not going to invite you to say that the *Mendip Range* was to blame, the porting during the earlier stages must have been so gradual and so slight as to be imperceptible. Otherwise the *Mendip Range* would have been to blame. either for starboarding or for continuing to starboard.

If it be the case, as suggested for the *Drake*, that the operation of passing the orders was slow, and the operation of complying with the order and getting the wheel over was slow also, it may be thought that if the captain of the *Drake* had just given the order to port 20 degrees when he saw the *Mendip Range*, she would not have turned more than to the extent that she did, even under a continuous port helm, and therefore it might be possible to accept, as the Court of Appeal has done, the statement of the captain of the *Drake* with hardly any or with no qualification.

Now one has to consider whether this continuous porting, developing as it did, was right. When the two vessels first sighted each other the *Drake* had not her black shapes up; and if she had any particular vessel in her mind for which she put them up it must have been the *Mendip Range*. If she had not put up the black shapes the officer in charge of the *Mendip Range* would have acted upon the rule with regard to crossing steamships, which imposed upon the *Drake* the duty of getting out of the way, and he would have expected her to get out of the way by porting, his duty would have been to have kept on his course and he would have kept on it. There would have been no collision, and the porting of the helm of the *Drake* in order to reach Church Bay and the porting to avoid the *Mendip Range* would have coincided. As it was, however, the *Drake*, having put up the black shapes, the officer in charge of the *Mendip Range* thought, and has been held to be justified in thinking, that it was his duty to get out of the way of the *Drake*, and thought also, and has been held to be justified in thinking, that with the directions of art. 22 of the Regulations for Preventing Collisions at Sea before him his proper course was to get out of the way by avoiding crossing the head of the *Drake*, that is to say by starboarding. This manœuvre was defeated by the *Drake*, I will not say porting, but, I will say in her favour, continuing under a port helm. This continuance, however, under a port helm was so gradual, in the view of the courts below, so imperceptible till the last, that there was no negligence on the *Mendip Range* in not observing it, and therefore the collision happened. Now if the *Drake* had not put up her black shapes and had continued under her port helm there would have been no collision. If, having put up her black shapes, she had relaxed her port helm and kept or even approximately kept the heading at which she was on when these vessels first came in sight of each other there would have been no collision. It was the unfortunate coincidence of these two things that brought it about.

Both courts below have found the facts as I have described them, but have nevertheless held the *Drake* not in fault. Roche, J., on the ground, as I understand him, that the porting and continuing to port of the *Drake* was not a manœuvre taken under the regulations to avoid the *Mendip Range*, but a course of navigation taken on her own account and irrespective of the *Mendip Range*, to reach her destination. But when the rules provide that a ship shall keep her course—I except cases where the vessels are travelling in a river or narrow channel with sinuous banks—they mean that she shall keep her compass heading till the danger has gone by. Otherwise the other ship could not know what manœuvre to take to avoid her. The *Drake* was not carrying a huge board with a notice that she was going round Rue Point or signalling by flags that she was. Those on board the *Mendip Range* had no reason to think that she was. The master thought that she had been injured, but that she was making for Ballycastle Bay on the mainland, which would have meant the *Drake* keeping on to the southward and not porting. If a ship, however, injured and in a haste to get to a place of safety manœuvres in a manner that would not have been expected in the presence of another vessel, that will probably happen which did in this case. The Court of Appeal decided upon very sweeping grounds. Bankes, L.J. and Scrutton, L.J. appear to have held that a vessel out of command is under no duty except to notify that she is such. That, if she can manage it, she can port or starboard, go ahead or astern, as suits her convenience, and all other vessels must give her the widest berth. It is a preliminary comment upon this view that their Lordships should have been logical and held the *Mendip Range* to blame. But there is a more serious observation.

It was observed by one of your Lordships that there is no article in the regulations directing the

navigation by two ships approaching one another so as to involve risk of collision when one is out of command and is showing the proper signals. But as the phrase "out of command" is explained in the regulations as meaning out of command so that she cannot get out of the way, it is obvious that if a risk of collision be imminent, and a collision is to be avoided, the other vessel must get out of the way; and if her duty be not one specifically imposed by the regulations it certainly is to be inferred from them. If it is not specifically imposed it may also be the case that 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" does not also specifically apply, and if it is not under the rules that the uninjured ship is to keep out of the way there may be no article requiring the broken-down vessel to keep her course. But just as rules of good seamanship and the inference from the regulations require the other vessel to keep out of the way of the broken-down one, so they require the broken-down one not to defeat the action of the other ship; and the only way in which she can be certain of not defeating it is by keeping her course, meaning by that the direct line of her compass heading at the time when the vessels ought to begin to act for each other. I am not speaking of cases where a ship owing to her broken-down condition cannot keep her course and will yaw about. Such a ship is to be excused and any approaching vessel should give her a sufficiently wide berth to avoid any danger from a yaw. But if a ship, because she hoists the broken-down signals, is to be enabled voluntarily to alter her course as much as she likes even to the extent of a right angle, regardless of other ships which have to navigate for her, all that is to be said is that she becomes a chartered libertine. "Faenum habet in cornu. Longe fuge." She is a mad animal, from which all other ships must flee.

In my view the *Drake* should be held to blame and alone to blame for this collision.

Solicitors for the appellants, *Downing, Hancock, Middleton,* and *Lewis* for *Middleton* and *Co.*, Sunderland.

Solicitors for the respondent, *Treasury Solicitor.*

Feb. 10, 11, *and March* 3, 1921.

(Before Lords BIRKENHEAD, L.C., HALDANE, FINLAY, CAVE, and SUMNER.)

MOUNTAIN *v.* WHITTLE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL, ENGLAND.

Marine Insurance — Time policy on houseboat at anchor—Liberty to shift—"Including all risk of docking"—Houseboat lost while being towed to dock—Abandonment of insured adventure.

The respondent 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 gridirons, or graving docks, as may be required during the currency of this policy." During the currency of the policy he 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 up the Itchen, and on arrival it was found that some of the side seams above the water-line were defective, and the bow wave made by the tug raised the water to the level of the defective seams, with the result that water entered and she sank. The respondent did not know that the seams were defective, and the towage was performed in the manner usual in Southampton Water. At the time when the houseboat left the Hamble the respondent did not intend to take her back during the currency of the policy but to lay her up in the Itchen.*

On an action on the policy brought by the respondent: Held, that the taking of the houseboat to the yard was authorised by the docking clause in the policy, and therefore the vessel was covered when the loss occurred; that the vessel was lost through a peril of the sea; and the respondent had not at the time of the loss abandoned the insured adventure.

Decision of the Court of Appeal (*reported* 14 *Asp. Mar. Law Cas.* 534; 122 *L. T. Rep.* 300; (1920) 1 *K. B.* 447) *affirmed.*

APPEAL by the defendant, an underwriter at Lloyd's, from an order of the Court of Appeal (reported 122 L. T. Rep. 300; (1920) 1 K. B. 447) affirming a judgment of Bailhache, J. whereby it was adjudged that the respondent (the plaintiff) was entitled to recover from the appellant 548*l.* 16*s.* 8*d.* and costs.

The action was brought on a time policy of marine insurance on the respondent's houseboat *Dorothy*, which was lost under circumstances that sufficiently appear from the headnote and the judgment of the Lord Chancellor.

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

Leck, K.C. and *L. C. Thomas* for the respondent were not called on.

The following cases were referred to:

Sassoon v. *Western Assurance Company*, 12 Asp. Mar. Law Cas. 206; 106 L. T. Rep. 929; (1912) A. C. 561;

Grant, Smith, and *Co.* v. *Seattle Dry Dock Company*, 122 L. T. Rep. 203; (1920) A. C. 162;

Leyland Shipping Company v. *Norwich Union Fire Insurance Society*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350;

Pearson v. *Commercial Union Assurance Company*, 3 Asp. Mar. Law Cas. 275; 35 L. T. Rep. 455; 1 App. Cas. 498.

After consideration their Lordship's dismissed the appeal.

Lord BIRKENHEAD, L.C.—This is an appeal from an order of the Court of Appeal dated the 7th Nov. 1919, affirming the judgment of Bailhache, J. in favour of the respondent.

The respondent's claim was for a partial loss under a policy of insurance subscribed by the appellant and covering the houseboat *Dorothy*.

The issues which require decision are, in general, whether the damage sustained by the *Dorothy* was caused by a peril insured against and whether the *Dorothy* was covered by the policy at the time of the loss.

The facts are simple and may be shortly stated. The *Dorothy* was bought by the appellant in the

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

summer of 1915, fitted out as a houseboat, and used as a residence for himself and his family. In Jan. 1918, she was let to Messrs. James, a firm of contractors who had undertaken to raise a sunken vessel, and who required accommodation for the men engaged in this task. Messrs. James towed the *Dorothy* to the Hamble River, where she remained with their men on board till the early autumn of 1918, when they gave up possession in pursuance of a notice from the respondent dated the 22nd June. When the workmen left, the *Dorothy*, being in a dirty condition, required cleansing and renovation before the respondent could reoccupy her. The necessary repairs required that she should be docked and put on the gridiron. Messrs. Camper and Nicholson's yard at Northam, about seven and a half miles away, was the nearest place where the *Dorothy* could be docked. There was no place nearer or more suitable.

The respondent had engaged a small tug called *The Test* to tow the *Dorothy* to the repairing yard above-mentioned, but at the appointed time *The Test* broke down and the deputy dockmaster sent the tug *Dorrington*, a much larger and more powerful tug, to tow the *Dorothy*. The contention was abandoned before your Lordships that the method of towage adopted was unusual or unseamanlike. But during the towage the unusual height of the breast wave, thrown up by the *Dorrington* and the *Dorothy* together, caused the water to reach the top-side seams of the *Dorothy*, invade the interior through the seams, and cause the *Dorothy* to sink shortly after her arrival off the gridiron at Messrs. Camper and Nicholson's yard.

It was contended on behalf of the appellants; first that there was no clear finding of fact that the cause of the casualty was the unusual height of the breast wave, or indeed that the breast wave was unusually high, and it was contended further that, if there were such findings, there was no evidence upon which they could properly be found. In my opinion these contentions fail. Commander Whittle, in his evidence, speaks of the heavy wash of both vessels. Mr. Simey, who argued the case for the appellants extremely well, admitted, what indeed is obvious, that the larger the tug, the greater the resultant wave, and he could not dispute, having regard to the evidence, that the tug actually employed was of disproportionate size and power. The judgments below seem to me to embody the necessary conclusion of fact in reasonably clear language. Bailhache, J. expresses himself as follows: "I am satisfied that what happened was that the breast wave, the bow wave from the *Dorrington*, raised the level of the water and caused the water to reach these leaky and defective seams. . . . It must be borne in mind that there was a rather unusual danger about this particular operation by reason of the comparative size and power of the *Dorrington* as compared with this houseboat." Bankes, L.J. used language even plainer: "It seems to me that the unusual height of this breast wave caused by using this very powerful tug to tow this houseboat in the way in which she was towed, may properly be called an unexpected occurrence, and properly be found as it has been found by the learned judge, to be a peril of the sea."

It should be added to this short statement of the facts, that the *Dorothy* was found, and rightly found, to be unseaworthy on the ground that her seams above the water side were leaky and defective. But the policy was a time policy and therefore the unseaworthiness of the vessel of itself afforded no defence to the claim. Nor was it contended that the defence under sect. 39 (5) of the Marine Insurance Act 1906, was open to the appellant, as it could not be and was not shown that the respondent was aware of the vessel's unseaworthiness.

The questions which arise upon these facts, and upon those submissions of the parties which survive the argument, are the following: (1) Was the loss caused by a peril insured against? (2) Was the *Dorothy* covered by the policy during the shifting from her anchorage to Camper and Nicholson's yard for the purpose of docking and being put on the gridiron? (3) Had the insured adventure been abandoned?

In order to answer these questions, it is necessary to consider the terms of the policy. This instrument was dated the 19th Aug. 1918, and was expressed to be for the space of six calendar months, commencing the 14th July 1918 and ending the 14th Jan. 1919, for 400*l.* on hull and material, machinery and boilers of the vessel *Dorothy* "whilst anchored in a creek off Netley, however employed, with liberty to shift." The words just quoted are typed at the beginning of the printed form. Additional clauses are annexed to the instrument in print, while at its foot is stamped a short clause to the following effect: "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." The perils insured against were perils usual in a Lloyd's policy, including perils of the seas.

I have made it plain that there are concurrent findings of fact in the courts below to the effect that the unusual size of the breast wave either caused the entry of the sea water or effectively contributed to its entry. I see no reason for differing from these findings, and I adopt them as the basis of the conclusion which I have reached. In my opinion, the nature of this wave constituted a "sea peril." The elements which are necessary to form a sea peril have frequently been collected and explained in this House. But it is no longer necessary, unless for the purposes of illustration, to go further than the statutory provisions of the Marine Insurance Act; that the term "perils of the seas" refers only to fortuitous accidents or casualties of the seas, and does not include ordinary action of winds or waves. In my opinion, the incidence and dimensions of the wave in question amounted to a fortuitous casualty of the seas and were not accounted for merely by the ordinary action of winds or waves. Upon the first point, therefore, I reach the conclusion that the loss was caused by a peril insured against.

It is in the next place contended that the *Dorothy* was only protected whilst anchored in a creek off Netley; that there was a deviation; and that she was unprotected at the moment of the casualty.

It is worth noticing that the parties apparently acquiesced in the view that the Hamble River, though not in fact a "creek off Netley," was to be treated as though it were. The appellants, however, disputed the reasonableness of founding upon this agreement a more extensive construction of the words "in a creek off Netley" than they would naturally bear. For the purpose of this opinion I draw no general inference from the tacit agreement to vary in this particular the scope of the original policy.

The respondent contended that two clauses of the policy extended its scope sufficiently for his purposes. In the first place he points out that he is given "liberty to shift." In the second place he relies upon the docking clause which I have already set out. Bailhache, J. has found in his favour on the shifting facility, but against him on the docking clause. The Court of Appeal reversing this conclusion rejected his submission upon the first point, but decided in his favour upon the docking clause.

I agree with the view of the Court of Appeal.

I think that the words "with liberty to shift" are to be construed as an extension of the scope of the policy, which would otherwise only protect the vessel while it was actually anchored in the creek. In other words, if the freedom to shift had not been stipulated for the vessel would have been unprotected during the innumerable small movements which circumstances may from time to time have required. I do not think that the words were intended to cover a voyage of seven or eight miles to a different part of the coast.

But the docking clause must be determined in reference to quite other considerations. In the first place it must be given a clear meaning. Counsel for the appellant attempted to attenuate its importance by pointing out that it was merely a stamped clause. I find myself quite unable in any case in which the circumstances are not altogether singular to treat some clauses of a contract as of primary and others as of secondary validity. The clause either is part of the contract or it is not. If it is, it must be construed in the same way as any other clause. It may sometimes be necessary in cases where the clauses of an instrument appear on the face of them to be contradictory to admit speculative appraisements of their comparative weight. But these ought always to be undertaken with hesitation, and applied with extreme caution. In the present case we are to give a meaning to a clause which protects the insured vessel against all risk of docking, changing docks, and going on the gridiron. It is conceded that there is no dock and no gridiron in the Hamble River or in any creek off Netley. But it is nevertheless contended by the appellants that in spite of the plain language of the clause protection ceased the moment the *Dorothy* left the Hamble River for Camper and Nicholson's yard at Northam, in other language that the words "now anchored in a creek off Netley" so completely dominate the whole policy as to override the docking clause altogether. I cannot accept this contention. No reasonable meaning can be given to the docking clause, unless it is construed as extending the protection to the course of a voyage to a dock or gridiron such as a reasonable owner might, under all the circumstances of the case, be expected to employ and be justified in employing. I am not impressed by the arguments used in order to illustrate the supposed extravagant consequences of this construction. If an insurer extends the protection of the vessel insured to a voyage for the purpose of docking the vessel, he may be expected to acquaint himself with the measure of his liability by ascertaining where docks are reasonably to be found and how far the "changing docks and going on gridiron" to which he has assented will increase his liability, and ought to be reflected in the rate to be charged. For these reasons I am of opinion that the second question must equally be answered in favour of the respondent.

The only remaining point may be very shortly dismissed. It is contended for the appellant that the insured adventure had been abandoned. This contention is founded upon the evidence of the respondent at p. 45 of the Record. Commander Whittle there stated that it was his intention to spend the winter living on board the *Dorothy* at Northam, thereby (so it is claimed) abandoning altogether his anchorage in a "creek off Netley." It is sufficient upon this point to observe that it is not alleged that such an intention was ever communicated to the insurers; that it is not contended that the respondent did any act which made his intention irrevocable; and that it is extremely improbable that he would have reached, without any consideration whatever, a decision which might conceivably have deprived him of a protection which in certain contingencies he might still need and for which he was bound to pay.

I am of opinion that the appeal fails on every ground and that it ought to be dismissed.

I move your Lordships accordingly.

Lord CAVE desires me to say he concurs in the opinion I have just read.

Lord HALDANE.—I have also had the advantage of previously seeing the proof of the opinion delivered by the Lord Chancellor. I concur in the conclusion at which my noble and learned friend has arrived, and there is nothing that I desire to add.

Lord FINLAY.—The action in this case was brought upon a policy of marine insurance on the *Dorothy*, a houseboat, to recover for a partial loss by perils of the seas alleged to have been sustained during the currency of the policy.

The policy was expressed to be for 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." It covered perils of the seas and contained the following clause: "Including all risks of docking, undocking, changing decks and going on gridiron or graving docks, as may be required during the currency of this policy."

The *Dorothy* had been lying in the Hamble River on Southampton Water. She belonged to the plaintiff, Commander Whittle, and had been used by him as a dwelling-house for himself and his family, but for some months before the 21st Sept. 1918 had been occupied with his leave by the workmen employed in some urgent work on Southampton Water. He desired to resume occupation of the houseboat, and finding that she was not in a fit state for habitation by himself and his family he arranged that she should be towed up to Messrs. Camper and Nicholson's yard at Northam on the River Itchen to be thoroughly cleaned and re-painted. A small tug, *The Test*, had been engaged for the towage, but owing to an accident *The Test* could not come, and a much bigger tug, the *Dorrington*, was sent instead. The master of the *Dorrington* lashed the *Dorothy* alongside the tug. Bailhache, J. before whom the case was tried, found that she was lashed alongside in the ordinary way with fenders to keep her off from the tug and fastened ahead and astern. On arriving at Northam, eight miles off, it was found that a great deal of water had entered the *Dorothy* during the voyage. At Northam the *Dorothy* was cast off

from the tug, and made further water until she sank.

The damages claimed were 400*l.* for partial loss in consequence of the sinking and 148*l.* 16*s.* 8*d.* under the suing and labouring clause. Bailhache, J. gave judgment for 548*l.* 16*s.* 8*d.* accordingly, and the Court of Appeal dismissed an appeal from his judgment by the underwriters. Three questions arise upon this appeal: (1) Whether the *Dorothy* was covered by the policy at the time of the loss; (2) whether the policy was abandoned; and (3) whether the loss was by perils of the sea.

1. The underwriters contend on the present appeal that the insurance covered the *Dorothy* only while anchored in the Hamble River and while shifting within the limits of the Hamble River, and that they are not liable as the loss took place while she was proceeding up the Southampton Water on her way to the Itchen.

It is by no means easy to put a definite meaning upon the expression in the policy "whilst anchored in a creek off Netley." The underwriters assert that the Hamble River had been selected as the creek off Netley where the *Dorothy* was to lie at anchor, and that the shifting clause gave power to shift only within the limits of the Hamble River. The assured, on the other hand, contends that the insurance applied to the *Dorothy* while in any creek off Netley and that the shifting clause covered her while moving from one such creek to another.

The expression "a creek off Netley" taken by itself seems equally applicable or equally inapplicable to the Hamble River and to the Itchen. There was no evidence given of any special meaning attributed by usage to this expression. What is clear is that both sides regarded this expression as covering the Hamble River. Bailhache, J. must have regarded it as covering also the Itchen. He decided that the *Dorothy* was covered by the shifting clause at the time of the loss. The liberty to shift must be to shift within the limits of the policy, and could not cover the *Dorothy* unless she was shifting to a place which the policy would cover. Bailhache, J. was of opinion that the *Dorothy* would not have been covered at the time of the loss by the "docking and undocking" clause.

The Court of Appeal did not agree with Bailhache, J. that the shifting clause covered the *Dorothy* at the time of the loss, as they were not prepared to hold that shifting to the Itchen would be within the terms of the policy. It is not necessary for your Lordships to decide between the views taken on this point in the Court of Appeal and in the court of first instance respectively. In my opinion the Court of Appeal were clearly right in holding that, whether the shifting clause did or did not apply, the *Dorothy* was covered by what has been termed the docking and undocking clause.

It was argued for the underwriters that the liberty to dock, &c., must be confined to doing so within the limits of the Hamble River, and that the *Dorothy* could not go on gridiron or graving dock unless it was situate within these limits. As there are no such conveniences in the Hamble River this construction would prevent the clause from having any operation whatever in the case of the present policy. I cannot so construe its terms. In my opinion this clause applies whether the dock or gridiron was itself within or without the limits of the policy protecting the *Dorothy* while anchored, and it would also cover the vessel while proceeding to the dock or gridiron and while returning from it. If this view be correct it follows that the *Dorothy* was covered while she was proceeding up the Southampton Water to the gridiron at Northam, even if the policy would not have applied to the *Dorothy* if anchored in the Itchen. The conclusion arrived at by the Court of Appeal upon this clause seems to me to be right on the natural meaning of the words, and to be in conformity with the decision in *Pearson* v. *The Commercial Union Assurance Company* (3 Asp. Mar. Law Cas. 275; 35 L. T. Rep. 445; 1 App. Cas. 498). It would very much restrict the operation of such a clause if the vessel could not go to any graving dock or gridiron beyond the limits covered by the policy for ordinary purposes. In the present case there was no place nearer or more suitable for taking the vessel to than Camper and Nicholson's yard.

2. A second point was made by the defendants with reference to the voyage to the Itchen. It appears from the evidence that the practice of Commander Whittle had been that the *Dorothy* should be laid up during the winter in Camper and Nicholson's yard, and that his family should live on board her there, and he said that it was his intention to do the same during the winter, which was approaching at the time when this loss was sustained. He said that he meant to re-decorate her and then live on board. The defendants contend that Camper and Nicholson's yard at Northam was beyond the limits of the policy. On this point it is not necessary for your Lordships' House to express any opinion. Even if Camper and Nicholson's yard were beyond the limits of the policy, so that keeping the vessel anchored there would have amounted to an abandonment of the policy, Commander Whittle, whatever he intended, had not communicated any such intention to the underwriters, and was absolutely at liberty to change his mind. He might, as soon as the decoration was completed, have taken the vessel back to the Hamble River if he were tempted to do so by specially fine weather. The mere fact that he had a certain intention in his own mind cannot amount to an election which would affect him as between himself and the underwriters.

I agree with both courts below in thinking that this point entirely fails.

3. There remains for consideration the question whether the loss was by perils of the seas.

It appears that the *Dorothy* was not seaworthy owing to some opening of the top side seams. As the policy was a time policy there was no warranty of seaworthiness and there is nothing to show that Commander Whittle was aware of the unseaworthiness. It is, however, necessary for the assured to establish that the loss was due to a peril of the seas. If the water was in a normal condition and got into the houseboat simply owing to the defective character of the seams there would be no loss by peril of the seas—the loss would have been by the defective condition of the vessel. A loss caused by the entrance of sea water is not necessarily a loss by perils of the seas. There must be some special circumstance, such as heavy waves causing the entrance of the sea water, to make it a peril of the seas. Was there such a peril here? Both Bailhache, J. and the Court of Appeal find that there was, and upon the evidence I cannot doubt that they were right. It seems to be quite clear that the *Dorothy* was exposed to a wash of an extraordinary character from the great size and

power of the *Dorrington*, the tug to which she was lashed. The breast wave so occasioned amounted to a peril of the seas just as much as if it had been occasioned by a high wind. No attempt was made on behalf of the underwriters to show that the water would have made its way into the houseboat to the same extent if the wash and breast wave had been normal. The wash occasioned by passing vesels at sea may constitute a peril of the seas if of an extraordinary character, and if the wash here was occasioned by something abnormal in the strength and size of the tug or the mode of towage it was equally a peril of the sea. The fact that it was due to some negligence in the management of the vessel on the part of those to whom the owner had confided her does not prevent such an accident being covered by the policy.

Bailhache, J. and the three judges in the Court of Appeal all agree in finding that there was an abnormally high breast wave caused by the size and strength of the tug to which the houseboat was lashed, and that this breast wave was responsible for the water reaching and entering through the defective seams. Apart altogether from the effect to be given to the concurrent findings of the two courts it appears to me upon perusal of the evidence that these findings were manifestly right, and that the appeal fails also upon this point.

I am therefore of opinion that the appeal should be dismissed with costs.

Lord SUMNER.—The subject matter of this time policy is the houseboat *Dorothy*, however, though not wherever, employed, for she is covered only "while anchored in a creek off Netley," with liberty to shift and with such other liberty as is involved in the docking clause.

"In a creek off Netley" limits the area within which the *Dorothy* is to be insured. What then is this area? The word is not "at" or "opposite"; and to speak of something being "off" a point on shore is very vague. The word "off" is not to be measured only by the distance straight off shore to the exclusion of the waters up or down the estuary. There is a further indefiniteness. Most creeks in the south of England have names; this creek is nameless. Moreover, is it the houseboat or the creek that is to be "off" Netley? I can only say that I do not know when a creek, which is itself an indentation in or on a shore, can properly be said to be off that shore.

At the date of the policy the *Dorothy* was actually at anchor in the River Hamble. The underwriters forebore to argue at the trial that, if so, she was not "anchored in a creek off Netley." Not that there was any agreement between the parties that the River Hamble was such a creek, though I think it would probably have been so held, but the point was not taken. The underwriters may have thought that to such a contention a claim for rectification would be a successful answer, for, if not, the policy never attached. At any rate, the policy is now to be construed as it stands, and not as if it had been expressed "while anchored in the River Hamble."

When the *Dorothy* sustained the loss sued for she was off Messrs. Campion and Nicholson's yard on the River Itchen and was still in tow, that is she was too far from Netley to be "off Netley" or "in a creek off Netley," and further, was not at anchor. Was she then exercising her liberty to shift? I think not. Whatever the area be within which she was laid up, it is within that area that she can shift, and not beyond it. Liberty to shift is not unlimited liberty to cruise or to anchor wherever the owner likes. The liberty must be confined to the limits of the lying up, to which the liberty to shift is ancillary.

What then is the effect of including "all risk of docking . . . changing docks and going on gridiron as may be required" during the six months covered? As an addition to the perils insured against it may be that these words have no effect on the area within which those risks are to be incurred; but so read, the words are idle, for there are no docks, graving docks or gridirons in any creek off Netley. No one supposd that there were. However urgently docking might be required, the *Dorothy* on this construction would be at owner's risk on passing the indeterminate limit of her laid-up area, and her owner might have to choose, and quickly too, between sinking at anchor in a creek at underwriters' risk or towing to a gridiron elsewhere at his own. This is not a practical view to take of the matter.

Further, risk of docking and undocking in any case includes some navigation outside the dock, the proximity involved being a question of fact. *A fortiori* is this true of "changing docks," and this involves a still wider area outside of any dock. If so much navigation outside of any dock is implied, because otherwise the clause would defeat its own object, I see no difficulty in implying that she was covered during the two or three miles at most by which she departed from her "creek off Netley." I do not understand it to be contested that she would have been covered while going from her anchorage to the gridiron, if there had been one within the area of the insurance, though that would have been implied from the docking clause, since the shifting would not be from anchorage to anchorage. Of course, this clause would not hold her covered while going to any dock, however far off or under whatever alteration of circumstances; but here the dock lay but a short distance beyond the limit, the passage was through similar waters, involving no different kind of risk from that of the passage within the specified area, and the ancillary character of this addition is strictly preserved. Even the point that in dry dock or on gridiron the craft is not waterborne is not enough to make the risk wholly dissimilar, for the houseboat, grounding at ebb-tide, might run much the same risk of being wrung as if unskilfully put on a gridiron or in dry dock. The clause is not a new and independent insurance, but is in support of the laid-up or port risk. As she was not in a port at all, except perhaps in the administrative sense, if the clause did not entitle her to go to Messrs. Campion and Nicholson's yard, it meant nothing.

The underwriters argue that it did mean nothing; yet it is a part of the contract. It is not part of the old form of Lloyd's policy; it is purposely added, however humble the hand by which it is stamped on the policy, and however much it is a matter of course to do so with laid-up risks. There is no evidence of any usage; no suggestion of mistake; no counter-claim to rectify the policy by striking it out. The fact that it is added to the form when the blanks are filled in and the form is made up for signature as a contract, shows that the words are words of contract, to which effect is to be given, if that can reasonably be done. Even if the docking clause were now part of the Lloyd's form, in this

connection they would be part of this contract, for docking may be as needful to a laid-up vessel as to one making voyages. There are some expressions in this form of policy which have no application to this risk, such as the liberty to touch and stay. This results from expressing a laid-up risk for time on a voyage form. Similar results always follow from expressing insurances on ship alone on a Lloyd s form, which is also used for insurances on goods. Some words in the common form are always found to have no application to the insurance actually effected. Everyone who is at all familiar with the way in which insurance policies are and long have been framed in practice and have always been interpreted in the courts for a century and more before this policy, must know that an attempt to construe a ship risk by reference to words which really belong to the goods form, is to disregard, and not to give effect to, the intention of the parties, but such is not the case here. The docking clause can have some meaning here; the only question is what that meaning is.

Two matters of fact alone remain, namely, (1) was there evidence of a loss by perils insured against, and (2) had the insured adventure been abandoned by the assured before loss? As to the first, the decision of Bailhache, J. was affirmed by the Court of Appeal, and I should not myself presume to differ from the conclusions of four authorities so learned and so experienced in this subject as Bailhache, J. and Bankes, Scrutton, and Atkin, L.JJ., and I think there was clearly evidence on which they could so find. In fact, my own conclusion would be the same, for the bow wave must have been indeed an exceptional one for 4ft. of water in 100 minutes' towing at a moderate speed to have been forced through seams which were not open enough to have attracted attention, and sinking by such a wave seems to me a fortuitous casualty; whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage.

I also think that the adventure was not abandoned in fact. What deviation would be as applied to this insurance I do not know, but, apart from the assured's being free to change his mind, I think he only meant that he did not intend to take the *Dorothy* back to the Hamble River, not that he did not intend that she should be anchored again "in a creek off Netley" at all during the residue of the term insured. The appellant s argument assumed that the policy was to be treated as if it had been expressed simply "whilst anchored in the Hamble River." I therefore agree that the appeal fails.

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

Solicitors for the respondent, *Constant and Constant.*

Judicial Committee of the Privy Council.

Oct. 19, 21, 1920, *and March* 10, 1921.

(Present: Lords SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL).

THE EDNA. (*a*)

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

Prize—Neutral ship—Purchase from enemy—Claim for damages for deterioration while commandeered by Crown — Validity and competency of sale—Declaration of London 1909, *art.* 56.

Prior to the outbreak of war with Germany in 1914 *a vessel which was registered in a neutral country N. was transferred to a company in a neutral country M., and registered in M. She was in fact of German character and rendered services to a German cruiser in the supply of coal and in other respects. She, however, took no direct part in hostilities, and was not in the employment of the German Government nor under the control of an agent placed on board by that Government. In Oct.* 1915 *she was bought* bonâ fide *and paid for by a neutral firm and her name changed. She was seized during her new ownership by a British cruiser and afterwards requisitioned by the Crown.*

Held, that the purchase was valid and complete as the vessel could not be regarded as having been an auxiliary to the German fleet so as to be subject to the disability of transfer attaching to warships.

Held, further, on a cross-appeal, that the captors were not liable for damages or costs in respect of the seizure, since there was substantial ground for questioning the neutral character of the ship, and the claimants' case had been supported by flagrantly false affidavits which rendered a judicial inquiry necessary; and that in any case the claimants were not entitled to an account of profits earned by the vessel while under requisition.

Judgment of Lord Sterndale, P. (*reported* 14 *Asp. Mar. Law Cas.* 443; 121 *L. T. Rep.* 281; (1919) *P.* 157) *affirmed.*

APPEAL and cross-appeal from a judgment of the Admiralty Division (in Prize) dated the 2nd April 1919 and reported 14 Asp. Mar. Law Cas. 443; 121 L. T. Rep. 281; (1919) P. 157.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), and *Clement Davies* for the Crown.

Sir *Erle Richards*, K.C., *C. T. Le Quesne*, and *W. Van Breda* for the respondents.

The following cases were referred to:

The Alwina, 13 Asp. Mar. Law Cas. 311; 118 L. T. Rep. 97; (1918) A. C. 444;
The Ceylon, 1811, 1 Dods. 105;
The Minerva, Roscoe, vol. 1, 591; 6 C. Rob. 396;
The Vrow Elizabeth, Roscoe, vol. 1, 409; 5 C. Rob. 2;
The Ariel, 1857, 11 Moo. P. C. 119;
The Baltica, Roscoe, vol. 2, 628; 1857, 11 Moo. P. C. 141;
The Zamora, 13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;
The Ostsee, 1855, 9 Moo. P. C. 150;

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

The Parlement Belge, 4 Asp. Mar. Law Cas. 83, 234; 42 L. T. Rep. 273; 5 P. Div. 197;
H.M. Submarine E 14, 14 Asp. Mar. Law Cas. 61, 533; 122 L. T. Rep. 443; (1920) A. C. 403.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—These are consolidated appeals from a decree of Lord Sterndale, P. ordering the release of the *Edna*. Her owners, the claimants, ask for costs and damages as well: the Crown asks for condemnation.

The *Edna* changed hands and flags and names several times in about eighteen months. Before March 1914 she was the *Jason*, a Norwegian ship belonging to the Aktieselskabet Dampskibet Jason. Then a Mexican company, the Lloyd Mexicano Societa Anonyma, bought her, and she became the *Mazatlan* on the Mexican register. The moving spirit in this transaction was a German named Friedrich Jebsen, who had incorporated the Lloyd Mexicano. His interest in its capital was so preponderant and his control over it and the *Mazatlan* was so complete that she thereby became a ship of enemy character on the outbreak of the war. The learned President's finding of this fact is not now contested. In Oct. 1914 the *Mazatlan* was requisitioned as a military transport in Mexican waters by persons acting on behalf of a Government, whether existing *de facto* or *de jure*, on some part of the Pacific coast of Mexico, and they had possession of her for about a year. Meantime there was in San Francisco a company called the International Banking Corporation, managed by a Mr. Wilson, which had lent money to the Lloyd Mexicano in 1913 and 1914, and a company called the Executive Company had also been in existence there since 1907, which was not a shipowning company, whatever else it may have been, and had a paid up capital of only $300. In Feb. 1915 Jebsen agreed to sell the *Mazatlan* to this Executive Company for $1000 down and $114,000 payable by instalments, when the ship could be got out of Mexican hands and delivered at San Franciso. While awaiting that event the Executive Company by amending its articles took powers to own a ship and manage her. Not satisfied with this, Jebsen in May founded a company in San Franciso called the Western Pacific Steamship Company, with the above-mentioned Mr. Wilson as its treasurer. In April the Lloyd Mexicano transferred the ownership of the *Mazatlan* to him for a purported consideration of $115,000 then paid, and in July he re-transferred her to this Western Pacific Steamship Company for a nominal consideration of $10. He was also allotted all the last-named company's share capital except three shares of $100 each. Somehow or other the authorities in Mexico who had control of the *Mazatlan* were then induced to release her. If, as is probable, somebody had to be paid a consideration for this purpose, the money seems to have come, not from the Executive Company or the Western Pacific Steamship Company, but from the International Banking Corporation.

In Oct. 1915 the *Mazatlan*, still flying the Mexican flag, returned to San Francisco. By this time an agreement had been arrived at with the present claimants, a firm of United States citizens carrying on business there, for the purchase of the vessel at the price of $125,000, and eventually a bill of sale in their favour from the Executive Company was duly executed and recorded. They received possession of the ship, changed her name to the *Edna*, placed her on the United States Register of Shipping, and paid over their purchase money, of which the Executive Company got $11,000 and the Lloyd Mexicano $114,000. Fifty thousand dollars of this were promptly remitted to Germany on Jebsen's account. The *Edna* thereafter traded under charter for the benefit of the claimants till Jan. 1916, when she was captured at sea by H.M.S. *Newcastle*. She was afterwards duly requisitioned for the use of His Majesty by order of the Prize Court.

How the Mexican steamship *Mazatlan* became in 1915 the United States steamship *Edna* would have involved a critical examination were it not that the Crown does not now dispute that the claimants bought and paid for the ship in entire good faith. This view was only adopted at a late stage. After a member of the claimants' firm had been eventually called as a witness at the trial and had been cross-examined, the advisers of the Crown confessed themselves satisfied. Accordingly two grounds only are now relied on for the captors, both going to the validity of the title acquired by the claimants —first, that such a transfer cannot be valid unless the claimants show that not only they but also their transferor acted in good faith, that is, without any purpose of defeating the belligerent rights of the Crown; second, that in the autumn of 1914 the *Mazatlan* was not only a ship of enemy character, but also stood in such a relation to the enemy Government that during the war no transfer of her at all would be competent or recognisable in a Court of Prize.

It is not enough to show that she was then engaged in carrying contraband of war or in rendering services to His Majesty's enemies, which, if followed sufficiently closely by capture, would have made her liable to condemnation in spite of her Mexican registry. Many months had passed since the autumn of 1914 before she was seized, and that chapter in her adventures had long been closed. Of course, if she still bore an enemy character in Jan. 1916, that in itself made her good prize, but neutrals like the claimants are entitled to purchase and take delivery of a private enemy merchantman in a neutral port, and if the transaction is complete and without reservation, as this transaction was, it stands and the ship is thereafter neutral. Accordingly the curious intervention of the companies above described between Jebsen and the claimants before the *Mazatlan* was sold in 1915 and her adventures in 1914 are relied on as showing the imperative reasons which Jebsen had for getting rid of her, and the consequence is said to be that while his object was to defeat the capture, which he knew to await her, that object was itself defeated by the fact that she had been in 1914 part of the enemy's resources for war.

There is evidence given by Admiral Sir W. R. Hall, then director of the Intelligence Division of the Admiralty, that: "Before the outbreak of the present war the German Government had made plans and arrangements whereby at various ports on the western coast of North and South America merchant ships were to be provided to act as fleet auxiliaries to the German cruisers operating in the Pacific." And it is contended that Jebsen was a German agent, who arranged

that the *Mazatlan* should so act. No definition is given of a "fleet auxiliary," nor is it shown to be a term of art. It does not appear to have been considered by any court before this case. Doubtless a fleet auxiliary renders help to a fleet, but what help, or what fleet, is in this connection another matter. The evidence above quoted is not contradicted and is entirely probable in itself.

Jebsen was a person of zeal and ability. He was determined to help his country in the war and was not too particular how he did it. It is, however, by no means obvious that such a determination involved his making his own ship a "fleet auxiliary" and taking the consequences himself, nor is it clear that to do so was the best way of giving assistance. The story begins with a German consul in San Francisco overreaching himself. The German cruiser *Leipzig*, then operating in the North Pacific, came into San Francisco to bunker. The consul, unwarrantably presuming on the indifference of the United States officials, ordered for her the very large quantity of 1000 tons of coal, but they refused to allow more to be shipped than enough to take her directly to Apia, the nearest German port. The *Leipzig*, however, was not bound for Apia. She was cruising in search of British merchantmen, a much longer voyage. At this point Jebsen showed himself a man of resource. The *Mazatlan* was then engaged in trading down the coast, calling at Mexican and other ports, where it was hoped (though doubtless without justification) that the local officials might be less incorruptible or more supine than those of the United States. In addition to her general cargo she obligingly loaded 500 tons of this coal for Guaymas, and also took on board what was believed to be a wireless telegraphic apparatus, with its operator, a German naval reservist, and some bags of letters. On her way down she called at San Pedro and there picked up Jebsen and some ladies, and three days later she happened to find the *Leipzig* in Ballenas Bay, anchored near her, and transferred to her the operator and the apparatus, the reservist and the bags. At Guaymas she found a German vessel called the *Marie*, which belonged to a relative of Jebsen's and was clearly a tender to the *Leipzig*. Here Jebsen went ashore and the coal was discharged into lighters, and no doubt has been suggested that it was duly transferred, directly or indirectly, to the *Leipzig*. The *Mazatlan* then proceeded to her next port of call, Topolobampo, where Jebsen again joined her, and soon afterwards she was requisitioned for a short time for Mexican use. Attempts had been made by him and by her captain to get into wireless communication with the *Leipzig* throughout the voyage, which the English operator thwarted by putting the apparatus out of order. His courage and resource no doubt deprived the *Leipzig* of much information, and his vigilance in communicating with the British consular authorities as opportunity served had probably the result that the operations of the *Mazatlan* were well known on the station and long remembered against her.

Jebsen was obviously a willing party throughout to the assistance that was being arranged for the *Leipzig*, and no doubt the proceedings were concerted with the *Leipzig's* officers, for otherwise they might have proved abortive. There is, however, no ground for supposing that the *Mazatlan* was under the orders of the *Leipzig* or was otherwise connected with her than as rendering the service of placing coals and other things where she or the *Marie* could get them, and as volunteering information, of which it was hoped that she would make use. Had the *Mazatlan's* character been Mexican, as her legal ownership was, what she did would have been a highly unneutral service. It is, however, a totally different thing to establish that these proceedings, which *primâ facie* were those of a private merchantman, though controlled by a person of accommodating and zealous disposition, really prove that she was a ship which could not be transferred to neutrals at all during the war, any more than a German man-of-war or a mail-steamer owned by the German Government or any other portion of the public property of the German Empire destined to its public use: (*Parlement Belge* (*sup.*). It must be possible to draw a line between unneutral service and "fleet auxiliaries" and between the cases in which neutrals can validly buy and take delivery of enemy ships and the cases in which they cannot; otherwise transactions which are expressly permitted to neutrals might be invalidated by circumstances of which they had no notice and could form no estimate.

That a vessel which is or has been a portion of the armed forces of a belligerent cannot by a mere private transaction be placed beyond the reach of capture on the high seas is well settled (*The Minerva*, (*sup.*); *United States* v. *Etta*, 4 Am. L. Rep. (N. S.) 387; *The Georgia*, 1868, 7 Wall. 32), and there is authority for the proposition that while a vessel formally incorporated in the enemy forces is and continues to be, for this and cognate purposes, a public ship of war, her mere actual employment in that capacity without formal incorporation or commission will also bring upon her the like disability: (*The Ceylon* (*sup.*), and *cf. H.M. Submarine E 14* (*sup.*). Various reasons have been given for this rule, as that transferability is an exception granted to enemy property in favour of commerce and that ships of war are not articles of commerce, or that such transfers would enable a belligerent to rescue himself from the disadvantage into which he has fallen and so to shift the disadvantage to his opponent, or that the ship sold might afterwards find its way back into the service of the flag to which she had belonged. If a public man-of-war remains in a neutral port for more than the limited time permitted to her by recognised rules, she has to be interned, for otherwise the neutral State would be rendering an indirect service to a belligerent as such. It it were open to a subject of that State to buy her under such circumstances, the payment of the price would be a direct service to the belligerent of a very real character, for instead of a ship which he could not use, he would get cash, which he could. The precise foundation of the rule, however, need not now be determined.

In the case of a ship which is not and never has been a part of the armed forces of a belligerent, other tests may be applicable. Ships which enlist in the service of such armed forces, though not armed themselves, may naturally be the subject of rules more stringent than those which govern ordinary merchantmen. The forces assisted may consist of single ships or of whole fleets. Assistance may be rendered when in company or when detached; it may consist in the supply of coal and stores, or in the collection and forwarding of information. An unarmed ship may be of service as a decoy or as a screen; the assistance may be

rendered casually or on a system, voluntarily or under orders, gratuitously or for hire. Such service is not necessarily confined to ships of the country to which the fleet assisted belongs or of a country engaged in the war at all. Again, such a ship may be captured *in delicto* and while rendering the service or after the service has come to an end. In the latter case different considerations may well arise, unless she is to be clogged perpetually for a single transgression and be incapable of valid transfer however long she may have mended her ways.

There seems to be no authority in point. Their Lordships considered the case of *The Alwina* (*sup.*) as one of the carriage of contraband only. The neutral vessel there was released and not treated as if she were a fleet auxiliary, although it was not disputed that the ship and her cargo had been despatched with the object of succouring a German squadron at sea, and if no services were actually rendered this was due to circumstances equally unforeseen and unwelcome, so far as her Dutch owners were concerned. The case, however, at most throws light on the liability of such an assistant to be subsequently captured while in the same ownership, and does not purport to decide anything as to the validity of an intervening change of ownership.

So much for the character of the assistance, which is material. Regarding the *Mazatlan* as a ship of enemy character, those in command of her nevertheless held no personal commissions from the German Government; she was not even such a "private ship of war" as was commissioned in the days of privateering; she took no direct part in hostilities; it is not shown that she was under the orders or control of any agent placed on board by the enemy Government; she was not even in the employment, still less in the exclusive employment, of such Government; she was not under requisition to them; she did not fly the colours of the German Navy, nor were her crew subject to military law. Regarded as a vessel on the Mexican register she had no immunity from visit and search or from arrest by appropriate legal proceedings in a municipal court, say of the United States, nor in such proceedings could the German Government, if they had chosen to submit to the jurisdiction, have been made liable for private civil wrongs done by those on board of her.

Their Lordships are not prepared to entertain a proposition so wide as that any help whatever rendered to a German man-of-war by a German merchantman would disable her owners from validly transferring ownership to a neutral under all circumstances for the remainder of the war. Such a proposition would go far to make the term "unneutral service" a mere name and to enhance to a surprising extent the consequences hitherto imposed on that form of misconduct. The communication to the *Leipzig* of the movements of British vessels by wireless telegraphy, in itself one of the gravest of offences, rested in intention only; the achievement was frustrated, and mere intention without more cannot in principle be followed by any such disabling consequence. Furthermore, the services actually rendered were confined to what passed at Ballenas Bay and at Guaymas, and were put an end to at any rate by the requisitioning of the ship a little later on the same voyage.

It is probable enough that, if things had prospered with the *Leipzig*, Jebsen meant the *Mazatlan* to render similar services on future voyages, but such services would be most usefully, because most unobtrusively, rendered by a peaceful merchantman continuing her regular voyages under the Mexican flag. Besides, whatever the title "fleet auxiliary" may mean, it seems to fit the *Marie* better than the *Mazatlan*, and Jebsen may have thought that in exposing his relative's ship to peril he had done enough. Two "fleet auxiliaries" were not needed, nor was it indispensable that the *Mazatlan*, having once engaged in such services, should be always so engaged. With the *Marie* serving as a link between the *Leipzig* and the shore, it might well be safest to employ now this ship and now that, as opportunity served, to bring the required cargo to the appointed rendezvous.

Their Lordships have accordingly come to the same conclusion on this point as the President. Though the captors had a case of substance, affording ground for inquiry, they did not show that the *Mazatlan* could not be validly sold to the claimants at the time when she was transferred.

In the alternative, the captors allege that the sale was one which, if not incompetent, yet ought not to be sustained. It is said that such a transaction must be tested by the state of mind in which it is conceived and carried through, and that in the nature of things the relevant state of mind is that of the transferor. The transferee's mind may be honest and yet the impropriety of the transferor's motives may defeat the whole transaction. For this authority is sought in art. 56 of the Declaration of London as being a considered and correct formulation of the law of nations on the point. Arts. 55 and 56 deal with transfers of enemy ships before and after the outbreak of war respectively. In the first case the transfer of an enemy ship is declared to be valid, unless it is proved to have been made in order to evade the consequences to which as an enemy ship the outbreak of war would expose her. In the second the transfer is declared to be void, unless it is proved that it was not made in order to evade those consequences. Transfers are effected by the combined action of two parties, the seller and the buyer, and the word "evade" suggests something more than "escape," for the latter is a result, while the former is a means by which a result is brought about. These considerations, coupled with the fact that art. 56 is linked with art. 55, point to the conclusion of Lord Sterndale that the article deals only with colourable or fictitious transfers, devised by both parties in combination. If, then, as the learned President thought, art. 56 does not conflict with the decision of this Board in *The Baltica* (*sup.*), it does not affect the present case, for, apart from the burden of proof, which does not now matter since the evidence is complete, there was an actual transfer, not colourable nor subject to any reservation, and this in the case of a private merchantman is sufficient when completed by delivery. The contention, however, is that the claimants have to prove that the transfer was made by the transferor, the person who makes it, otherwise than for the purpose of evading capture and condemnation. If this construction is the true one, the article very considerably alters the law as laid down in decisions which bind or have been accepted by this Board, and the alteration is an enhancement and not a waiver of belligerent rights. If pressed

to its logical results, it would in practice invalidate most transfers to neutrals, for how could a neutral command the evidence of his transferor, who alone could make a clean breast of his motives and objects in entering into the transaction? If the enemy's testimony were not forthcoming, how could it ever be inferred from circumstances alone that among the many objects with which men sell their chattels, the object of escaping the harassing peril of capture may not have been one? If, on the other hand, that evidence was given, what is the state of facts in which any court would believe that the vendor was wholly innocent of such a desire? It is better to adhere to the settled rules laid down in *The Ariel* (*sup.*) and *The Baltica* (*sup.*). Of course, a vendor may be shown to be so interested in getting rid at all hazards of the appearance of ownership as to lead to the conclusion of fact that he really did what he was most interested in doing, and shed the apparent title while retaining the property. A court would then hold that there was no real sale, not that the sale was real and effectual, but that the vendor's reprehensible state of mind caused the buyer to lose the ship for which he had paid his money. The article is in all probability an endeavour to find an acceptable compromise between English and Continental views on the point, and if so, is not an authority to be followed now.

The claimants, on the other hand, contend that it is the state of mind of the buyer that alone can matter. If he honestly intends to buy and does buy, the seller's reasons for selling are immaterial. He has his reasons or he would not sell, but what they are is of no consequence. This again will not do. To say that no regard need be had to the mind of the seller goes too far. No doubt, when once the question, whether the sale is a real sale, is answered in the affirmative, the prior motives and objects of both parties become merely antecedent and preliminary matter, but in ascertaining how that question is to be answered great light is thrown on the transaction by considering the situation of both parties, so as to test what they purported to do by what they must really have intended. Plainly, however, the mere fact that to uphold the sale might prevent the Crown from obtaining a condemnation cannot affect the matter, for that would mean that a judgment upon a question of fact should be given one way or another, according as the upshot affected the interest of the British Crown.

In the present case it is now clear that what the claimants meant to do was what they purported to do, namely, to buy the ship without reservation, and what they did was to perform their part of the contract so made by paying the price and taking delivery. Beyond the fact that they changed her name, a circumstance immaterial as things stand, though had other facts been proved against them it might have had some importance, nothing has been done on their side to raise any doubt against them. The ship was not left in Jebsen's service or at his disposal, but was chartered to third parties for account of the claimants. Their evidence is that when they bought her they had heard nothing of the earlier adventures of the *Mazatlan*. On Jebsen's side there were circumstances which give rise to much suspicion, but it is now accepted that the claimants had no cognisance of or participation in them. Their Lordships are of opinion that the evidence, viewed as a whole, disclosed no ground on which it could have been held that the *Edna* was, when captured, still a ship of enemy character. There is no other way in which the captors' appeal can be supported. The interval which elapsed between the carriage of contraband and the conduct, which in a vessel of neutral character would have been unneutral service, and the capture of the *Edna*, namely, from the autumn of 1914 to Jan. 1916, would have been too great and the change of circumstances too complete to support a condemnation, if the *Mazatlan* were regarded as not being of enemy character in 1914. As, however, her enemy character down to the sale to the claimants in 1915 is not now in dispute, the whole question turns on the validity and on the competence of the sale. In their Lordships' opinion the appeal fails.

The cross-appeal depends on the question whether there was adequate ground for seizing the *Edna* and pressing the claim for her condemnation till the trial. All the proceedings were in themselves regular. The ship was requisitioned pursuant to the rules, and it is not suggested that the case was persisted in for the purpose of prolonging the period of profitable requisition. Their Lordships cannot regard so improper a course as anything but a theoretical possibility, which in the present case has, fortunately, not even been discussed.

The law relating to claims for costs and damages against captors was fully stated by their Lordships' Board in *The Ostsee* (*sup.*), when all the authorities were considered. There no question of the reality or validity of a transaction or of its good faith arose, and against the ship and her conduct and that of her owners, who had been her owners all through, nothing was alleged. The ground given for seizing her, in fact, did not exist, and it was held that the actual captors' honest belief that it did could not by itself serve as a probable cause for seizure. Here the acts of the ship, which are relied on, were real enough, though they ceased before the title of the claimants arose and without their participation or knowledge, but they are material to the critical question whether the ship could validly be seized. It was suggested that in the present case the seizure was due to the captors' mistake of law, namely, as to the nature of those public ships of war which are not transferable during war; while in *The Ostsee* (*sup.*) it was due to the captors' mistake of fact, namely, as to the issue of a proclamation of a blockade, and that equally in either case the owner of the ship captured should not suffer for their mistake. This is really fallacious. On the question of the existence of the blockade there was nothing to be inquired into; on the question what the character of the *Mazatlan* was, her undisputed action raised a real subject for inquiry. There can be no doubt that when the ship was taken, those, at any rate, who directed the action of the cruiser, had substantial ground for questioning her neutral or her private character. She had been so employed on the voyage above described as to justify inquiry, and after the first and before the second requisitioning by the Mexican authorities she was sent on another voyage along the same coast. Either requisitioning might under the circumstances have been really not unwelcome to her owners, for, till things had blown over, it would afford an unobtrusive seclusion for a ship that had earned for herself a certain amount of evil notoriety. The

termination of this retreat was quickly followed by a transfer to the United States Registry, and an intercepted letter revealed the fact that a German Government official had forwarded to Germany part of the purchase money paid for her. It is quite impossible to say that there was not probable cause for supposing that she had been a German "fleet auxiliary" and so was liable to seizure with a view to condemnation.

It has long been assumed as good law that captors can rely at the trial on facts unknown to them at the time of capture (*The Elize*, 1854, Spinks, 88), nor did the respondents attempt to contest this. The evidence as it developed showed much that was provocative of doubt and suspicion. The financial circumstances preceding and attending her sale showed a reasonable case for believing that Jebsen was engaged in creating a screen of United States intermediaries between himself and the actual buyers, such as would disarm the suspicions or defeat the investigations of a captor and make it possible to find a complaisant neutral, who would willingly and successfully act for his protection. Even when the claimants came to give their own account of the matter on affidavit, they did not explain away this mystification, but only disclaimed participation in it. It is true that they proved actual payment of the price, but cross-examination might prove that they had a greater connection with Jebsen's acts than was consistent with good faith or the reality of the sale. The captors might well desire to have their evidence given orally in open court. Furthermore although the oral evidence given in 1919 ultimately confirmed the account of their conduct which the claimants had given in affidavits before the end of 1916, they also put forward numerous other affidavits so flagrantly false that the learned President expressed his surprise at their using them at all. Instead of contenting themselves with a completed title as neutral buyers and with proving their independence and ignorance of the *Mazatlan's* earlier proceedings, they advanced a case, which was really Jebsen's case, and was untrue. The captors could not be expected to sift out the false affidavits from the true and apply for the release of the ship on a case better than that which, as a whole, the claimants made for themselves. Those who put forward a case of which so large a part was disingenuous, must not complain if the whole of it, with their own oral evidence, was submitted to the judgment of the learned President, as a matter which only the court could decide. It is true that he states that he arrived at his conclusion in favour of the captors with much doubt, though his examination of the facts was careful and thorough. It is not necessary for their Lordships to indicate whether they have shared his doubts or not. If it were so, that would be no reason for reversing his decree. Similarity of doubt is not a ground for dissimilarity in conclusion. The allowance of damages and costs is largely a question of discretion, which in past times has but rarely been answered unfavourably to captors, and it is enough to say that their Lordships see no sufficient reason for differing from his opinion.

The claimants further indicated a somewhat singular argument, namely, that the *Edna* should not have been detained at all, for her papers were in order, nothing on board of her or connected with her then ownership or employment awakened any just suspicion, and those who seized her are not shown to have had at the time any knowledge of such circumstances of suspicion as have since been elicited on a scrutiny of the evidence. Their Lordships think that such a contention unduly narrows the right and utility of seizure as a preliminary to trial and condemnation. Even under the old practice the allowance of further proof rested in the discretion of the court. It is true that it was not the practice to exercise that discretion in favour of such an order under the circumstances prevailing in the wars at the end of the eighteenth and beginning of the nineteenth centuries. The likelihood of further evidence of value being obtainable was so small in proportion to the delay that it would involve, as to disincline the court to allow a more remote investigation than the examination of the ship's papers and the administration of the standing interrogatories already provided for. Now, however, under modern conditions, when the facilities for ascertaining the truth by subsequent investigation and the introduction of various kinds of evidence make even a considerable delay so well worth incurring, it can hardly be doubted that the same judges would have freely exercised their discretion in the contrary direction. This would be peculiarly so if the question in debate were the validity and genuineness of the ship's apparent nationality. If inquiry on such a subject were to be limited to the regularity of her papers and register, it would not be worth while to embark upon it, for nowhere would it be less likely that captors would find proof of or even ground for suspecting the unreality of a transfer to a neutral flag than among the formal documents required to protect and conceal it. Unless search after the truth is to be abandoned in such cases or denied altogether, it must follow that, on grounds wider than the mere practice of the Prize Court as settled under the authority of the present statute, captors are entitled to justify detention of a ship, even though she is ultimately released, on grounds only made apparent upon an examination of subsequent evidence given on either side.

The conclusion therefore must be that on no ground are the captors liable in damages or costs. The claim for something in the nature of an account of profits, earned by the use of the vessel while under requisition, is equally unsustainable. There is no theory of the relations between captors and claimants, still less between His Majesty, for whose use the ship was requisitioned, and the shipowners, which would support a claim of such a kind. No issue has been raised as to unrepaired injury sustained by the ship; the claim, if any, must be for damages and costs only. It is right to recognise that a result which restores the ship to her owners but leaves them without recompense of any kind for the loss of the use of her between 1916 and 1919 must be profoundly disappointing to them, and may seem to be not without some suspicion of paradox in law. It would be unsatisfactory that so long a time should have elapsed before this cause could be brought to an issue, were it not that the claimants do not seem to have taken any active steps to accelerate it and may well be supposed to have recognised that the delay was one which they could not fairly complain of. It is to be hoped, however, that, whatever the conditions of future wars may be, this case may never be regarded as anything but highly exceptional in this particular.

Their Lordships will humbly advise His Majesty that both the appeal and the cross-appeal should be dismissed with costs.

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

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

Feb. 3 *and March* 16, 1921.

(Present: Lords SUMNER, WRENBURY, and Sir ARTHUR CHANNELL.)

THE ZAMORA (No. 2). (*a*)

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

Prize—Neutral ship—Contraband cargo—Condemnation of ship and entire cargo—Knowledge of owner.

Where the owner of a neutral ship knowingly carries a cargo which is in whole or in part contraband, he is liable to forfeit his ship, but there can be no confiscation of the vessel unless there is evidence from the shipowner's conduct and other circumstances that the owner or possibly the charterer or master knew of the true nature of the cargo.

Lord Parker's observations on the evidence of knowledge on the part of the shipowner which would establish the liability of the cargo to condemnation, in The Hakan (14 *Asp. Mar. Law Cas.* 161: 117 *L. T. Rep.* 619; (1918) *A. C.* 148), *discussed.*

Judgment of Lord Sterndale, P. affirmed.

APPEAL from a judgment of the Admiralty Division in Prize, dated the 31st March 1919, whereby the President, Lord Sterndale, condemned the appellants' steamship *Zamora* and her entire cargo.

Mackinnon, K.C. and *Balloch* for the appellants.

Sir *Ernest Pollock* (S.-G.), *Stephens*, K.C., and *Lilley* for the respondent, the Procurator-General.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—This was a case of condemnation of a ship and its entire cargo. The latter was contraband and had an ulterior enemy destination; and of this it was held that the shipowner had sufficient knowledge. The ship was Swedish, the voyage New York to Stockholm, and the cargo consisted of 400 tons of copper, 101,494 bushels of wheat, and 69,379 bushels of oats. It was purchased on f.o.b. New York terms from sellers unconnected with the contraband adventure. The date of the capture was the 19th April 1915.

At the outset the grounds of suspicion against the cargo were not great. The contraband trade had not then attained the magnitude which characterised it later on in the war. Copper and cereals were no doubt in demand in Germany, but they were also required for common consumption in Sweden and that in large quantities. The proximity of Sweden to Germany was therefore of less importance; unless the case against the cargo succeeded, there was none against the ship.

Claimants duly appeared, and a large body of documents relating to the cargo was soon forthcoming. The purchases, the shipment, the taking up of documents and the destination of the cargo were fully set out and minutely vouched. Though the copper and the cereals were alleged to belong to different consignees, unconnected with one another, they were all insured by the same policies, a singular circumstance in itself, and the further fact that they were insured f.p.a. raised further suspicion. There for a considerable time the matter rested. It remained a case of the importation of commodities in common use in a neutral ship from one neutral country to another by neutral merchants for consumption in their own country.

Appearances, however, were deceptive. The consignees of the copper were a Swedish company which might well have been above suspicion, for, as Lord Sterndale records, there were upon its board of directors the Minister for Foreign Affairs in the late Swedish Government, an ex-Minister of Finance, and an ex-Minister and late member of the Supreme Court; yet behind the screen of these highly respectable personages there was being carried on a speculative adventure, which involved a continuous scheme of deception, to be supported, in case of need, by much hard swearing. The whole cargo, in fact, belonged to the Austrian Government, and was imported into Sweden *en route* for Austria. The ship was chartered to a German, who was acting as agent for the Austrian Government, and the Swedish consignees were merely playing a part in the transaction. The documents were genuine enough; that is to say, they came into existence at the time and for the purposes for which they were ostensibly created, but behind them all and behind the charterer and the consignees, who were puppets, handsomely paid, stood an enemy Government. No more striking instance has occurred of a contraband transaction, which all but succeeded; none which proves more conclusively what patience and tenacity are needed in probing to the bottom an apparently straightforward case, or how liberal and even indulgent a court of prize must sometimes be in granting the time required to exhaust all the means at the captors' disposal for discovering the truth.

How that truth became known to the Procurator-General, it is not now material to inquire. It was disclosed by him on affidavit in Aug. 1918, and proved to be conclusive. The claimants of the copper withdrew their claim without a contest. The claimants of the cereals made shift to fight their case and lost. The President condemned both the copper, the wheat and the oats. There remained the case of the *Zamora*. After hearing the evidence of Mr. Banck, the managing director of the company which owned her, the President condemned the ship. It is from this condemnation that her owners now appeal.

The case made was that even where the whole cargo consists of contraband, nothing less than actual knowledge of its character by the carrier will forfeit the ship. It was not denied that circumstances may raise a presumption of knowledge such that the carrier must rebut it or fail. It was not contended that a person who had knowledge of facts sufficient to point the mind of a reasonable man to the truth could escape by wilfully shutting his eyes to fuller information, but the presumption of knowledge was said to be one only of fact and not of law, each case therefore depending on its own circumstances, so that, if cargo is bound to a neutral port and consists of unwarlike commodities in substantial demand and common use there, only proof and not presumption of knowledge of its ulterior destination will condemn the ship. If the President held that a decree condemning the entire cargo would in itself warrant a decree con-

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

demning the ship also, he was wrong in spite of the judgment of Sir Samuel Evans in *The Hakan* (*sup.*) and *The Maracaibo* (13 Asp. Mar. Law Cas. 522; 115 L. T. Rep. 639; 1916, P. 266). The true proposition was one quoted from the judgment of this board in *The Hakan:* "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."

It may be admitted that knowledge of the character of the cargo is more obviously natural when the ship is being loaded for her owners' account than when she is only chartered, and when she is chartered at a rate of freight on the quantity delivered with a cesser of liability in favour of the charterer than when she is chartered for a lump sum freight payable in advance. Conversely a voyage to an enemy port is more significant than one to a neutral country, even though it is a neighbour of enemy territory, and the loading of a cargo of arms and ammunition than the loading of commodities no less indispensable to neutrals than to belligerents. So far the circumstances of each case may vary and modify the conclusion almost indefinitely, but one circumstance is common to all the cases and can never be forgotten—that is the existence of a state of war with the temptations and the profits which contraband traffic holds out to complaisant traders. It does not follow that every case stands by itself and is independent of authority, nor need captors make out the knowledge of the shipowner as prosecutors have to bring home a charge to a person accused in an English criminal court. In any case there is no immunity to a shipowner, because he charters his vessel and does not concern himself with the cargo. Indeed, in one respect at least this case requires a sharper degree of scrutiny, for such a course is so easily made a screen for the schemes of others, and so easily becomes deliberate blindness.

It is clearly settled that a shipowner who carries an entire cargo of contraband knowingly forfeits his ship in prize. What constitutes knowledge and what suffices as evidence of it may be matters of difficulty. During part of the eighteenth century the rigorous doctrine still prevailed that any carriage of contraband involved as a penalty the confiscation of the carrying ship. By the end of that time, Sir William Scott records, in *The Ringende Jacob* (1 C. Rob., p. 89), and in the *Neutralitet* (3 C. Rob. 295), that the practice of the great powers had greatly relaxed that rule. In *The Hakan* and *The Maracaibo* (*sup.*) Sir Samuel Evans did not inquire whether the carrier knew the contraband character of the cargo. He took it that the ancient rule was suspended only and was still in existence and capable of being revived, so that, except in so far as the Crown had waived its rights by adopting art. 40 of the Declaration of London, the old rule must still be enforced. The objection to this is that Sir William Scott records a change founded on the agreement of nations, one of the most important sources of international law. After over a century of recognition, can it be said that the relaxation is a mere revocable waiver which a single Sovereign can withdraw? Lord Parker of Waddington, in pronouncing their Lordships' judgment on appeal in the *Hakan*, pointed out that the common element which unites the varying practices of different nations is knowledge on the carriers' part of the character of the cargo carried, and that a presumption of knowledge, sometimes rebuttable and sometimes not, is the feature which makes relevant the proportion of the contraband cargo to the whole. Some countries attach to certain proportions a presumption of knowledge in all cases, irrespective of the extent to which the mind of the particular carrier or shipowner may consciously have been privy to the carriage of contraband. The English Prize Courts, at any rate, have long held that if a shipowner knowingly carries a cargo which is in whole or in large part contraband, he is liable to forfeit his ship. It accordingly becomes necessary to examine the facts of this case somewhat at length, for if they warrant the inference that the shipowners knew that they were carrying contraband, the decree of condemnation should be affirmed without further inquiry.

The Rederiaktiebolaget Banco, of Stockholm, owned two steamers, the *Zamora* and the *Augusta*. Most of the shares were held by the family of Banck, and Mr. Bror Banck, its head, was the largest shareholder and managing director of the company. He was also managing owner of another ship, the *Orion*, managing director of the Orient Company, which also owned a vessel, and had a good deal of house property. He must, therefore, be credited with much business experience, and his affidavit and oral evidence testify to his good education and his extensive knowledge of English.

To Mr. Bror Banck there came one day in 1915 a Mr. G. Pott, who introduced himself as a shareholder in the Orient Company, seeking a disengaged ship, as he wished to charter one for grain and general merchandise from New York to Stockholm. He came twice. Mr. Banck looked him up in the directory, and found that he had a good address and a large income, and spoke about him to a friend or two, "who had only good to say of him." Accordingly he obtained the *Zamora*. Pott was in fact a German, who previously had had something to do with goloshes. He had now gone into shipping. There was no correspondence. The charter-party, though made out on a form which was ill adapted to a lump sum freight, provided for a hiring for the voyage for "14,500*l.*, all in British sterling, payable before signing bills of lading at current rate of exchange for bankers' sight bills on London bank." It is dated the 20th Feb. 1915.

The ship was then two days out from the Tyne bound for New York. On reaching that port his agents told the captain that they had a cable from Mr. Banck giving the names of the shippers and receivers for the grain, and later on another cable gave the same information for the copper, and added "instruct Ohlson proceed direct home north of Shetland." Mr. Banck must have surmised that Pott had sub-let the entire steamer to other parties, who were to provide the cargo, and when Pott afterwards told him so, he seems to have expressed no surprise. He says that he thus prescribed the route for fear of mines, and to the suggestion that the real reason was to escape search by British ships, he replied "Not particularly." From whom he learnt the names of the shippers and receivers of the cargo he does not say. Thus, when his own company's interest would have suggested inquiry as to the character of those concerned in an adventure which might involve an ulterior enemy destination, he knew little of his charterer, and of the shippers and consignees he knew and asked nothing at all.

The bills of lading for the grain were dated the 18th March and made it deliverable to B. Ursells Eftertraedare, paying freight as per charter-party. There is no charter to which this term could apply. The bill of lading for the copper was dated the 20th March, and provided for payment of freight in cash immediately on discharge in the usual money of the country, but it named no rate. Pott should have paid Mr. Banck 14,500*l.* at least by the 20th March, when the *Zamora* sailed. Mr. Banck produced his company's books to show that in point of fact 7500*l.*, or its equivalent in kroner, was paid to the company on the 17th March, for which he said a receipt was given, though no counterfoil was produced nor does the name of the payer appear. The balance only appears in the day book as paid on the 30th April. Mr. Banck said that it was Pott who paid both sums.

According to Mr. Banck, 14,500*l.* for a voyage of some six weeks or so was just a normal freight at the time, a few pence over the last fixture he had seen, but he produces no charters or evidence to corroborate his statement. It is true that the Crown gave no information upon the point either, but, on a question of freights in Sweden, there can be no doubt which side was best able to develop the evidence. Now the *Zamora* had been bought by the Rederiaktiebolaget Banco in 1912 for only 11.250*l.*, being then thirty years old and in need of repairs, but what they cost is not stated. For insurance purposes she was estimated as being worth 20,000*l.* in 1915, though the sum insured was only 16,000*l.*, and, in consideration of a bail of 14,000*l.*—which the President's judgment states to have been the result of a valuation made for the purpose after the seizure—was released to her owners. When the company was incorporated in 1905 its joint capital was fixed at 335,000 kroner as a minimum, and 1,000,000 as a maximum. In 1918 the shares issued, assuming that they were all fully paid, accounted only for 415,000 kroner. Accordingly, the freight for a voyage of two months at most exceeded the purchase price of the steamer three years before and exceeded the amount of her valuation for bail. It fell little short of the amount for which she was insured, and it was very much more than half of the paid-up capital of the company. In favour of Mr. Bror Banck their Lordships will suppose that during the war neutral shipowners regularly made handsome profits, but these figures appear to them to be more than normal. They were, at any rate, big enough to make it worth Mr. Banck's while to put himself about unless he was assured that his freight was in no peril.

He had another reason for concern. His hull insurance against war risks was void if the ship carried contraband of war to a belligerent Power, and, of course, as his lump sum freight was to be prepaid, he had no policy on freight at all. Now, of Pott he knew little, and of the consignees less, if he knew anything at all. The welcome awaiting American copper and cereals in Germany, if forwarded from Sweden, would obviously be so warm, that the unknown consignees might quite probably be importing them for the purpose of sending them on, but if they left New York by the *Zamora* with an ulterior destination, his war-risk policy on the ship would be void. Nevertheless he remained unconcerned as to the cargo and its consignees, and, even when nearly half his freight remained unpaid until after the ship was in the captors' hands at Barrow, he took it almost as a matter of course. He asked Mr. Pott the reason for the capture, but he was not anxious. "I felt myself as strong as anything," he says, "and I knew there was nothing incorrect." How he knew this he does not say, but he leaves it to be inferred that this was the result of the confidence with which Mr. Pott or perhaps the directorate of the Swedish Trading Company had inspired him. Of the balance of his freight he said nothing: his trust in Mr. Pott's ability to pay was complete. He had heard nothing up to that time of any connection between Pott and contraband German trade. He did not associate high freights, if this was a high freight, with contraband. As he says: "This was only just in the beginning of the war, and we never thought anything of it." He had no reason to doubt that both the copper and the grain were destined for Swedish use, and, further, the export of both commodities from Sweden was prohibited by the Swedish Government. It has been suggested on his behalf that he was just an old ship's captain, a very simple person.

Mr. Bror Banck's confidence in his new acquaintance, Pott, went considerably further. When the second instalment of the *Zamora's* freight was already some four or five days overdue, he actually chartered to him a second ship, the *Augusta*, and again for a lump sum on the same form of charter. This time, however, the freight was paid all at once on the 30th April, but the charter was somewhat departed from since instead of drafts in New York, cash was forthcoming in Stockholm.

If these deviations from the strict language of the charters stood alone, they might be explicable on the ground that printed forms of charters were used more suitable to freights payable on the quantity delivered at rates agreed than to a lump sum payable in advance. There is, however, a further deviation which is quite inexplicable. This was put to Mr. Banck, who professed to be taken by surprise and said it was a puzzle, a term which the President somewhat ironically adopted. Argumentative explanations were offered, of which it is enough to say that they do not fit the facts. The one person who ought to have explained the matter was not called. This person was Mr. Carl Banck, who was associated in the management of the appellant company's business with his father, Mr. Bror Banck, and had control of it during the latter's not infrequent visits during March and April 1915 to his house property at Trelleborg and Helsingborg. This gentleman either was unaware of the existence of the lump sum charters for the *Zamora* and the *Augusta* or he treated them as shams. In each case he gave the consignees of the cereals receipts for freight due on those parcels on shipment, in the former case at the rate of 72 kroner per ton of 20 cwt., in the latter at the rate of 60 kroner only. The first was dated the 17th March, that is before the date of the bill of lading; the second the 7th April, three weeks before the lump sum freight was paid, if paid it was. The sum mentioned in the *Zamora* receipt cannot be made to correspond with the sums entered in the day book as received for chartered freight, and the amount of money exceeds by more than 100,000 kroner the sum which it was Mr. Bror Banck's case that he received from Pott on that very day. Who paid these bill of lading freights, and how the weights of the cargo came to be known

in Stockholm at or before the dates of shipment in New York does not appear. Mr. Sten Stendahl, who carries on business as B. Ursells Eftertraedare, the consignees of the cereals, swore that these receipts represented the conditions of his freight engagements with Pott and were given when the money was paid to the appellants for account of Pott, but Mr. Bror Banck evidently professed to be quite unaware that his company had been receiving Pott's freight at all.

The appellants, are, therefore, in a dilemma. If what Stendahl says is true, the appellants, by one of their managers, were assisting in the creation of that screen of mercantile documents with which the cargo claimants disguised the truth of the transaction, and in default of explanation must be taken to have done so deliberately, for they were taking charge of Pott's profits, though Pott was in default in paying what he owed them. The accounts which such a transaction must certainly have involved have not been disclosed, doubtless for good reasons.

If, on the other hand, what Stendahl says is false, as in other matters it mainly is, then the lump-sum charter is a sham and the appellants were receiving on their own account a higher freight than they profess to have contracted for, differently calculated and concealed by false book entries. It is not necessary to consider whether old Mr. Banck was in some respects hoodwinked by young Mr. Banck, for the appellants must be affected by the knowledge and conduct of both their managers, but Mr. Bror Banck's attitude in the witness-box was that of a man who was not so much astonished as surprised. The production of these receipts was something that he had not reckoned on, and an explanation was beyond his power to improvise.

In his judgment Lord Sterndale uses the expression, "If Mr. Banck had not actual knowledge, he could have had it if he had taken the steps which he should have taken to acquire it." This proposition does not really lend itself to any misapprehension, but it may be as well to say something as to the nature of the duty to which it refers. Mr. Banck's position involved two kinds of obligation; the one towards his company, the appellants, and, in respect of his own large holding in it, to himself, and the other towards the Prize Court. His duty to his own company required that he should, among other things, make proper inquiries to safeguard its interests and to avoid exposing its property to risks which he did not mean to take in the transaction to which he was committing it. If he neglected this duty, he was disregarding alike his interest as a capitalist and his obligation as a director, and he is open to the inference of fact that after all he knew what he was about, and with a full apprehension of the risks run had made up his mind that the freight made it worth while to run them. To the court his duty is, as representing the claimants, to present their claim frankly and to make such full inquiries as would enable him to put the court in full possession of the truth as to the claim, so far as it lay in his power to do so. If this duty was neglected, his company is again exposed to the inference that it was not neglected for nothing; that he had at least got upon the track of matters which he thought it better not to pursue, or that the claimants were in possession of information which it did not suit them to divulge. The judgment of Lord Sterndale was not intended to convey and does not convey that Mr. Banck owed a duty to the belligerents to avoid carrying this cargo, but it was carried at his company's risk and to his company's profit, and in exercising their right to prevent contraband traffic belligerents are entitled to the full protection of Courts of Prize in penetrating the disguise of a feigned or deliberate ignorance on the part of neutral claimants.

Lord Sterndale thus expressed his final conclusion: "I think the true inference is that, if Mr. Banck did not know this was a transaction in contraband, it was because he did not want to know, and that he has not rebutted the presumption arising from the fact of the whole cargo being contraband."

Their Lordships have been invited to read this as saying that Mr. Banck is not proved to have known the contraband character of the adventure; that if he did not know, because he did not want to know, he was within his rights and owed no duty to the belligerents to inform himself; and that the *Zamora* is condemned contrary to the passage above cited from the *Hakan* upon a legal presumption arising solely and arbitrarily from the fact that the whole cargo was contraband. It may be that, in his anxiety not to state more than he found against Mr. Banck, the learned President appeared to state something less, but there are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise. It is in the latter sense that their Lordships take the President's words. So far from finding that Mr. Banck was devoid of knowledge of the contraband character of the adventure, he thought, and they agree, that Mr. Banck understood it very well, so well that he knew where to draw the judicious line between scanty but sufficient information and undeniable complicity. Knowledge being proved, no opinion need be expressed as to the effect of presumptions in the present case. The evidence fully bears out the conclusion that the transaction was in its inception ambiguous; that any doubts about it were resolved in favour of an illegitimate complexion, so far as Mr. Banck was concerned, by his incuriosity, his reticence and his detachment. So far from showing that he was truly ignorant, he has only involved his company, the claimants, in the consequences which follow from the hazardous possession of sufficient knowledge to condemn them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: for the appellants, *Thain, Davidson, and Co.*; for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, July 30, 1920.

(Before McCARDIE, J.)

HARRISONS LIMITED *v.* SHIPPING CONTROLLER. (*a*)

Charter-party — War risks — Stranding of ship— Sailing in convoy—Consequences of hostilities or warlike operations.

The steamship I. *was at all material times under requisition by the Admiralty under the terms of the charter-party T.* 99. *Under this charter-party the Admiralty were not liable for ordinary risks at sea, but undertook to be liable for risks from all "consequences of hostilities or warlike operations." The I. was under orders to sail and did sail from Salonica to Taranto, in Italy. She had on board hospital stores for the British Government, and carried a few British troops and officers. When nearing Taranto she was navigated without lights, being then in the war zone. She was escorted by a British destroyer. No lights on shore were visible, and she was ordered by the commander of the destroyer to follow a pilot escort which had come out of Taranto. This order she complied with, although without such an order the master would not have attempted to enter the port. Almost immediately after being ordered to follow the pilot escort the I. lost sight of her lights and was stranded on the rocks just outside the port of Taranto.*

Held, following the decision of the House of Lords in Green *v.* British India Steam Navigation Company (The Matiana) (14 *Asp. Mar. Law Cas.* 513; 123 *L. T. Rep.* 721; (1921) *A. C.* 104), *that, though the stranding of the I. took place while she was being navigated under war conditions, the damage done to her did not arise in consequence of warlike operations, and the Admiralty were not liable.*

The British Steamship Company *v.* The King (The Petersham) (14 *Asp. Mar. Law Cas.* 404; 123 *L. T. Rep.* 721; (1921) 1 *A. C.* 100) *explained.*

AWARD in the form of a special case stated by the arbitrator, Mr. R. A. Wright, K.C. The case raised an important question upon the construction of clauses 18 and 19 in charter-party T. 99.

The two clauses were as follows:

Clause 18. The Admiralty shall not be held liable if the steamer 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 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 from all consequences of hostilities or warlike operations whether before or after the declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer if she be totally lost, 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 by clause 31.

A dispute arose between the owners and the Admiralty as to whether the Admiralty were liable to the owners for damage caused to the steamship *Inkonka* in consequence of her stranding on Capo St. Vito, in Italy, on the 17th Nov. 1917. The arbitrator found that the stranding was occasioned by the inefficient lights of the pilot escort, and was not a consequence of hostilities or warlike operations within clause 19 of charter-party T. 99, and that therefore the Admiralty were not liable.

The following facts were set out in the judgment of the learned judge:—

On the 14th Nov. 1917 the *Inkonka* sailed under Admiralty orders from Salonica, bound for Taranto, in Italy. She was laden with hospital stores for the British Government, and had on board a few British troops and officers. Before sailing she was furnished with a printed book (D.P. 20) which purported to describe the lights and entrance to the port of Taranto. This book, owing to recent changes, turned out to be incorrect.

On the 15th Nov. the *Inkonka* passed through Corinth Canal and proceeded towards Taranto. She was navigating in the war zone and therefore sailed without lights. She was escorted by a destroyer, H.M.S. *Pincher*. The weather was stormy. The master trusted to dead reckoning, but on the 17th Nov., about 6 p.m., he was enabled, through sighting three stars, to get a more accurate position. He then put his course N. ¾ E. At 9 p.m. he signalled H.M.S. *Pincher*, and said that he ought to have run his distance and should stop then if no lights were seen. At about 10 p.m. no shore lights were seen, but he was ordered by H.M.S. *Pincher* to follow a pilot escort which had come out of Taranto to escort vessels into the port and which exhibited two violet lights astern. The master thought he was about ten miles from Capo St. Vito (guarding the southern entrance to Taranto), which he thought was bearing N.E. This view was erroneous, but he had no light to guide him. The shore leading and other lights were not lighted in war time, unless ships were entering and then signalled. The night in question was dark and stormy. The master would not have tried to enter the port if he had not been ordered to do so by H.M.S. *Pincher*. Disobedience to those orders entailed a severe penalty. In view of the peremptory order he received, he relied, and could only rely, upon the pilot escort, and he followed her about two cables distant.

H.M.S. *Pincher* followed about one and a half cables behind the *Inkonka*. Another ship's light had been sighted by the *Inkonka*, and in fact, though the master did not know it, it was the light of H.M.S. *Isonzo*, which was also approaching Taranto, and which proceeded to follow astern of H.M.S. *Pincher*. At 10.30 p.m. certain shore lights appeared. In fact (though the master did not know it) these shore lights were the leading lights of the defended port of Taranto and had been turned on in response to signals from H.M.S. *Isonzo*. The master could not identify these lights by reason of the defective information in book D.P. 20. He therefore continued to follow the pilot escort ahead till he suddenly lost sight of her lights and could

(*a*) Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.

hear no whistle or signal from her or make out her hull. Two minutes after he had lost sight of the pilot escort a red light suddenly flashed on the port bow of the *Inkonka*, the master of which was still on the same course as when he had actually seen and been following the pilot escort lights. The master, seeing the red light on his port bow, immediately put his helm hard-a-port, and the *Inkonka* swung to starboard, and almost immediately afterwards ran ashore off Capo St. Vito; the red light was in fact the light on Capo St. Vito, though the book D.P. 20 did not indicate any such light. The master ported away from the light, hoping to swing round away from it, but in fact there was no room to turn, and porting brought the vessel right on the rocks. The master immediately signalled to H.M.S. *Pincher* that he was ashore, and H.M.S. *Pincher* got clear. H.M.S. *Isonzo* also picked up a pilot escort and, like H.M.S. *Pincher*, proceeded into port. It was not clear whether their pilot escort was the same pilot escort as that which had been leading the *Inkonka*.

By par. 7 of the award, if and so far as it was a question of fact the arbitrator found that the stranding of the *Inkonka* was caused by the inefficient lights of the pilot escort, and that, if the lights had been adequate having regard to the low visibility of the night, there was no reason why the *Inkonka* should not have safely followed the escort into Taranto, or should have been stranded.

By par. 8 he accordingly found (if and in so far as it was a question of fact) and he decided (if and in so far as it was a question of law and subject in that case to the opinion of the court) that the stranding was not a consequence of hostilities or warlike operations within clause 19 of T. 99.

Subject to the opinion of the court on any question of law, the arbitrator awarded that the Shipping Controller was not liable in respect of the matters in question to the owners. If the court should be of opinion that the award was not erroneous in law it was to stand; but if the court was of opinion that the award was erroneous in law it was to be set aside, and instead thereof it was to be that the Shipping Controller was liable to the owners in respect of the matters in question, the parties not having submitted to the arbitrator any question of amount or any question save that of liability.

Sir *John Simon*, K.C. and *Neilson*, K.C. for the shipowners.—The Admiralty are liable to the shipowners for damage caused to the *Inkonka* by stranding. The vessel was not incurring a "sea risk" within the meaning of clause 18 of the charter-party, but she was engaged in a "warlike operation" within the meaning of clause 19. She was under the orders of the British Admiralty, on a voyage from Salonica to Taranto, having on board troops and hospital stores for the British Government. She was navigating in the war zone under the escort of a British destroyer and bound to obey the orders of the commander. Under Admiralty regulations she sailed without lights. The stranding was a "consequence" of the warlike operations mentioned in clause 19, and the warlike operation was the proximate cause of her running on to the rocks. It is true that the fact of her being engaged in a warlike operation did not prevent her from navigating independently, and if, in order to avoid a sea risk, she had of her own accord tried to enter the port of Taranto, her own act would have been the proximate cause of damage. But the attempt to enter the port was made under the express order of the naval commander, which she was bound to obey, and formed part of the warlike operation which she was carrying out. The warlike operation was the proximate cause of the stranding, and the stranding was the consequence of the warlike operation:

> *British and Foreign Steamship Company* v. *The King* (*The St. Oswald*) 14 Asp. Mar. Law Cas. 121, 270: 118 L. T. Rep. 640; (1918) 2 K.B. 879.

There was no intervening cause which prevented the warlike operation from being the proximate cause of the disaster. Nor had those in charge of the vessel any time for exercising their discretion. The present case must be distinguished from the cases of *Britain Steamship Company* v. *The King* (*The Petersham*) (14 Asp. Mar. Law Cas. 404; 123 L. T. Rep. 721; (1921) 1 A. C. 100) and from *Green* (*The Matiana*) v. *British India Steam Navigation Company* (14 Asp. Mar. Law Cas. 513; 123 L. T. Rep. 721; (1921) 1 A. C. 104).

Sir *Gordon Hewart* (A.-G.) and *Raeburn*, K.C. for the Shipping Controller.—The Admiralty are not liable for the damage caused to the *Inkonka* by stranding. The vessel at the time when the stranding occurred was not engaged in a "warlike operation" within the meaning of clause 19 of the charter-party. She was incurring a "sea risk" within the meaning of clause 18. It lies upon the shipowners to prove that the vessel was engaged in a warlike operation, and in this they have failed. She was engaged in transporting stores, a commercial operation, and the presence of a few troops on board does not turn the operation into one of a warlike character. Further, the stranding was not a "consequence" of a warlike operation even if the vessel were so engaged. The proximate cause of the stranding was the negligence of those navigating the vessel. They could have told the naval commander that they were not willing to enter the port of Taranto at night, and in that case the order would not have been enforced; but they did not adopt this course and were accordingly negligent. It was owing to carelessness that the vessel did not follow the course set by the pilot boat. In the case of *Green* (*The Matiana*) v. *British India Steam Navigation Company* (*sup.*), the House of Lords held that the cause of the loss was not a "warlike operation" under the terms of charter-party T. 99, and the same view ought to be taken by this court. The principle laid down in *The Matiana* case is the same as that involved in the present case. The presence of a few troops and stores on board the *Inkonka* is not sufficient to make a distinction between the two cases, and does not form a test as to the nature of the operation in which the vessel was engaged. It cannot be said that the carrying of troops, or the orders of the commander of the destroyer, was the proximate cause of the stranding. It was caused by the increase of a marine risk, and the vessel took this increased risk for the purpose of avoiding a war peril. The following cases may be referred to with advantage:

> *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*, 14 Asp. Mar. Law Cas. 4, 258: 118 L. T. Rep. 120 (1918) A. C. 350;
> *Ard Coasters* v. *The King*, 36 *Times* L. Rep. 555;

Ionides v. *Universal Marine Insurance Company*, 1 Mar. Law Cas. 353; 8 L. T. Rep. 705; 14 C. B. N. S. 259;
Owners of steamship Larchgrove v. *The King*, 36 *Times* L. Rep. 108;
Richard de Larrinaga v. *Admiralty Commissioners*, 14 Asp. Mar. Law Cas. 572; 123 L. T. Rep. 485; (1920) 3 K. B. 65;
British India Steam Navigation Company v. *Green*, 14 Asp. Mar. Law Cas. 513; 121 L. T. Rep. 559; (1919) 2 K. B. 670;
Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 55.

Neilson, K.C. in reply.

The following judgment was read by

MCCARDIE, J. (after stating the facts the learned judge continued). — The question is whether, on the facts as I have stated them (apart from clauses 7 and 8), the stranding of the *Inkonka* was a consequence of hostilities or warlike operations. Inasmuch as the circumstances are stated by the arbitrator in full detail, I conceive that his summarised findings in clauses 7 and 8 of the award are open to review. The question becomes one of law immediately the full facts appear, and the master of the *Inkonka* has been exonerated from any negligence or breach of duty. My task as a judge of first instance is embarrassing. The burden rests upon me of interpreting as best I can the body of decisions which bear upon the point, and of eliciting the true effect of the opinions in the House of Lords in the recent cases of *Britain Steamship Company* v. *The King* (*The Petersham*) (*sup.*) and *Green* (*The Matiana*) v. *British India Steam Navigation Company* (*sup.*). Those weighty opinions represent not only a conflict of view between majority and minority, but also an apparent difference of opinion on several points between the distinguished Law Lords who formed the majority itself. It seems clear from the opinion of all in the House of Lords in those cases that the words "warlike operations" are a broader phrase than the word "hostilities." The question, therefore, comes to this: "Was the stranding of the *Inkonka* a consequence of warlike operations?" No definition has yet been given of that phrase. If given, it might have solved many of the difficulties which arise. Illustrations have been offered with frequency, and it is, of course, less difficult to illustrate than to define. The embarrassment of definition springs, I conceive, from the breadth of the phrase "warlike operations." It is a complex phrase. It denotes and connotes an infinity of varying circumstances. Just as it is difficult to define the words "fraud" or "accident," so with the phrase "warlike operations." Even the most exhaustive definition could scarcely comprise the differing circumstances which may arise. The problem is further and strikingly complicated by the fact that the words have to be considered in connection with the full phrase "all consequences of hostilities or warlike operations." This word "consequences" introduces the ever-difficult question of causation as illustrated, for example, by *Becker, Gray and Company* v. *London Assurance Corporation* (14 Asp. Mar. Law. Cas. 156; (1918) A. C. 101). Causation involves the notion of sequence, and this notion has not as yet been fully grappled with or exhaustively treated. It is a topic of profound juristic complexity. The courts cannot act as metaphysical analysts. They can only administer or state the law in practical language upon particular aggregates of circumstance. But in such a case as the present it is always well to remember the cogent words of Lord Sumner in *Becker, Gray and Co.* v. *London Assurance Corporation* (*sup.*). "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." It is always of vital importance to remember that clause 19 in this charter follows and is subject to clause 18. Clause 18 saves the Admiralty from liability for ordinary marine risks and perils of the sea. Clause 19 deals with a wholly different set of risks—namely, those which spring from hostilities or warlike operations. In time of war marine risks exist as fully, and perhaps more fully, than in time of peace; and they are none the less marine risks because their details may be coloured or added to, or the danger enlarged, by the existence of war-time conditions. It seems proper to distinguish between war-time conditions of merchantman traffic and the actual occurrence of warlike operations. The imposition of regulations upon merchantmen, whether such regulations be slight or stringent, and whether they be general or specific, does not of itself seem to constitute a warlike operation. If it were otherwise, then it would follow that upon the outbreak of war all British merchant ships became subject to, and participants in, warlike operations, inasmuch as they all fell within the compulsive area of Admiralty regulations.

The Defence of the Realm Act 1914 (5 Geo. 5, c. 8) provided by sect. 1, sub-sect. 1 (2), that for securing the public safety and the defence of the realm regulations might be made "to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty." Under this statutory power cogent regulations were made, including (*inter alia*) regs. 36 to 39. Reg. 37 is as follows: "Every vessel shall comply with such regulations as to the navigation of vessels as may be issued by the Admiralty or Army Council, and shall obey any orders given, whether by way of signal or otherwise, by any officer in command of any of His Majesty's ships, or by any naval or military officer engaged in the defence of the coast. . . ." It is a criminal offence to disobey any such regulation or order. By sect. 46 of the Naval Prize Act 1864 (27 & 28 Vict. c. 25) it was made a crime for the master of a merchantman under convoy of a British ship of war to disobey any lawful signal, instruction, or command of the commander of the convoy. Sect. 31 of the Naval Discipline Act 1866 (29 & 30 Vict. c. 109) provides as follows: "Every master or other officer in command of any merchant or other vessel under the convoy of any ship of Her Majesty shall obey the commanding officer thereof in all matters relating to the navigation or security of the convoy, and shall take such precautions for avoiding the enemy as may be directed by such commanding officer; and if he shall fail to obey such directions, such commanding officer may compel obedience by force of arms, without being liable for any loss of life or of property that may result from his

using such force." I have quoted the above statutes and regulations, inasmuch as the argument of Sir John Simon for the owners of the *Inkonka* largely turned upon their compulsory and penal effect.

The contract now before us is a charter-party; but it is well to recall the words of Lord Shaw of Dunfermline in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society* (*sup.*): "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." With this passage may be read the observations of Scrutton, L.J. and Mr. MacKinnon in their work on Charter-parties, 9th edit., art. 79, and notes. In *The Leyland* case (*sup.*) Lord Shaw of Dunfermline observed that "Causation is not a chain, but a net." I may venture to add that it is a net in which a judge of first instance may easily become entangled. Sect. 55, sub-sect. 1 of the Marine Insurance Act 1906 (6 Edw. 7, c. 41) provides: "Subject to the provisions of this Act, and unless the policy otherwise provides, 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." It will be observed that the words in the present charter-party are "all consequences of hostilities or warlike operations"; but I conceive that since the decision in *Ionides* v. *Universal Marine Insurance Company* (*sup.*) in 1863, it is established law that the words "all consequences" must be treated as meaning the "totality of causes" not "their sequence, or their proximity or remoteness": (see per Willes, J. in that case and per Lord Sumner in *The Matiana* case (*sup.*).

Bearing the above-stated matters in mind, let me briefly deal with the facts of this case. In the first place, I think that the *Inkonka* was not herself engaged in a "warlike operation." She was a merchantman. So far as I know, she was not armed. She carried hospital stores for the British Government. She had no war material in the ordinary sense aboard. Her aim was to get as peacefully and expeditiously as she could from Salonica to Taranto. It is true that if assailed by a submarine she might have attacked the latter in defence by ramming; but the same might be said of all other merchant vessels, and such a contingency cannot of itself be said to find her within the area of "warlike operations." She was never, in fact, attacked, nor is there any evidence that hostile craft were in her proximity. It is true that she had on board a few British troops and officers; but it does not appear whether they were invalids or not. Probably they were invalids or convalescents. She was not a transport in the ordinary sense. If she had been such a vessel it might be held that she was engaged in warlike operations. In *The Petersham* case (*sup.*) Lord Atkinson said: "The transfer of the combative forces of a power from one area of war to another or from one part of an area of war to another part, for combative purposes, would, I think, be a warlike operation." Assuming that this passage is agreeable to the other opinions in the House of Lords, yet I think that Lord Atkinson only meant to refer to vessels which were either vessels of war or transports in the ordinary sense. The dominant features of the ship and the dominant object of her voyage must, I humbly venture to think, be looked at. It cannot be that the presence of a few soldiers aboard, whether wounded or unwounded, turns a merchantman into a transport or changes an otherwise peaceful voyage into a warlike undertaking. Many merchantmen during the war carried several Royal Navy men for the purpose of serving the protective guns, or for other reasons. Such fact would not, I conceive, turn a merchantman into the equivalent of a man-of-war. If it did, then the liability of war-risk insurers would be vastly increased. There is here no finding of fact on this point by the arbitrator which could lead to the conclusion that the *Inkonka* was herself engaged in a warlike operation. This view is, I believe, consonant with the opinion expressed by Roche, J. in *Owners of Steamship Larchgrove* v. *The King* (*sup.*). The facts in the *British and Foreign Steamship Company* v. *The King* (*sup.*) were quite different. Apart from the admission made by the Crown in that case, it is to be noted that the vessel there in question, the *St. Oswald*, was actually engaged as a transport in the Eastern Mediterranean, and assisting in the evacuation of troops from Gallipoli. Now the *Inkonka* here was, of course, sailing without lights in a war region; but it is now clear from *The Petersham* and *The Matiana* cases (*sup.*) that an ordinary merchantman is none the less engaged on an operation of peace rather than an operation of war because she is without lights pursuant to imperative Admiralty directions. The *Inkonka* was also sailing under convoy of H.M.S. *Pincher*, and was under enforceable obedience to her. A convoy has been described by Maude and Pollock on Merchant Shipping as "a naval force, consisting of a ship or ships appointed by the Government, or by the commander of a station, to escort and protect merchant ships proceeding to certain parts." I presume that a convoy may consist of one war vessel only escorting a single merchantman. It is now clear from the majority opinions in *The Matiana* case that a merchantman under naval convoy, and bound to obey that convoy, is not thereby engaged in a warlike operation. The convoy may be so engaged, but the merchantman convoyed sails on a different footing. I may invoke the striking and cogent illustration given by Atkin, L.J. in the Court of Appeal in *The Matiana* case (*sup.*). He said: "The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peacelike operation of conveying merchandise by sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding." I infer from the general body of opinion in the House of Lords in *The Petersham* and *Matiana* cases (*sup.*) that the naval convoy in this present case should be deemed to be engaged in a warlike operation. I doubt if Lord Sumner expressed any definite view on the matter, but I think that such is the broad result of the general opinion in those cases. If so, then the question still remains whether the *Inkonka* was stranded as a "consequence of warlike operations." Lord Cave, in *The Petersham* case (*sup.*) put the point as follows: "It is necessary to show first that there were hostilities or warlike operations which could have caused the collision; and, secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations. It was mainly upon this second

point that the opinions in the House of Lord differed in *The Matiana* case (*sup.*). It is essential to ascertain the view of the majority of the law Lords in that case.

The broad facts in *The Matiana* case (*sup.*) were these. She was sailing under convoy and without lights. She was bound to obey the orders of the convoy, and was under their compelling directions. She was in a region infested with submarines. The senior naval officer ordered a change of route. The *Matiana* accordingly changed her course. She was bound to do so. Then an order to zigzag was given. The *Matiana* obeyed it. About two hours afterwards she struck a small unlighted reef. The night was calm. No breakers were seen before she struck. Her master was blameless. He was, by order of the escort, travelling upon an unusual route. If the order had not been given, or if the reef had been lighted, the accident would not have occurred. Upon these facts the majority of the law Lords held that there was no loss in consequence of a warlike operation. This ruling is of far-reaching effect. It establishes that if a merchantman is lost by striking a rock or stranding or the like peril of the sea, whilst being compelled by an accompanying escort to take an unusual route, and/or to navigate either zigzag or in some other unusual manner, the loss is a peril of the sea, and not, without more, a consequence of warlike operations. I feel that this ruling is substantially inconsistent with the dictum of that great lawyer Swinfen Eady, M.R. in *British and Foreign Steamship Company* v. *The King* (*sup.*), where, in reference to that case (where the *St. Oswald*, sailing without lights, pursuant to Admiralty orders, collided with a French battleship) he said: "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 humble opinion, the facts in the present case cannot be distinguished from the facts in *The Matiana* case (*sup.*). The details vary, but the salient features are alike. Just as collision is, *primâ facie*, a marine risk, so stranding is, *primâ facie*, a marine risk. Just as the *Matiana* was ordered to take an unusual course, so the *Inkonka* was ordered to enter Taranto when her master, as a matter of good seamanship, would have desired otherwise. Just as the *Matiana* was under the compulsion of her escort, so the *Inkonka* was under the compulsion of H.M.S. *Pincher*. Just as the *Matiana* struck a reef, so the *Inkonka* went ashore. Just as the *Matiana* was held to have suffered from a sea risk, so I hold that the *Inkonka* suffered also from a sea risk. I see no material distinction between the two cases.

The arbitrator here found as a fact that the stranding of the *Inkonka* was caused by the inefficient lights of the pilot escort, and that if those lights had been adequate there was no reason why the *Inkonka* should not have safely reached Taranto. If the element of compulsion by H.M.S. *Pincher* be eliminated, this present case seems to bear much resemblance to *Ionides* v. *Universal Marine Insurance Company* (*sup.*). There the *Linwood* got ashore because a light had been removed from Cape Hatteras in the course of the Civil War by the Confederate troops. Had the light been burning, the *Linwood*, a Federal ship, would not have been wrecked. It was held that the proximate cause of the loss was a peril of the sea, and not the hostile act of the Confederate troops in extinguishing the light.

In the present case I support the award of the arbitrator. I hold that although the *Inkonka* was stranded whilst being navigated under war conditions, yet her damage did not arise in consequence of warlike operations. Many decisions were cited to me by Sir John Simon and Mr. Neilson for the owners, and by Mr. Raeburn for the Shipping Controller. If the case had been free from authority, I should have ventured, with the greatest diffidence, to state the rules which, I think, might well prevail upon the points at issue in this and other cases under clause 19, but there is now much authority on the matter. Unhappily, however, it is in a state of great doubt and complexity. I find it most difficult to extract any guiding principle from the judgments. Dictum conflicts with dictum, and decision opposes decision. A judge of first instance is indeed embarrassed in analysing and weighing the various and variant opinions of great authorities. I have, therefore, abstained from expressing any view save that which directly bears upon the present case, and I omit any expression of opinion upon such a point, for example, as to whether or not *Ard Coasters* v. *The King* (*sup.*), and *Richard de Larrinaga* v. *Admiralty Commissioners* (*sup.*) are consistent with the opinion given by the House of Lords in *The Petersham* and *The Matiana* cases (*sup.*). I venture to respectfully express the hope that an authoritative formulation may before long be given which will remove the existing doubts, settle the relevant principles, and guide the daily application of the law. I uphold the award of the arbitrator in this case. The owners of the *Inkonka* must pay the costs of the proceedings before me.

Award upheld.

Solicitors for the owners, *Pritchard* and *Sons*.

Solicitor for the Shipping Controller, *Treasury Solicitor*.

Judicial Committee of the Privy Council.

Jan. 18 *and March* 16, 1921.

(Present: Lords Sumner, Parmoor, and Sir Arthur Channell.)

The Prins der Nederlanden. (*a*)

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

Prize Court—Carriage of contraband—Allowances of freight—Discretion and jurisdiction.

The Prize Court has jurisdiction to award freight in respect of the carriage of contraband goods which have been condemned, but the exercise of the discretion to allow it is very rare, and depends upon the particular circumstances of each case.

Held, in the present case that ignorance of neutral shipowners as to the enemy destination of contraband goods, their conduct in informing the British authorities of the proposed shipment, and their services in carrying the goods from a neutral port did not provide a sufficient foundation upon which

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

a discretion to allow freight could properly be exercised.

Decision of Sir Henry Duke, P. (reported (1920) *P.* 216) *reversed.*

APPEAL from a judgment of the Prize Court dated the 31st March 1920.

The appeal was by the Procurator-General from an order of the President (Sir Henry Duke) awarding freight to the respondents, neutral shipowners, in respect of the carriage of 1780 bags of cocoa, shipped in the steamship *Prins der Nederlanden*, and condemned as contraband having an enemy destination.

Sir *Gordon Hewart* (A.-G.), *Branson*, and *Harold Murphy* for the appellant, the Procurator-General.

Dunlop, K.C. and *Darby* for the respondents.

Lord SUMNER.—In this case the Procurator-General, having obtained a decree for the condemnation of cargo as contraband, appeals against the President's allowance of freight on it to the Koninklijke West Indische Maildienst, the owners of the carrying vessel the *Prins der Nederlanden*.

The allowance of freight for the carriage of contraband is undoubtedly very rare. Two reported cases only have been found in which it has been ordered, *The Brita Cœcilia* (Hay & Marriott, 234) and *The Neptunus* (3 C. Rob. 108). Other cases in Hay and Marriott, in which freight was in fact given, appear to have been cases where the cargo was the produce of the shipowners' own country or cases of pre-emption of ship's stores for the use of the Crown. In the first case nothing is recorded but the bare fact, in the other the allowance was made, though in argument the captors had contested its competence. It is, therefore, a decision in favour of the jurisdiction and the circumstance that the contraband articles were but "in a small quantity amongst a variety of other articles" may have influenced the learned judge, but more probably as the ground on which he exercised his discretionary jurisdiction in favour of the ship, than as the test for deciding in which cases such a jurisdiction is exercisable at all. Certainly the *Neptunus* is not, as the appellant argued, a mere instance of *de minimis non curat lex*. During the present war Sir Samuel Evans recognised the existence of such a discretionary jurisdiction in *The Jeanne* (13 Asp. Mar. Law Cas. 567; 115 L. T. Rep. 838; (1917) P. 8), but he did not exercise it. The cases of condemnation of contraband goods, where the reports expressly state that the ship lost her freight, are very numerous, and as long ago as *The Sarah Christina* (1 C. Rob. 237) in 1799, "I shall content myself," Sir William Scott says, "with the restitution of the ship, withholding as usual on the carriage of contraband the allowance of freight and expenses," a mode of expression which seems to suggest the exercise of a discretion to withhold what he had jurisdiction to allow (see, too, *The Ringende Jacob*, 1 C. Rob. 89; and *The Neutralitet*, 3 C. Rob. 294), and Mr. Wheaton's note to *The Commercen* (1 Wheat. 382) observes that on the carriage of contraband "freight is almost always refused" in British courts. This is stated, too, as the standing rule in works of authority such as Pratt's Story (pp. 92 and 93), Hall's International Law, Part 4, chap. 26, sect. 4), and Holland's Prize Law (sect. 83). The first even states that the shipowner "is never allowed freight . . . upon the carriage of contraband goods, nor where there has been a spoliation of papers," which is probably a mere statement of the practice, not a proposition as to jurisdiction. Of course, if goods have only been made contraband during the voyage, the shipowner may be in a different position.

In the present case the Procurator-General's argument denies such a jurisdiction altogether and contends that in the case of contraband any allowance of freight is incompetent; if so, *The Neptunus* was wrongly decided and in *The Sarah Christina* Sir William Scott understated the law. No authority in support of the point is forthcoming.

The theory on which, in any case, a Court of Prize allows to carriers a freight on cargo condemned is not very consistent or logical. It is plain that when it does so at the expense of captors, it is not on the footing of any prior obligation legally binding upon them. They have entered into no contract; they have made no request for services to be rendered; there is, so far as they are concerned, no promise to pay, express or implied. When they bring in the ship and claim condemnation of the goods carried they act wholly *ex adverso* towards the carrier, and solely in the exercise of superior belligerent rights. By placing the goods in the marshal's hands they determine the carrier's lien, and the issue of a decree of condemnation, at any rate, involves the frustration of the voyage. On the other hand, the carrier's personal contract with the shippers or other parties, who are liable to pay freight, either subsists and may be enforced or is determined by the inability of the carrier to bring the goods to the agreed port of discharge and there deliver them, an inability in respect of which he has no legal rights or grievance against the successful captor. Whether his inability to sue for freight arises because his contract, or the law applicable to it, provides for payment of freight only on the completion of the voyage and right delivery of the cargo, and does not provide for freight *pro rata itineris*, or whether his inability to obtain it is caused by his having lost his lien and so having no possessory right to enforce or to release against good consideration, it arises at any rate from acts, which, so far as the captors are concerned, give him no right to damages, when they are followed by a decree of condemnation.

It is said that the carrier has enhanced the value of the goods captured by bringing them to the place of capture, and that the captor should not be allowed to appropriate this enhanced value without payment. This, however, leads to no clear principle. It would be equally true and so it ought to be equally applicable, whatever the grounds for condemning the goods, whether the freight is prepaid or not, and whether or not the carrier has an available legal remedy against strangers. In fairness he might be deemed to receive it to the use of the party who has prepaid, or in satisfaction of the liability of the party who is still liable to pay, but these considerations merely go to the person to whom the compensation ought ultimately to be paid, and not to the propriety of saddling the captor with freight on the prize condemned in his favour. In all cases if the prize was condemned freight free, the captor would be getting something for nothing, and if so, on this view, he ought to pay in all cases even in cases of contraband or of prepaid freight, and the measure of his payment would be the increased value of the goods, if any, and not, or not merely, a fair return to the ship

owner for the carriage performed. If the allowance of freight on goods condemned rests on the view that the captor is getting something of value from the carrier, what distinction is there between cases of contraband cargo where freight is refused and cases of capture of enemy property, not contraband, where it is allowed? (*The Emanuel*, 1 C. Rob. 296; *The Commercen*, 1 Wheat. 387). In each case the value added to the goods by the carriage is added by conduct on the carrier's part, which is not wrongful in itself, though the belligerent has the right to interrupt and prevent it.

On the other hand, ignorance (a term perhaps more appropriate than innocence, both to the occupation of shipowning and the carrier's actual relation to the carriage of contraband) would become a highly material consideration if disallowance of freight on contraband rests truly on the theory of its being a penalty. Nevertheless the contrary has been held (*The Oster Risoer*, 4 C. Rob., 195). If the penalty is inflicted for the commission of an offence, proof of *bonâ fide* ignorance of the facts constituting the offence surely merits an acquittal. It is suggested that in this connection the present respondents were put on inquiry because a German steamer had brought the cocoa to Las Palmas and a German agent looked after the transhipment there, and because the original voyage on which the cocoa was shipped before the outbreak of war was to Germany, though owing to the war it had been discontinued. It seems to their Lordships that these circumstances would, if anything, rather lull than excite suspicion in the respondents of a substituted transit to Germany to be effected by getting the cocoa taken in the *Prins der Nederlanden* to a Dutch port, and there consigned to the Netherlands Overseas Trust.

The term penalty, however, though often mentioned (*e.g.*, in the *Commercen* at p. 394), is not in this connection really one which implies that the carriage of contraband is attended with the usual incidents of the commission of an offence. Neutrals who carry contraband do not break the law of nations; they run a risk for adequate gain, and, if they are caught, they take the consequences. If they know what they are doing, those consequencies may be very serious; if they do not, they may get off merely with some inconvenience or delay. This must suffice them. Having done their best to aid one belligerent by carrying contraband for him, they cannot ask that the other shall pay the penalty for his own success in defeating the attempt by rewarding the neutral carrier as if his venture had succeeded. That would be to encourage the carrying of contraband, whereas it is a thing to be deterred. Nor should ignorance of what he is doing be a safeguard to the carrier. If he is to be deterred, it must be made worth his while to know, in order that he may prefer to abstain.

It seems therefore, to follow that, when freight is allowed, it is from the court's view of fair dealing towards parties whose conduct is not open to blame, and it is refused in order to protect the effectual exercise of belligerent rights. Reasons of this kind seem founded rather in policy and discretion than in legal rule and legal right. There are many passages to be found in the reported decisions which point in this direction. Thus if a neutral vessel is captured with enemy cargo she is discharged with full freight; "no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo" (*The Fortuna*, 1809, Edw. 56, 57). "This rule was introduced for the benefit of the shipowners and to prevent the rights of war from pressing with too much severity upon neutral navigation" (*The Prosper*, 1809, Edw. 72, 76). On the other hand, Sir William Scott speaks of the whole law of contraband as a matter of the practice of the court (*Jonge Tobias*, 1 C. Rob., 329), and implies that although the court can relax, and has relaxed its practice in other directions in this respect, it will introduce no alteration (*Sarah Christina*, 1 C. Rob. 237), or only in very special circumstances (*The America*, 3 C. Rob. 36). Some difficulty, it is true, may be felt on the other side. The allowance of freight may be very fair to the neutral shipowner, and yet quite the reverse for the captors, at whose expense the freight will be found, whether charged on the proceeds of the prize or directly decreed against them. If captors have the right to prevent the cargo from reaching its destination, why must they pay for the exercise of that right; why is not capture and condemnation to the neutral carrier what perils of the sea are, a risk of the adventure? For practical purposes it is enough to say that such is the law of nations, as administered in Courts of Prize; but the theory of it must be that the court, endeavouring to hold an even balance between belligerent rights and the rights of neutral trade, requires that the captors' windfall shall suffer some abatement under circumstances of legitimate carriage and will only adjudge the *res* in its hands to those who, in placing it there, have submitted to its jurisdiction, after fair consideration for those who lose by mere misfortune and without fault. Now a jurisdiction to do what is fair in the circumstances of a given case is essentially a jurisdiction which is discretionary in its exercise. Long practice now forbids that discretion to be exercised so as to deprive shipowners of freight which has long been regularly allowed to them; but it is still open to the court to make a discretionary allowance when circumstances are wholly exceptional.

On this reasoning their Lordships find it impossible to accede to the contention that there is never any jurisdiction to allow freight on contraband goods condemned. Not only would this overrule *The Neptunus* and falsify sundry passages which describe the disallowance of freight as usual, not as inevitable, but it would be inconsistent with the theory that the claim for freight rests rather on an appeal on the court's duty of protecting neutrals than on a liability in the captors. Their Lordships are not minded to disclaim a jurisdiction, which may enable a Court of Prize to secure to neutrals in suitable cases a return for work done in the way of their trade and without circumstances of disregard of neutral obligations in the course of it.

At the trial the Procurator-General did not prove that the shipowners had any knowledge of the destination of the cargo, though there is some difference of opinion whether he admitted that they had none. The President was evidently satisfied that they were ignorant of it, and upon this and upon the advantage derived by the captors from the carriage of the goods he decided to exercise his discretion in favour of allowing freight. Before their Lordships the claim put forward by the shipowners was a far-reaching one, for they claimed a

right to freight unless it could be shown against them that they knew they were carrying contraband. If so, the owner of a general ship would rarely lose his freight, for captors could seldom hope to bring such knowledge home to him, considering how numerous and often how small are the separate parcels shipped, and in what haste they are often taken on board. In cases of continuous voyage a similar difficulty would arise even for entire cargoes, and such a rule would in the case of cargoes wholly or mainly contraband have no middle term between forfeiture of the ship and release of it with an allowance of freight. It is not too much to require that shipowners should know both the contents of belligerents' proclamations as to contraband and the descriptions of the goods entered in their own manifests. How it might be, if contraband articles were fraudulently concealed in seemingly innocent packages or disguised by the shippers under a plausible misdescription, need not now be decided. The shipowner always has the remedy in his own hands if he requires his freight to be prepaid, and the general practice in the late war to do so shows how available such a remedy is. Their Lordships, therefore, think that the exercise of a discretion to allow freight on contraband ought not to turn merely on the question whether the shipowner knew or did not know the character of his cargo, still less that proof of his ignorance should be treated as a title to a decree for freight.

In the present case the shipowners rely, in addition to their ignorance, upon the candour with which they facilitated the task of the detaining officers by giving early and regular notice of the parcels they were bringing forward from their different ports of call. Certainly their Lordships would not wish to belittle the assistance which such practices, if widely adopted, would give to the capturing power; but it would be idle not to observe that these timely intimations principally served to minimise delay to the line of steamers concerned, and to promote good relations between their owners and the British Government. Their Lordships are unable to find, either in this course or in the respondents' ignorance, or in their meritorious service in carrying the cargo to the place where it was captured, or in the combination of these circumstances, a sufficient foundation upon which, in accordance with the current of decisions, a discretion in favour of allowing freight could be properly exercised, and they, therefore, think that the learned President's decision was wrong. Having come to this conclusion, their Lordships think it undesirable to endeavour to indicate what circumstances would have justified an allowance of freight. As the question is essentially one of discretion, this ought to be decided in each case in the first instance by the judge of the Prize Court on the circumstances as they arise before him. It also makes it unnecessary to examine at length the two subsidiary points as to the freight on the return voyage by the *Lapwing* or the argument derived from the alleged continuing liability of Onnes and Son. As to the first, they think that the *Lapwing* brought back the goods to England as part of an arrangement to avoid delay to the *Prins der Nederlanden*, and therefore for the benefit of the respondents. The overcarriage and return of the cargo could not benefit the captors. In no case, therefore, would they allow the *Lapwing's* freight. As to the second, even if Onnes and Son are still under a liability for freight, the circumstance seems to be irrelevant. If the captors ought to pay, it does not release them from liability that discharge of their obligation may prove an advantage to these very undeserving persons. On the other hand, viewing the refusal of freight as a matter of penalty, no one can regret it if the shipowners prove to be able to mitigate the effect of it by enforcing a liability on Onnes.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed with costs, and that the decree made by the learned President should be set aside.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondents, *Pritchard* and *Sons.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, April 20, 1921.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

DENHOLM LIMITED *v.* SHIPPING CONTROLLER. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter - party — Requisitioned ship — T. 99 (*clause* 25)—*Cargo of coal — Fire in cargo — "Accident" — Whether "accident" limited to ship or includes cargo.*

The concluding lines of clause 25 (*b*) *of the charter-party T.* 99, *which provide that "if through any accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and reloading the same is to be deducted from the hire," are not limited to an accident to the ship, but include an accident to the cargo.*

So held by Bankes and Atkin, L.JJ. (*Scrutton, L.J. doubting*).

Judgment of McCardie, J. (15 *Asp. Mar. Law Cas.* 141; 124 *L. T. Rep.* 378) *reversed.*

APPEAL by the Shipping Controller from a judgment of McCardie, J. on an award in the form of a special case.

The claimants were Messrs. Denholm Limited, the owners of the steamship *Carron Park.* The respondent was the Shipping Controller. The *Carron Park* was requisitioned by the respondent under the terms of a charter-party known as T. 99, clause 25 of which provided:

(*a*) If from deficiency of men or stores, breakdown of machinery, or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period, of whatever duration, during which the vessel is inefficient.

(*b*) Partial inefficiency. Any work that may be done during a period of partial inefficiency of the steamer, except proceeding to a port for repairs, or to replenish bunker coals owing to an accident, shall be paid for on the basis of the time it would have occupied had the steamer remained efficient. If upon the voyage her speed be reduced by a defect in or breakdown of any part of her machinery, damage to propeller, rudder, or by any other mishap of hull or

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

engines or cargo, the time so lost and the cost of any extra coal consumed in consequence thereof shall be deducted from the hire; but should the steamer be driven into port or to anchorage by stress of weather or for coals, such detention or loss of time shall be at the Admiralty's expense. In the event, however, of breakdown at sea or other accident necessitating the steamer proceeding to a port of refuge for repairs, or to replace or land crew, hire to cease until the steamer arrives back in a similar position to that in which she was at the time of the breakdown or accident, &c., and any coals used to be replaced or paid for by owners, whichever the Admiralty may elect.

Sub-clause (*c*), with the marginal note, "Period of inefficiency not to count," was as follows:

If through accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging and reloading same to be deducted from the hire. Any time so lost shall count as part of the term of the charter named in clauses 2 and 7, but the Admiralty have the option of keeping the steamer for an additional period equivalent to the whole or part of the time lost.

The ship loaded a cargo of coal and left the docks of her port of loading. While lying at anchor, fog-bound, outside the docks, a fire broke out in the cargo of coal in one of the holds and the ship had to return to dock to discharge some of the cargo to get at the fire and extinguish it. No damage was done to the ship. The Shipping Controller claimed, under the above clause, to deduct from the hire the time occupied in the operations rendered necessary by the outbreak of fire.

McCardie, J. held that the outbreak of fire in the cargo was not an "accident" within the above clause; that in any case the words "accident" in the concluding lines of clause 25 (*b*) was limited to an accident to the ship and did not include an accident to the cargo; and that the Shipping Controller was not entitled to the cesser of hire which he claimed.

The Shipping Controller appealed.

Sir *Gordon Hewart*, K.C. (A.-G.), *MacKinnon*, K.C., and *Darby* for the appellant.

Leck, K.C. and *D. H. Leck* for the respondents, the shipowners.

BANKES, L.J.—This is an appeal from a judgment of McCardie, J. in favour of the shipowners. The dispute between the parties is in reference to the proper construction of clause 25 of the charter known as T. 99, under which this vessel the *Carron Park* was being worked at the time of the matters which give rise to this dispute. She was loaded with a cargo of coal at Barry. She put to sea; she was detained in Barry Roads by fog, and whilst she was there, the cargo caught fire; and, as a result, she had to put back to Barry, and it was thought prudent to discharge some portion of her cargo. It was discharged, and ultimately fresh cargo was put into her. The question is whether, under the terms of the charter-party, the charterers are entitled to deduct all or part of the time occupied in unloading and reloading the cargo from the hire. The matter went before an arbitrator who stated a special case, and I think that he has found that there was an accident in fact on board this vessel, and that the accident was the cargo catching fire. I think the case before the arbitrator was fought upon the assumption that there was an accident in fact, and that the dispute between the parties was whether the word "accident" used in the material part of clause 25 (*b*) referred to an accident to the vessel, or included also an accident to the cargo; and I think that the special case was stated upon the footing that an accident had in fact happened, and that the arbitrator desired the opinion of the court as to whether or not the contention of the one party or the other in reference to that accident was correct.

A great part of McCardie, J.'s judgment is occupied in considering whether there was an accident at all. With respect to the learned judge, I do not think that point was open to him, or to the parties, and therefore I proceed upon the footing that what happened on this vessel was an accident, and the only question is whether it is the kind of accident which is contemplated by the material part of this clause which excludes the charterer from the payment of hire during the period occupied in loading and discharging the cargo. The clause is not well drafted, and read as the charterer wishes it to be read, it certainly does introduce an unusual provision, I think, in another part. Our attention has been called to the clause where the owner is responsible for ventilation. That may be usual, but the owner is made responsible also for the stevedores. It may be that the charter was drawn to include matters which are not quite usual because the draughtsman intended to insert an unusual provision in this clause 25. I do not think that one is entitled to speculate as to why this particular sentence was introduced into this clause, and unless it was so obviously improbable that one can say it is impossible that anybody ever could have intended either to insert such a clause or to agree to it, I think one must construe it according to the language used.

The constructions sought to be put upon the clause are: the construction of the charterer is that the last sentence but one, which provides that if, through any accident, any part of the cargo or bunkers have to be discharged the time occupied in discharging and reloading the same is to be deducted from the hire, is to be read as a provision independent of what has preceded it, and that the words are to be used in their natural meaning. If that is the true view, it seems to me to be obvious that the charterer is right, because there is no qualification on the word "accident" at all, and the words are just as much appropriate to an accident to the cargo as to an accident to the ship. The contention on the other side, as I understand, is that the earlier part of that clause is dealing with accidents to the ship, and, inasmuch as the earlier part of the clause is dealing with accidents to the ship, so you should read the whole clause, wherever it refers to "accident," as accident to the ship, or, possibly as an alternative, the suggestion, as I understand it, is that the earlier part of the clause is dealing with causes which may result in loss of time, and which may result in a stoppage of hire, and this last sentence but one is dealing with the same clause to an additional extent—that is to say that, if for one of the causes enumerated above the steamer is delayed, then the hire proceeded, but it may be that, in addition to being merely delayed, the cargo may have to be discharged and reloaded; and if therefore from the same accident referred to above this consequence follows, then the hire is to cease. The choice is between those two constructions. For some time I hesitated as to the view taken by the learned judge that this clause was not sufficiently clearly

expressed to deprive the owner of the hire to which he was entitled under the earlier part of the charter, and I have hesitated whether or not that is not the view which should be taken of this dispute. But having given the matter the most careful attention I can, I think that there is no sufficient ground for saying that these words in the last clause but one are not plain, and that what really leads one to doubt about the matter is not because of any infirmity of the language, but a feeling in one's own mind that one does not quite understand why this clause should have been inserted. That does not seem to be enough, if the words are plain, and I decide in this case, because, in my opinion, the words are so plain that it is not reasonably possible to take the view that the clause has not sufficiently clearly expressed the intention that hire shall cease.

In those circumstances I think that this appeal succeeds.

Scrutton, L.J.—I wish I was in a position to express my view about the first point. My brothers have felt able to come to a clear view as to what this clause means. I at present am in the position that I do not know what it means. I doubt whether my brothers are right, but I am not clear enough as to the alternative view to give a dissenting judgment. I do not suppose that state of mind will be satisfactory to either of the parties, and it certainly is not satisfactory to myself. I think there is a great deal to be said for the view my brothers are taking that there is here an accident: that part of the cargo or bunkers had to be discharged through an accident, and that the time occupied in discharging or reloading the same has to be deducted from the hire. I quite feel the force of the statement that they are words which in their ordinary meaning do cover a view in favour of the charterer. On the other hand, I have very great difficulty in understanding why the accident to the cargo, with which the ship has nothing to do, should deprive the ship of its hire; and I think there is a good deal to be said for the view that this clause is dealing with accidents which render the ship inefficient, and is guarding against the view that the ship, being efficient to discharge and efficient to reload, though not efficient to proceed, hire must be paid for the time in discharging and reloading, which is a view which has been taken by Bailhache, J. in a case cited as to reloading. The whole clause is very different from the ordinary clauses in a time charter in ordinary commercial matters, which provide exactly the opposite to this one as to accidents which may occur. Having clear words on one side, and those doubts as to the reason on the other, I regret to say that I am, at the present moment, quite in doubt as to what the clause means, and I therefore do not feel justified in either agreeing or dissenting, although, as I say, I do not pretend for a moment that it is a satisfactory state of mind to be in. But it is my state of mind.

Atkin, L.J.—It appears to me, on the whole, that the charterer's contention is correct in this case. I know of no artificial rule of construction in construing charter-parties by which the words are to be used in favour of the shipowner, unless some very special degree of clarity is employed in using words in favour of the charterer. It appears to me you have got to give to the words used their plain and ordinary meaning, of course, considering the whole context.

Now, taking the whole context in this case, we have got an off hire clause, and there is a reference to this clause three or four times to "accidents" and one to "mishap." "Accident" is not defined at all, and I am of opinion that throughout the clause "accident" means what it says, namely, any accident. But in a prior part of the clause it is an accident having certain consequences—namely, making the ship inefficient. I can conceive an accident to the cargo which would make the ship inefficient, and, if so, I think it would be such an accident as is referred to in the former part of the clause. It is an accident; but it is quite plain, I think, that the first two paragraphs of the clause relate to accidents which have the result of making the ship inefficient. In this particular clause the same word is used. Now the words in this particular sentence seem to me to be simple words, and not to admit of any ambiguity. "Accident," to my mind, means any kind of accident, and one does not limit it, in my view, to an accident to the ship or an accident to the cargo. It might be an accident to the crew, it might be any accident which causes a part of the cargo or bunkers to be discharged, and, if so, the time occupied in discharging and reloading the same is to be deducted from the hire. It has been a little difficult, to my mind, to find out exactly what is the restriction sought to be imposed by the shipowners. Sometimes it is said to be an accident to the ship; at other times it is said to be an accident causing the ship to be inefficient. I use no reason for introducing any of those limitations into this sentence. The word used is entirely a general word, and it appears to me unnecessary to consider the motives for putting this clause in, or to consider whether it is reasonable or unreasonable, except this, of course: If the clause as so construed led to a manifest absurdity, you perhaps would have to construe the word in a sense which did not lead to the absurdity, but it seems to me—I appreciate the difficulties that have been put by my brothers, which I feel the force of—that sometimes there are conditions which, I think, might make this a reasonable contract. The ship is responsible for stowage, or makes itself responsible for the stevedores, and the ship is responsible for the ventilation; it might be that, by reason of something done or omitted to be done in respect of these two matters, an accident to the cargo might arise. I see no reason myself why, under these circumstances, the ship should not have undertaken that any detention which is caused by such act or omission on the part of the persons for whom the ship was responsible should not be for ship's account. Again, the accident might be such an accident to cargo as would involve the common safety both of the cargo and of the ship, and indeed this seems to be a typical kind of accident, because if the cargo gets on fire, damage to the ship is just as likely to follow as damage to the cargo and, under the circumstances, if the ship puts back, for what is, after all, in substance the necessity of the common adventure, I see no reason why the parties might not reasonably have stipulated that the detention should be for the shipowners' account; in other words, the charterer has not to bear the loss himself.

I am not at all sure that the words do not, in addition—I think they probably do—cover the case of accident to the ship alone where, in order to repair the ship, the cargo has to be taken out

and then has to be put back again. The case of *Thomas Smailes and Sons* v. *Evans and Reid Limited* (14 Asp. Mar. Law Cas. 59; 116 L. T. Rep. 595; (1917) 2 K. B. 54) dealt with that. It seems to me, as I say, that there is no reason to import any particular limitation in these words. They are reasonably plain; if so, I think it is our duty to give effect to them. I agree that the question of whether here there was an accident or not is not open, and was not intended to be open on the case, because the arbitrator has found this was an accidental fire.

I think there was every ground for saying that the fire breaking out in the coal cargo in this manner was, in fact, itself an accident; however, the point does not seem to me to be open.

BANKES, L.J.—We think that the time that should be excluded should include all the time from the moment when the discharge of the cargo commenced until the time that the fresh cargo was completely put on board; assuming, of course, that the whole of that time was occupied according to the custom of the port in either unloading or loading. You would not, for instance, exclude mealtimes, nor night, if it is in accordance with the practice of the port not to load; but, of course, if there was time lost by reason of this cargo being diverted to another vessel and fetching fresh coal, that would have to be excluded. If those figures can be agreed we can enter a judgment that will cover the matter; if not, then we will send it back to the arbitrator.

Appeal allowed.

Solicitors: *Treasury Solicitor; Lawless and Co.*

Thursday, April 28, 1921.

(Before BANKES, WARRINGTON, and SCRUTTON L.JJ.)

SANDAY AND Co. *v.* STRATH STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Short delivery—Claim against shipowner—Mistake—Onus of proof—How discharged.

The plaintiffs claimed from the defendants, who were shipowners, damages for short delivery of a cargo of linseed from Argentina. The plaintiffs said that they delivered on board the defendants' ship at Buenos Ayres, 17,104 bags of Plate linseed for carriage to London. The defendants by their bill of lading and mate's receipts admitted that they received that number of bags on board. The defendants only delivered 16,948 bags in London. The bags delivered on board at Buenos Ayres were tallied by tallymen on behalf of both the plaintiffs and the defendants; and as to 2085 bags, by three tallymen. The tallymen all agreed as to the number of bags delivered to the ship, but an error appeared in one tally book and an alteration in another. The total amount arrived at by the tallymen was accepted by the mate for the purpose of the mate's receipt and was accepted as correct for the purpose of insertion in the bills of lading signed by the master. It was clear on the evidence that there was no possibility of loss by theft or otherwise during the voyage. The learned judge, therefore, found that it was proved beyond a reasonable doubt that all the bags and their contents that were received by the ship from the plaintiffs at Buenos Ayres were delivered by the ship to the plaintiffs in London, and he held that all cases of short delivery turned on inferences of fact. A plaintiff claiming damages for short delivery must prove his case, and it was prima facie *enough to entitle him to succeed if he proved the delivery of a less number or weight or measure of goods than that admitted in the bill of lading. That proof placed the onus on the shipowner to establish that the number, weight, or measure admitted by the bill of lading was wrong. The shipowner might discharge that onus by direct evidence that a mistake was made by the tallymen from whose tallies the bill of lading was made out, or by indirect evidence proving beyond reasonable doubt that none of the goods were lost or stolen after receipt, and that he delivered all that he received. In this case the defendants, the shipowners, had proved beyond all reasonable doubt that they had delivered all that they received, and that there must have been a mistake in the tally at Buenos Ayres and in the bill of lading figures which were the result of that tally.*

Held, on appeal, that the learned judge had fully appreciated the question of law which governed the matter, and that there was no ground for setting aside his findings of fact.

APPEAL by the plaintiffs from a judgment of Greer, J. in an action tried in the Commercial List.

The plaintiffs claimed damages for short delivery of Plate linseed shipped on board the steamship *Helmsloch* at Buenos Ayres on or about the 24th Dec. 1919, under two bills of lading, dated the 24th Dec. 1919.

The plaintiffs were grain merchants in London; and they alleged in their points of claim that the defendants were the owners of the steamship *Helmsloch*. Under contracts contained in bills of lading, dated the 24th Dec. 1919, and signed by the master of the ship, the defendants received at Buenos Ayres 17,104 bags of linseed, shipped in good order and condition by Messrs. Sanday and Co. of Buenos Ayres and accepted the same for carriage to London, there to be delivered in the like order and condition to the order of the said shippers or their assigns.

The plaintiffs claimed as the holders of the bills of lading, which were endorsed to them, and they thereby claimed as owners of the goods.

They alleged that the defendants, in breach of their duty or undertaking to carry the goods safely and deliver them in good order and condition, failed and neglected to deliver the whole of the 17,104 bags which they received, but only delivered 16,948 bags.

The defendants admitted the bills of lading, but denied that they were endorsed to the plaintiffs, or that the plaintiffs were the owners of the goods. They further alleged that the plaintiffs were the charterers of the ship and that the goods were shipped under the contract contained in a charter-party between the parties dated the 19th Sept. 1919, and not under the bills of lading.

Alternatively, they alleged that the bills of lading contained the following provisions: (*a*) "freight for the said goods in accordance with the charter-party, dated London, the 19th Sept. 1919, all the conditions and exceptions of which charter-party,

(*a*) Reported by T. W. MORGAN and W. C. SANDFORD, Esqrs., Barristers-at-Law.

including the negligence claim are incorporated herewith," and (*b*) "weight measure quality and value unknown."

The defendants further pleaded that they had delivered to the plaintiffs all the bags of linseed put on board the steamship at Buenos Ayres.

Alexander Neilson, K.C. and *Clement Davies* appeared for the plaintiffs.

R. A. Wright, K.C. and *Claughton Scott* for the defendants.

Cur. adv. vult.

Dec. 20, 1920.—Greer, J.—In this case the plaintiffs claim damages for non-delivery of 156 bags of linseed shipped by them on board the defendants' steamship *Helmsloch* in Dec. 1919 at Buenos Ayres, for carriage to and delivery at the Port of London. The plaintiffs say that they delivered on board the *Helmsloch* 17,104 bags of linseed at Buenos Ayres; that by their mate's receipt and bill of lading the defendants admitted that they received that number on board, and that as the defendants only delivered 16,498 bags in London, the linseed weighing 1.68 per cent. less than the bill of lading weight, they, the plaintiffs, are entitled to recover damages for the loss of 156 bags and their contents.

The bags delivered to the ship at Buenos Ayres were tallied by tallymen employed by the plaintiffs as ship's agents to tally on behalf of the defendants. 15,019 bags were tallied as delivered to the ship ex the Elevator Company's warehouse alongside the ship's berth, and 2085 as delivered by cart. As to the last-mentioned number, there was evidence that there were three tallies, one by men employed by the carting contractor who delivered the bags to the ship, one by the tallymen employed to act for the shippers, and one by those employed by Messrs. Stanley to tally for the ship. As regards the bags from the warehouse, I am not satisfied that there were more than two tallies, one by the people in the warehouse on behalf of themselves and Messrs. Sanday, and one by those who were tallying for the ship. The tallymen all agreed as to the number of the bags delivered, and the total amount by such agreement was accepted by the mate for the purpose of the mate's receipt, and the figures from the mate's receipt were, as a matter of course, accepted as correct for the purposes of stating the number of bags in the four bills of lading signed by the master.

It was stated by Mr. Charles Broome, the manager of the Grain Elevator warehouse, in a statutory declaration which was by consent used as evidence, that the balance of the plaintiff's stock in the warehouse remaining after shipment of the 15,019 bags was found to be correct. This evidence makes out a strong *primâ facie* case that 17,104 bags of linseed were delivered to the ship. I am satisfied that the tally of the number of bags delivered in London was carefully done by those who tallied for the ship and for the receivers. The full bags were counted, the empty bags were counted, and the broken pieces carefully collected, and the number of bags represented thereby was accurately ascertained. Unless the count at Buenos Ayres can be successfully attacked, the defendants are responsible for 156 bags short delivered. Though evidence of the number delivered to the ship makes a strong *primâ facie* case, it is open to some criticism. There is no first-hand evidence of the count made by the tallymen in the warehouse. The whole of the plaintiffs' evidence consists of the statutory declaration of the manager, who, from the nature of the case, can have no first-hand knowledge of the actual count, though, of course, he is naturally familiar with the method usually adopted.

No tally books kept either by the Elevator Company's men or by Messrs Sanday's men are produced. The latter, I was informed by plaintiffs' counsel, had been lost. The ship's tally books were put in evidence for the plaintiffs. It is apparent on the face of tally book W. M. 4 that a mistake was made by counting twenty-seven bags twice over, and in W. M. 1 and W. M. 2 a figure of thirty, at some time before the column in which it appears was added up, has been altered to fifty. If I am right in concluding, as I do, that there was a mistake in adding twenty-seven bags twice over, Mr. Broome's evidence as to the plaintiffs' balance in warehouse being correct becomes difficult to accept. It was proved that the bags went straight through the chutes into the hatches, that the hatch-covers and tarpaulins were put on each evening when the work ceased, that each bag weighed at least a hundredweight, and that, to prevent pilfering, there were two armed watchmen on board day and night. It seems highly improbable that during these nine days in which the loading took place 156 bags of linseed, each weighing about a hundredweight, could have been abstracted from the hold, taken ashore, and removed without anything being noticed to give rise to suspicion.

Indeed, bags of linseed do not seem the kind of commodity that would afford any great temptation to the prowling night thief. I am satisfied beyond any reasonable doubt that no bags of linseed were stolen from the ship after they had been put in the hold. It is also clear on the evidence that there was no possibility of loss by theft, or otherwise, during the voyage.

I therefore find that it is proved beyond a reasonable doubt that all the bags and their contents that were received by the ship from the plaintiffs at Buenos Ayres were delivered by the ship to the plaintiffs in London.

Mr. Neilson, for the plaintiffs, contended that the decisions of the courts were such that I was not entitled on the evidence to find for the defendants. He relied especially on three cases: *Harrowing* v. *Katz* (10 *Times* L. Rep. 115, 400); *Bennett and Young* v. *Bacon* (13 *Times* L. Rep. 204); *Smith* v. *Bedouin Steamship Company* (1896) A. C. 70).

In *Harrowing* v. *Katz* (*sup.*), there was a claim by the defendant for short delivery of 377 cases of petroleum. The bill of lading, founded on two tallies, one made on behalf of the ship and the other on behalf of the shippers, acknowledged the receipt of 377 cases more than were delivered at the port of discharge. Kennedy, J. held on the facts that the shipowner had not discharged the onus that lay upon him of disproving the accuracy of the bill of lading number, supported, as it was, by a careful double tally. But if the report of the case before Kennedy, J. is carefully examined, it will be found that the method of loading was quite different from the method adopted in the present case, and the ship failed to prove that there were no opportunities of loss after the cases were delivered to the ship.

Bennett and Young v. *Bacon* (*sup.*) is a similar case relating to the short delivery of 100 cases of tomatoes which were delivered from lighters by

derricks into the ship's hold. The report does not state what facts, if any, were relied on by the ship to show that the goods could not have been stolen or lost after delivery to the ship, and it therefore does not help me to decide the present case.

In *Smith and Co.* v. *Bedouin Steam Navigation Company* (*sup.*) a shortage of twelve bales of jute was claimed for. The loading occupied twelve days, so that the theft, or loss, of one bale per day after the bales had been delivered on board would account for the discrepancy. The majority of the bales (the bill of lading number was 1000) were delivered from boats to the hatches and there tallied by the ship's tallymen, but some of the bales were not delivered to the hatches, but were placed on deck. In his speech Lord Shand says (1896) A. C. at p. 80): "The evidence does not make it quite clear that bales to the number of twelve may not have been removed from the ship's deck after being placed there, and taken away by the lighters, particularly during the work carried on in the evenings after dark." Later on, he says: "No one can say that there is proof that such abstraction did take place. But it is for the shipowners to displace the shippers' evidence furnished by the acts of their own servants. It appears to me that they do not do so by proof which does not exclude the possibility that the bales in question might have been abstracted from the ship's deck, or which does not make this so highly improbable that such a suggestion must be entirely thrown aside."

Lord Halsbury's observation (1896) A. C. at p. 76) which was relied on, to the effect that no evidence had been given leading to any such conclusion as would upset the effect of the admission in the bill of lading, must be read in the light of the facts mentioned by Lord Shand; and it should not be forgotten that the appeal did not involve the question as to whether there was evidence on which a judgment for the ship could have been supported. The judge of first instance had found for the appellants, the holders of the bill of lading. The House of Lords held that that finding ought not to have been reversed by the Second Division of the Court of Session sitting as a Court of Appeal.

The truth of the matter is that all these cases of short delivery turn on inferences of fact and not on rules of law. The rules of law are quite clear. They are as follows: (1) A plaintiff claiming damages for short delivery must, like any other claimant, prove his case. It is sufficient to entitle the plaintiff to succeed if he proves the delivery of a less number or weight or measure of goods than that which is admitted in the bill of lading. This proof puts the onus on the shipowner to establish that the number, weight or measure admitted by the bill of lading is wrong. He may do so by direct evidence showing that a mistake was made by the tallymen from whose tallies the bill of lading was made out. (4) He may do so by indirect evidence sufficient to satisfy the tribunal of fact beyond reasonable doubt that none of the goods were lost or stolen after receipt, and that he delivered all he received.

Now that so many cases are tried without juries, there is a real danger of mistaking inferences of fact set out in the reported cases for rules of law. There is a great, and, I think, unfortunate tendency to cite reported inferences of fact as if they were rules of law. The facts of two cases are never quite identical, and even in cases where they appear to be so the weight attachable to testimony varies so greatly that it is never possible to say that a judge who decided one way in the case of *A.* v. *B.* would, even on similar evidence given by different witnesses, in the case of *C.* v. *D.* draw the same inferences of fact.

There is nothing in the cases that have been cited, nor in the well-established rule about the onus of proof, to prevent me from giving effect to the opinion that I have formed as to the reasonable effect of the evidence taken as a whole. In my judgment, the defendants have discharged the onus which lay upon them of proving beyond reasonable doubt that they have delivered all that they received, and that there must have been a mistake in the tally at Buenos Ayres and in the bill of lading figures which were the result of that tally. There must be judgment for the defendants with costs.

Judgment for the defendants.

The plaintiffs appealed.

Alexander Neilson, K.C. and *Clement Davies* for the appellants.

R. A. Wright, K.C. and *Claughton Scott* for the respondents.

BANKES, L.J.—This is an attempt to set aside the finding of the learned judge upon a pure question of fact, and this court would only do that on being satisfied that the conclusion at which the learned judge arrived was obviously wrong. In my opinion, it is quite impossible to come to that conclusion in this case. The learned judge seems to have tried the case with great care and to have given a very full and elaborate judgment, which indicates that he fully appreciated the question of law which governed the matter and that he applied his mind, as far as I can see, to the material facts of the case.

The action was brought to recover damages for short delivery of 156 bags of linseed which were said to have been shipped by the defendants on their vessel at the Plate, and which they failed to deliver on arrival of the vessel in London. The plaintiff's case, of course, was founded upon the bill of lading, which contained the statement that the quantity of bags which the plaintiffs were claiming to have the right to have delivered to them had been shipped. The learned judge's attention was called to some of the cases which have been reported on the question of short delivery, and, amongst others, to the *Smith* v. *Bedouin Steamship Company* case (1896) A. C. 70). I have already read, and will read again, what Lord Halsbury said in reference to the position of a claimant who relies upon the statement in the bill of lading that a certain quantity of goods had been shipped. What he says is this: "To my mind, the cardinal fact is that the person properly appointed for the purpose of checking the receipt of the goods has given a receipt in which he has acknowledged on behalf of the person by whom he was employed that those goods were 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 never were on board at all." Now it was to that question that Greer, J. applied his mind as to whether there was sufficient evidence to satisfy him that these goods never had been put on board at all.

He first of all directed his mind to the question whether, upon the evidence, there was any possibility of these goods either having been stolen on their way to the vessel either from the cart or from the warehouse, and to the question whether there was any possibility of their having been tampered with, or interfered with in any way, or removed after they had been once placed on the vessel and before the vessel arrived; and the conclusion he comes to is: "I am satisfied beyond any reasonable doubt that no bags of linseed were stolen from the ship after they had been put into the hold. It is also clear on the evidence that there was no possibility of loss by theft or otherwise during the voyage." So he excludes the possibility of there having been any loss after the goods had been put on board, and I do not understand that Mr. Neilson challenges his finding of fact upon that point.

Now it may well be that, upon the authorities, a judge who has to deal with this question of fact should not be satisfied merely with arriving at the conclusion that the presumption arising from the statement of the bill of lading had been displaced; but there was one further inquiry which the learned judge made, and which I think ought to be made in this class of case, and that is what is the evidence with regard to the tally and to the way in which these goods were put on board and the care that was taken to count and tally them as they were put on board? With regard to that, in this case, the learned judge only had what I may call general evidence of the course of business and one set of the tally books and a man who did not profess to be able to speak to the correctness of the tally, but whose only concern with the tally was that he had added up the totals entered in the book by someone else. Nobody was called who took part in any way with the actual tally, and therefore all the learned judge had before him was the one set of tally books; he had none of what I may call the original papers—the tally slips or chits—but a book in which the conclusion of the tally had been entered. He looks at these books, and upon looking at them he says to himself that they were clear evidence of mistakes having been made in the tally and of alterations having been made in the conclusions arrived at by the person who made the entries in those tally-books that were produced. In my opinion, that is quite sufficient to justify a learned judge, who has already come to a conclusion in reference to the possibility of theft or removal of the goods, in coming to the conclusion that there had been mistakes made in the tallying of the goods into the vessel. That is the view that the learned judge took in this case. He appears to me to have delivered a very careful judgment and a judgment with which it is quite impossible for this court to interfere. For these reasons I think the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion.

SCRUTTON, L.J.—I agree, and I have nothing to add to the reasons given by Greer, J.

Solicitor for the plaintiffs, *W. G. Glover.*

Solicitors for the defendants, *Pritchard* and *Sons* for *A. M. Jackson* and *Co.*, Hull.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, July 14, 1920.

(Before ROWLATT, J.)

BOMBAY AND PERSIA STEAM NAVIGATION COMPANY *v.* MACLAY. (*a*)

Practice—Diversion of ship by direction of Shipping Controller—Claim for compensation—Loss of use and expenses of diversion—Shipping Controller sued as individual—Practice — Government not bound by judgment against official as individual —Action misconceived.

The steamship H. *was in Sept.* 1919 *on a voyage from Newport to Alexandria with a cargo of coal. On the* 30*th Sept.* 1919 *she received a wireless message from the Shipping Controller, directing her to proceed with her cargo to Port Said. She arrived at Port Said on the* 3*rd Oct., and on the* 7*th Oct. the master was informed by the senior naval officer at Port Said that the Shipping Controller's direction to proceed to Port Said had been cancelled and that the vessel might proceed on her voyage to Alexandria. The vessel arrived at Alexandria on the* 8*th Oct., six days later than she would have done but for the Shipping Controller's direction to proceed to Port Said. The plaintiffs, the owners of the vessel, brought this action against the defendant, the Shipping Controller, claiming a declaration that they were entitled to compensation for the loss of the use of the vessel for the six days, and the expenses incurred by them in consequence of the direction given by the defendant under the Defence of the Realm Regulations, and that the amount of compensation should be referred for assessment. It was not disputed that the defendant was authorised by law to give the direction in question. By his defence the defendant pleaded that he was not rightly made a party to the action, and that no cause of action was disclosed in the statement of claim either against him personally or as Shipping Controller.*

Held, that the action was misconceived. The defendant could not be sued, either as an individual or as Shipping Controller. The Crown could not be bound by any judgment obtained in the action. The defect could not be regarded as trivial, and an application to cure the defect by substituting the Attorney-General as defendant could not be entertained.

ACTION in the Commercial List.

The plaintiffs, who were the owners of the vessel, the *Hornayun*, brought this action against Sir Joseph Maclay, the Shipping Controller, and they claimed a declaration that they were entitled to compensation in respect of the loss of time and consumption of stores by their vessel which, while on a voyage with a cargo of coals to Alexandria, was ordered by the defendant to go to Port Said. They further claimed that the amount of compensation should be referred for assessment either to the Admiralty Transport Arbitration Board or to such other referee or tribunal as the court might direct.

In Sept. 1919 the plaintiff's steamer, the *Honayun*, was on a voyage from Newport to Alexandria with a cargo of coals. On the 30th Sept. 1919, the ship was directed by wireless from

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

the Control Board to proceed to Port Said, and did so. She arrived there on the 3rd Oct., and remained there until the 7th Oct. On that day the master was informed by the senior naval officer of that port that the direction of the Board of Control above-referred to was cancelled, and that the ship was free to proceed on her voyage to Alexandria. The *Hornayun* arrived at Alexandria on the 8th Oct., being about six days late; and the action was brought in respect of that loss of time which had resulted from the ship's compliance with the deviation order.

The defendant pleaded that the facts alleged by the plaintiff did not disclose any contract by any person on behalf of the Crown or the Shipping Controller, and that there was no ground for the declaration asked for, and there was no cause of action against Sir Joseph Maclay either in his personal capacity or as Shipping Controller.

MacKinnon, K.C. and *Jowitt*, for the plaintiffs, referred to

China Mutual Steam Navigation Company v. *Maclay*, 14 Asp. Mar. Law Cas. 175; 117 L. T. Rep. 821; (1918) 1 K. B. 33.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), and *G. W. Ricketts* for the defendant.—The action is not maintainable. They referred to

Dyson v. *Attorney-General*, 103 L. T. Rep. 707; 105 L. T. Rep. 753; (1911) 1 K. B. 410; (1912) 1 Ch. 158;
Raleigh v. *Goschen*, 77 L. T. Rep. 429; (1898) 1 Ch. 73;
Guaranty Trust Company of New York v. *Hannay*, 113 L. T. Rep. 98; (1915) 2 K. B. 536;
Hosier Brothers v. *Derby* (*Earl*) *Secretary of State for War*, 119 L. T. Rep. 351; (1918) 2 K. B. 671.

Rowlatt, J.—The plaintiffs bring this action against Sir Joseph Maclay, the Shipping Controller, and they claim a declaration that they are entitled to compensation in respect of the loss of time and the consumption of stores by their vessel which, while on a voyage with a cargo of coals to Alexandria, was ordered by the defendant to go to Port Said, although when she got there she was released and allowed to proceed to Alexandria. It is not disputed that the defendant was authorised by law to give this direction.

Further, it is not suggested that any statute or regulation puts upon Sir Joseph Maclay any financial responsibility in respect of the matters in question. If there is any liability to pay compensation under par. 3 of reg. 39 B.B.B. of the Defence of the Realm Regulations, such a liability rests on the Government, that is the Treasury of this country.

In these circumstances, the point is taken that this matter cannot be decided in an action for a declaration brought against Sir Joseph Maclay. No action can be brought against the Shipping Controller as such.

There is no power to sue the Shipping Controller in his official name. The action must be brought against Sir Joseph Maclay, if at all, as an individual. It has been long established that if an official of the State does something, which, if done by anyone else would be a tort, and there is no law which gives him authority, in virtue of his office, to do that particular act or thing, he must, notwithstanding his official position, answer for it in his own name.

An action for an injunction or for a declaration that he must not do the thing again will not lie against him. Similarly, if a person, by virtue of the position which he holds, claims to be entitled to do a particular act or thing himself, an action can be brought at the instance of someone who may be affected, for a declaration that the defendant is not entitled to do that act or thing.

But in dealing with matters of contract or a question of monetary liability under a statute the position is very different. In the case of a contract made by the representative of a public department, the representative is an agent only, and there can be no question of suing him for money under the contract. It is not sought in this case to sue Sir Joseph Maclay for money payable by statute, but the question is whether, when a person has a demand of this kind, he can get a declaration of his rights against the Treasury by suing an official in his own name because he cannot sue him in any other way.

This subject first came into prominence in *Dyson* v. *Attorney-General* (103 L. T. Rep. 707; 105 L. T. Rep. 753; (1911) 1 K. B. 410; (1912) 1 Ch. 73. In that case certain forms had been issued by the Inland Revenue authorities. The Attorney-General was in a position to enforce obedience to them by bringing informations for penalties. It was there decided that an action could be brought against the Attorney-General in the name of his office to have it declared that the forms were bad, and that the Attorney-General was not entitled to enforce obedience to them. That is how it was put by Pickford, L.J. in *Guaranty Trust Company of New York* v. *Hannay* (113 L. T. Rep. 98; (1915) 2 K. B. 536), and that adequately describes the position.

The decision in *Dyson* v. *Attorney-General* (*sup.*) was based on the old practice in Chancery. It had long been recognised that the Crown cannot be sued, nor could the Attorney-General be sued as representing the Crown, there being nothing in his patent making him liable to be sued for the Crown. But for a long time, as is explained in Mitford Pleadings in Chancery (5th edit.), at p. 32, it had been quite common to make the Attorney-General a defendant to actions in Chancery.

In the administration of property the Court of Chancery decided the rights of competing claimants, and it often happened that it dealt with a subject-matter in which the Crown, as well as the immediate defendant, had an interest; and when that happened the Attorney-General was made a defendant to the bill, so that he could appear and establish or relinquish the rights of the Crown.

In the same way a foreign Sovereign, who could never be sued, was sometimes added as a defendant to a bill in Chancery when the subject-matter was one in which there might be a claim on his behalf. If the foreign Sovereign was made a defendant, he could come in if he chose. In the cases where the Attorney-General was made a party, it will be found that there could be no personal process against him. He was not a corporation. The bill was simply brought to his attention by being left at his chambers, and he could come in and argue it if he liked. He was the officer of the Crown to assert the Crown's rights,

and I can quite understand that in *Dyson* v. *Attorney-General* (*sup.*), a case in which I was one of the counsel, the feeling of the judge was that the Attorney-General, the officer to whom is entrusted the enforcement of the Crown's rights in court, should be made a defendant, so that it might be ascertained what rights he had on behalf of the Crown to enforce. Thus the practice grew up.

But what is the position of Sir Joseph Maclay? He cannot be sued as Shipping Controller, in virtue of his office. It cannot be said that the Crown is to be bound and estopped by suing a private individual who fights the case, possibly at his own expense, though he does not do so in this instance. Such an officer might go out of office or he might die.

When an action is brought against the Attorney-General in Court, a notice is given to the barrister who holds the Crown's patent. Notice is given to the Attorney-General to come in and argue the point. But that cannot be extended to an individual who holds a different kind of office, who has done nothing which makes any call upon himself. I think, therefore, that this action is misconceived.

Then it is said that, after all, it is a small matter, which can be remedied by amending the pleadings and substituting the name of the Attorney-General as defendant. But objection has been taken by the Solicitor-General, and I cannot treat it as a small matter which can be dealt with in that way. It has never been established that, by suing the Attorney-General you could prejudice a petition of right in which money is claimed from the Treasury. That is a claim against the Sovereign, and it is to be dealt with by the Sovereign on the advice of a Secretary of State. If the Attorney-General is proceeded against he has no choice but to deal with the question.

I cannot treat things that are constitutionally different as the same, and, therefore, I do not think it is a trivial matter when I am asked to substitute the name of another public officer on the writ as defendant instead of the one already there. Therefore I think this action is misconceived.

I shall say nothing on the merits, and my opinion is entirely gratuitous, but I think there is something important in this proceeding. It is said that there is a tendency, nowadays, to disregard the limits of power in those who hold official positions, and they seem inclined to do justice as they like. I think that in these circumstances courts of justice ought to be careful and observant of the limits of their own powers, and ought to guard the limits of their own jurisdiction, and be careful of the ambit of that of others. This action will be dismissed.

Judgment for defendant.

Solicitors for the plaintiffs, *Holman, Fenwick, and Willan.*

Solicitor for the defendant, *Treasury Solicitor.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 16, 23, *and March* 23, 1920.

(Before Hill, J.)

THE CEDRIC. (*a*)

Collision—Both to blame in equal degree—Right of contribution of English shipowners against a French shipowner in respect of life claims by French crew's representatives—French law as to shipowners' liability for life claims—French laws of the 29th Dec. 1905 *and the 15th July* 1915—*Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *ss.* 1, 3.

The Y. O. (*French owner*) *and the* C. (*British owners*) *were held equally to blame for a collision in which the* Y. O. *was sunk and certain of her crew drowned. The registrar found* 7131*l. due from the* C. *to the* Y. O. *The representatives of the said deceased seamen had brought life claims against the* C., *who admitted liability.*

The owners of the C. *claimed a declaration that they were entitled to recover half the amount of the life claims from the* Y. O. *and to set off the same against the* 7131*l.*

Held, (1) *that under the law of France, which was admitted to apply, shipowners were not liable to pay life claims except in case of their own personal negligence;* (2) *that under the law of England the French owner would not be liable under Lord Campbell's Act* (*the defence of common employment being open to him*); (3) *that the owners of the* C. *had no right of contribution from the owner of the* Y. O. *in respect of payment by the* C. *on the life claims; and* (4) *that sects.* 1 *and* 3 *of the Maritime Conventions Act* 1911 *by their provisos did not impose any liability upon any person who is exempted by any provision of law. The owners of the* C. *were therefore not entitled to the declaration asked for.*

Cross-motion upon summons to confirm registrar's report.

The facts and contentions herein are fully set out in his Lordship's judgment.

Balloch for the defendants.

C. R. Dunlop, K.C. for the plaintiff.

Hill, J.—In the damage action between the *Yvonne Odette* and the *Cedric* both ships were pronounced to blame. The *Yvonne Odette* was lost with several of her crew. The owner of the *Yvonne Odette* has proved his damages before the registrar and merchants, and by summons asks that the report be confirmed. The report includes claims for lost effects and share of fishing. Representatives of deceased members of the crew have begun actions in respect of loss of life against the owners of the *Cedric*, who admit liability. The amount of damages in those actions has not yet been determined.

The owners of the *Cedric* ask by motion that they may be at liberty to pay the amount of the damages found by the registrar to be due to the owner of the *Yvonne Odette* into court pending the ascertainment of the damages in the life claims, and ask for a declaration that the owners of the

(*a*) Reported by Sinclair Johnston, Esq., Barrister-at-Law

Cedric are entitled to recover contribution from the owners of the *Yvonne Odette* for half the amount of the damages and costs in the life claims, and that, upon ascertainment of the damages and costs in the life claims and payments thereof by the owners of the *Cedric*, they may be at liberty to deduct from or set off against the amount of damages found due from them to the owners of the *Yvonne Odette* half the amount of the damages and costs paid in respect of the life claims.

The question for decision is whether the owners of the *Cedric* are entitled to such contribution. Assuming that they are not in a position to prove personal negligence, causing the loss, on the part of any particular deceased man as an answer to the claim of his representatives, the owners of the *Cedric* are liable in full in respect of the life claims. Whether they are entitled to contribution from the owners of the *Yvonne Odette* depends on whether the Maritime Conventions Act 1911 gives them that right. Apart from the Act they can have no such right.

It is contended that they are given the right, firstly, by sect. 1 of the Act, and, secondly, by sect. 3. The argument on sect. 1 of the Act is based on the decision in *The Cairnbahn* (12 Asp. Mar. Law Cas. 455; 110 L. T. Rep. 230; (1914) P. 25), and is that sect. 1 includes loss to the owners of the *Cedric* by reason of having to pay damages for loss of life on board the *Yvonne Odette*. The argument on sect. 3 of the Act is based on the specific words of the section, which provides: "Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owners of the other vessel or vessels to the extent to which those vessels were respectively in fault."

I am not at all sure that sect. 1 has any reference to liability for life claims, which are specifically dealt with by sects. 2 and 3. But, assuming that sect. 1 and the reasoning in the decision in *The Cairnbahn* (*sup.*) do apply to life claims, both sects. 1 and 3 are subject to a proviso. By the proviso to sect. 1 the section is not to be construed as imposing any liability upon any person who is exempted by any provision of law. I leave out the words of the proviso not relevant to the question in this case. By the proviso to sect. 3 the owners of the *Cedric* can only recover from the owner of the *Yvonne Odette* contribution to the damages for loss of life if the damages could in the first instance have been recovered from the owner of the *Yvonne Odette* had he been sued. This is carried out by sub-sect. 2 of sect. 3, which entitles the paying owner to stand in the shoes of the life claimants.

In either case the court has to find out whether the damages for loss of life on board the *Yvonne Odette* could have been recovered from the owner of the *Yvonne Odette*, or whether he is exempted from liability by any provision of law. It was assumed in argument that the liability of the owner of the *Yvonne Odette* was governed by French law. If it were governed by English law the owner of the *Yvonne Odette* would certainly be exempt from actions under Lord Campbell's Act; the defence of common employment would be open to him. His only liability would be under the Workmen's Compensation Acts. What would be the effect under the Maritime Conventions Act of a Workmen's Compensation Act liability if the *Yvonne Odette* had been British, I need not consider. I desire to express no opinion upon it. The *Yvonne Odette* was French, and her owner was not liable under the Workmen's Compensation Acts.

I have to ascertain whether, under French law, the owner of the *Yvonne Odette* is exempted from liability for the loss of life of the master and seamen on board his own ship. What is the French law is a question of fact. I have before me the evidence of two French lawyers, who express opposite views. M. Bodereaux, for the plaintiff, says that the question is determined by arts. 1 and 2 of the law of the 29th Dec. 1905, which in terms declares the owner free of liability, except in case of his own personal negligence. The French lawyer for the defendants does not dispute that that was the effect of the law of the 29th Dec. 1905, but says that the law of the 15th July 1915, which, like the Maritime Conventions Act 1911, was passed to give effect to certain conventions, overrides the law of the 25th Dec. 1905, and imposes upon the owner of a French ship liability for loss of life of anyone on board his ship. He says that this is the result of the provision that "the ships at fault are jointly and severally (*solidairement*) liable to third parties for losses caused by death or wounds, subject only to the remedy (*sauf recours*) of the ship which may have paid a larger proportion than she is eventually found liable to pay under the foregoing paragraph" (*i.e.*, the clause as to the proportions of loss).

In this controversy of fact, I am driven to look at the law of the 15th July 1915 for myself. It deals with the proportions of blame; it provides that damage to ships, cargoes, and effects and property of crews, passengers, and persons on board are borne by the ships in fault in the aforesaid proportion without joint and several liability to third parties (*san solidarité à l'égard du tiers*); it provides for life and personal injury claims as above stated. There are no provisos analogous to the provisos to sects. 1, 2, and 3 of the Maritime Conventions Act; there are no savings of limitation rights, or of defences based on contractual exemptions, or on personal negligence of claimants. Yet these rights existed in French law before the law of the 15th July 1915. I cannot think that law made a clean sweep of them. For instance, I cannot think the right to limit liability given by art. 216 of the Code de Commerce was abolished by the law of the 15th July 1915, or that the law of the 15th July 1915 gives a seaman, whose personal negligence causes a collision and loss to himself, a right of action for damages against his owner. The French law seems to me to deal only with the incidence of liabilities as between the owners of the two ships in fault, and not to give to the persons injured causes of action which they otherwise would not have. I am, therefore, of opinion that the evidence of M. Bodereaux ought to be accepted.

I hold that the owner of the *Yvonne Odette* is exempt from liability to the representatives of the deceased members of the crew of the *Yvonne Odette*. The case, therefore, falls within the proviso to sect. 3 of the Maritime Conventions Act, and the owners of the *Cedric*, when they pay the life claims, will have no right to contribution.

I therefore confirm the registrar's report with costs, and I dismiss the defendants' motion with costs.

Solicitors: *Thomas Cooper* and *Co*, for *Hill, Dickinson*, and *Co.*, Liverpool; *Stokes* and *Stokes*.

April 19 *and* 26, 1920.

(Before HILL, J.)

THE ESPANOLETO. (*a*)

Writ in rem—*Issue of, when* res *not within jurisdiction—Renewal of writ after twelve months by leave—Extension of time—Order VIII., r.* 1—*Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.

The master of a vessel lost his life in a collision with the E. *on the* 25*th Feb.* 1917. *A writ* in rem *was issued by his widow on the* 13*th Dec.* 1918, *but was not served, as the* E. *had left the jurisdiction, and was not renewed within twelve months under Order VIII., r.* 1. *On the* 19*th March* 1920 *the* E. *was again within the jurisdiction; leave was granted on an* ex parte *application, and writ served. On motion to set aside writ:*

Held, (1) *that a writ can be issued although at the time of the issue the* res *is not within the jurisdiction*; (2) *that the "commencement of proceedings" in sect.* 8 *of the Maritime Conventions Act* 1911 *means commencement by issue of writ, not by arrest*; (3) *that, in general, leave to renew will not be granted if, but for the enlargement of time, the plaintiff's claim would be barred by a statute of limitations. But when an application is made to extend the time for the renewal of a writ in an action which comes within sect.* 8 *of the Maritime Conventions Act* 1911—*which is a limitation section of a very peculiar kind—the application must be considered on its merits, and the court must inquire whether the circumstances are such that the court would give leave to issue a writ notwithstanding that the time had expired.*

THE facts and arguments are fully set out in the judgment.

Langton for the plaintiff.

Alfred Bucknill and *Hayward* for the defendants.

The following cases were cited:

The Caliph, 12 Asp. Mar. Law Cas. 244; 107 L. T. Rep. 274; (1912) P. 213;
Re Jones, 1877, 25 W. R. 303;
Doyle v. *Kaufman*, 1877, 3 Q. B. Div. 7, 340;
Smallpage v. *Tonge*, 55 L. T. Rep. 44; 17 Q. B. Div. 644;
Hewett v. *Barr*, (1891) 1 Q. B. 98.

HILL, J.—The plaintiff is the widow of the master of the steamship *Artisan*, who lost his life by reason of a collision between the defendants' steamship *Espanoleto* and the *Artisan* on the 20th Feb. 1917. On the 13th Dec. 1918 the plaintiff issued a writ *in rem* against the *Espanoleto*. It was not served, and no warrant of arrest was applied for. It was not served because by that time the *Espanoleto* had left the jurisdiction. The writ was not renewed within twelve months, the proper time, and on the 19th March 1920 the plaintiff applied *ex parte* for leave to renew the writ. She obtained that leave and caused a warrant of arrest to issue, the *Espanoleto* having by that time come within the jurisdiction. On the following day conditional appearance was entered, and an undertaking to put in bail given. At the time when I granted, *ex parte*, leave to renew the writ, I was aware that there might be a question arising under sect. 8 of the Maritime Conventions Act 1911 which it would be proper for the court to consider, and, that order being made *ex parte*, it was, of course, open to the defendants to say that the order for renewal had been wrongly made, and that it ought to be set aside. That is one of the objections they have taken on this motion, and which I have to consider.

It is a motion by the defendants to set aside the writ and the renewal and the warrant of arrest, and to discharge the undertaking to put in bail. The first ground of objection is that the arrest is invalid, because there was no valid writ in existence at the time of the arrest. If the writ is bad there is, of course, nothing to support the warrant of arrest. A preliminary objection was taken at the hearing that the original writ was bad, because it was said a writ *in rem* cannot be issued unless at the time of issue the *res* is within the jurisdiction. No authority is given for that proposition, and I think the point is a bad one. Of course, a writ *in rem* cannot be served till the *res* comes within the jurisdiction, but I can see no reason why the writ cannot be issued and then served when the *res* comes within the jurisdiction.

The other objections turn on the Maritime Conventions Act. The point was taken to keep it alive, in case the matter should go further, that sect. 8 of that Act does not, in respect of life claims, repeal the one year's limitation prescribed by Lord Campbell's Act. If that were right and the one year's limitation under Lord Campbell's Act still applied to a writ against the ship, then, inasmuch as the collision happened on the 20th Feb. 1917 and the original writ was not issued until the 13th Dec. 1918, the objection would have been a good one. But the point was decided in *The Caliph* (*ubi sup.*) against the defendants' contention, and I follow that decision. Having regard to sects. 3, 5, and 8 of the Maritime Conventions Act, I do not desire to express any opinion different from *The Caliph* (*ubi sup.*), but in any case I should follow that decision.

The next contention was that the proceedings were not commenced within two years under sect. 8, because that section contemplates that proceedings should be commenced not by issuing a writ, but by arrest. I do not agree. Sect. 8 relates to proceedings *in personam* as well as to proceedings *in rem*. It is an English statute, and in English law it is well understood that proceedings are commenced by the issue of a writ. Order I., r. 1, and Order II., r. 1, of the Rules of the Supreme Court show that an action in the Admiralty Division, like an action in any other division, is commenced by the issue of a writ, and I can see no reason at all for giving a different meaning to the commencement of proceedings under sect. 8 from that which obtains in every other action.

That brings me to the real point in the case Was the plaintiff entitled to a renewal of the writ, the twelve months having expired and expired some time? The original writ was issued within two years, but it was not renewed within the proper time. The court has power to extend the time and to give leave to renew. That is quite clear

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

from the decision in *Re Jones* (*ubi sup.*) and the cases I am about to mention. Whether the leave should be granted after the time has expired must depend, like every other question of granting an extension of time, upon the circumstances of the particular case. In general, leave will not be granted if, but for the enlargement of time, the plaintiff's claim would be barred by a statute of limitations. That is to say, it will not be granted to revive a barred cause of action (see *Doyle* v. *Kaufman*, *ubi sup.*, and, with reference to that case, *Smallpage* v. *Tonge*, *ubi sup.*, and especially *Hewett* v. *Barr*, *ubi sup.*). In general the court must not by renewal deprive a defendant of an existing right to the benefit of a statute of limitations. But sect. 8 of the Maritime Conventions Act is a limitation section of a very peculiar kind, for it contains a proviso unknown to any other statute of limitations; in one event—namely, if there has not been any reasonable opportunity of arresting the defendant vessel within the period—it directs the extension of the limited period of two years, and, further, gives the court power to extend it on any other sufficient grounds.

In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within sect. 8 is made, the matter is not to be disposed of merely by saying that the two years have elapsed and the claim is statute-barred and no renewal can be granted. The application to renew must be considered on its merits, and the court must inquire whether the circumstances are such that the court would give leave to issue a writ notwithstanding that the time had expired.

In the present case affidavits were filed from which the following facts appear: The collision was in Feb. 1917, and the *Espanoleto* for the first time came within the jurisdiction on the 24th Oct. 1918. On the 25th Oct. 1918 the owners of the *Artisan* issued a writ against the owners of the *Espanoleto* and caused her to be arrested. On the 20th Nov. 1918 in that action an undertaking to appear was given and consent made to the vessel's release. On the 3rd Dec. 1918 instructions to the solicitors for the present plaintiff in her action were given. It is said that there is a letter written a week or two earlier instructing them that there would be a claim, but an affidavit shows that the solicitors received the instructions on the 3rd Dec. to present the claim, and they then requested that the name and address of the plaintiff should be cabled to them to enable them to issue the writ. That information was obtained on the 13th Dec. 1918, and upon that day the plaintiff's writ was issued. But in the meantime, on the 11th Dec. 1918, the *Espanoleto* had sailed, and left the jurisdiction. The *Espanoleto* was not again within the jurisdiction until March 1920, when the renewal was applied for and obtained, and the warrant of arrest granted.

The question, to my mind, is whether, in these circumstances, first, the case comes within the obligatory part of the proviso; and, secondly, if it does not, ought I to exercise my discretion in favour of the plaintiff? I think it is not absolutely certain that the case does not come within the obligatory part of the proviso, because I am not at all sure, on the facts as stated, that the plaintiff had had a reasonable opportunity of arresting the ship. But, whether that is so or not, I think I ought to exercise my discretion in favour of the plaintiff. If she had applied for leave to issue a writ in March 1920, I should have granted it. I think, therefore, *à fortiori*, I should grant renewal of the writ which she had originally issued in Dec. 1918.

I therefore make an order in favour of the plaintiff extending the time, and the effect of that is that the defendants' motion is dismissed with costs.

Solicitors: *W. A. Crump* and *Sons*; *Pritchard* and *Sons*, for *Batesons*, *Warr*, and *Wimshurst*, Liverpool.

July 12 *and* 26, 1920.

(Before HILL, J.)

THE VOLTURNO. (*a*)

Collision—Damage for detention during repairs—Date at which the rate of exchange must be taken for conversion into English currency.

Where loss has been suffered by the detention of a ship during repairs owing to collision, the damages must be assessed with reference to the actual period of detention. And if those damages are proved in a foreign currency, the tribunal must convert them into English money at the rate of exchange ruling at that time.

MOTION in objection to a report of the registrar.

The facts and contentions are fully set out in his Lordship's judgment. The following cases were cited in the course of the case:

Barry v. *Van den Hurk*, 123 L. T. Rep. 719; (1920) 2 K. B. 709;
Lebeaupin v. *Crispin*, 124 L. T. Rep. 124; (1920) 2 K. B. 714;
Di Ferdinando v. *Simon*, 124 L. T. Rep. 117; (1920) 2 K. B. 704; (1920) 3 K. B. 409;
Kirsch and Co. v. *Allen, Harding, and Co.*, 122 L. T. Rep. 159; 123 L. T. Rep. 105; 25 Com. Cas. 63, 174;
Scott v. *Beavan*, 1831, 2 B. & Ad. 78;
Manners v. *Pearson and Son*, 78 L. T. Rep. 432; (1898) 1 Ch. 581;
Marburg v. *Marburg*, 1866, 26 Maryland, 8.

Bateson, K.C. and *Balloch* for the English owners.

G. P. Langton for the Italian owners.

HILL, J.—On this motion in objection to the registrar's report, the only question for decision is as to the rate of exchange at which a loss by detention suffered by the owners of the *Volturno* is to be converted from Italian into English currency.

The collision happened on the 17th Dec. 1917 between the *Celia* and the *Volturno*. Both ships were damaged. Temporary repairs to the *Volturno* were made at Gibraltar. Permanent repairs were made at Newport News. The temporary repairs caused a detention of the ship from the 25th Dec. to the 30th Dec. 1917. The permanent repairs caused a detention of the ship from the 24th Jan. to the 18th Feb. 1918. The *Volturno* was an Italian ship, and was under requisition to the Italian Government under a charter-party by the terms of which she was off hire during each period of repair. By the terms of this charter-party hire was payable by fortnightly

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

payments. The hire was payable in Italian lire. The loss to the owners of the *Volturno* by reason of her so coming off hire was in respect of the period the 25th to the 30th Dec. 1917, 47,372.32 lire, and in respect of the period the 24th Jan. to the 18th Feb. 1918, 257,046.40 lire. The damage action was begun by the owners of the *Celia* by writ dated the 24th Jan. 1918. In that action the owners of the *Volturno* counter-claimed. By judgment given on the 22nd July 1919 both ships were pronounced to blame. The owners of the *Volturno* filed their claim in the reference on the 19th Nov. 1919. In it they claimed as damages for loss of use of the *Volturno* the two amounts of lire above mentioned, converting into pounds sterling the 47,372.32 lire at 39.90, and the 257,046.40 lire at 41.30. These were respectively the rates of exchange ruling on the last day of the respective periods of detention.

By an agreed statement of facts, it was stated that the rate of exchange was as follows at subsequent dates, namely, the 22nd July 1919 (date of judgment), 37.55; the 19th Nov. 1919 (date of filing of claim of the *Volturno*), 50.52; and the 8th June 1920, 66.25. On the last-mentioned date the claim, except as regards the rate of exchange on the two items in question, was agreed between the parties, and the only question submitted to the registrar was as regards the rate of exchange on the two items. I observe that in the claim which had been filed the owners of the *Volturno* sought to convert the cost in dollars of the permanent repairs at Newport News at 4.77, which, presumably, was the rate at the completion of the repairs on the 18th Feb. 1918, or of payment of the repairs account on the 20th Feb. 1918. It certainly was not the rate at the 8th June 1920. I am not, however, informed upon what terms the items other than the detention items were agreed. I only mention the fact because the same question as to the time at which the rate of exchange is to be taken may arise as well in regard to cost of repairs as in regard to loss by detention.

The registrar has reported that in his opinion the date of payment is the time at which the rate of exchange should be taken. He says: "In the case of the *Bellagio* I decided, on the authority of Roche, J. in *Kirsch and Co.* v. *Allen, Harding, and Co.*, that the rate of exchange should be taken at the date of payment." The expression "date of payment" is not very clear. In an ordinary reference tried out before the registrar, the registrar must finally express in English currency the amount of damages which he finds to have been suffered. He cannot award an amount expressed in a foreign currency, for a judgment cannot be entered in foreign currency; it can only be entered in English currency. But I will assume that what is meant is that, damages having been assessed in a foreign currency, they must be expressed in English currency at the rate of exchange ruling at the time when they are assessed; that is, at the date of the report. This is in accordance with the decision in *Kirsch and Co.* v. *Allen, Harding, and Co.*, where, in assessing damages for breach of contract, damages expressed in American dollars were converted into English currency at the rate ruling at the date of the judgment.

The controversy before me has been whether the rate should be taken at the date at which the tribunal assesses the damages, or whether it should be taken at some other date. Mr. Bateson, for the owners of the *Volturno*, contended that the rate should be taken as at the date of the writ, or as at the respective dates when the loss by detention was suffered. Mr. Langton, for the owners of the *Celia*, contended that the registrar was right. His strong argument was that the owners of the *Volturno* suffered their loss in lire, and that they would be fully compensated by receiving such an amount in English currency as would at the date they received it purchase the same amount of lire, and that the judgment should therefore be for as many pounds sterling as at the date of judgment would provide that amount of lire.

In addition to *Kirsch and Co.* v. *Allen, Harding, and Co.*, I was referred to the later decision of Roche, J. in *Di Ferdinando* v. *Simon*, and to the decisions of Bailhache, J. in *Barry* v. *Van den Hurk* and of McCardie, J. in *Lebeaupin* v. *Crispin*. Since the hearing of this motion, *Di Ferdinando* v. *Simon* has been confirmed in the Court of Appeal.

These decisions make it clear that Mr. Langton's strong argument and the opinion of the registrar are unsound. In *Di Ferdinando* v. *Simon* the action was for damages for breach of contract to carry goods from London to Italy and for conversion. Roche, J. found the breach and the conversion, and held that the proper measure of damages was the value of the goods at the date when they should have arrived in Italy, which he fixed as the 10th Feb. 1919, and he found the value in Italian lire. He converted the sum of lire so found into English currency at the rate of exchange ruling at the same date, and gave judgment accordingly. On the appeal the contention of the defendants was Mr. Langton's contention in the present case. It did not prevail. Bankes, L.J. said that the plaintiff was entitled to have his damages assessed as at the date of the breach, and that, in order to expresss the damages in English money, the rate of exchange must be taken as it was at the date of the breach. It is to be observed that in *Di Ferdinando* v. *Simon*, whether regarded as a case of breach of contract or of conversion, the damages were ascertainable by ascertaining the market value of the goods at the date at which they should have arrived.

The other cases mentioned were cases of contracts of sale at a price expressed in dollars, and of claims either by seller or buyer for failure to take or give delivery, in which the damages were ascertainable by ascertaining the difference between the contract price and the market price in dollars. In *Lebeaupin* v. *Crispin* the damages appear to have been ascertained by taking the difference between the contract price and the market price at the date of breach. McCardie, J. is careful to point out that he is dealing only with ordinary damages for breach of contract. In *Barry* v. *Van den Hurk* the date of breach is stated to be March and the sellers sold against the buyer in June 1918; the damages in dollars were ascertained by ascertaining the difference between the contract price and the price so realised in June, and were converted into English currency at the rate ruling at that date. I conclude that either the rate was the same in June as in March, or that it was admitted or held that the sellers acted reasonably in not selling till June.

No question of consequential damage suffered at a date subsequent to the breach was involved in any of these cases. But the principles involved seem to me to apply to consequential damages in contract and to damages in an action for negligence. These principles are: an English judgment for damages must be for a sum of English money; where the

damages are assessed in a foreign currency, they must be converted into English money at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed, and not at the rate of exchange ruling at the date when the tribunal is called upon to convert into English money the damages so ascertained. Find the date with reference to which the damages have to be assessed, and that is also the date at which the exchange must be taken for the purpose of conversion.

I apply this to an action of negligence causing collision and damage to a ship, and consequential loss of use of a ship during repairs. The damages must be assessed with reference to the actual period of detention. It is at that time that the owner suffers damage by loss of use. If those damages are proved in a foreign currency, the tribunal must convert them into English money at the rate of exchange ruling at that time. Strictly, it may be that, inasmuch as the loss by detention is suffered day by day, the damages for such loss should be converted at the average rate over the period of detention, or it may be that in the present case, the hire being payable fortnightly, the loss was suffered when the fortnightly payment succeeding the detention became due and was subject to the deduction in respect of the time when the ship was off hire. I need not determine these niceties in the present case. If the rates are to be taken as at the time of the detention, it has not been suggested that the rates should be taken as other than 39.90 in respect of the period of temporary repairs, and 41.30 in respect of the period of permanent repairs. I should add that a rate of exchange is mentioned applicable to a date, Nov. 1918, at which the Italian Government notified that the ship had been off hire during the periods of repair. The ship came off hire by virtue of the charter-party, and it is immaterial when, in settling accounts between the owners and the charterers, the amount was actually debited in account.

What I have said above of course applies only when at the time the reference is held the repairs have been done and the detention already incurred. If the claim is for prospective damages, no question of exchange arises, or, if it arises at all, it is a matter of estimate and probabilities, like everything else in such a claim.

The result is that I allow the appeal. The matter need not go back to the registrar. The two items will be converted into English currency, the first at the rate of 39.90, and the second at the rate of 41.30. I give the appellants the costs of the appeal.

Solicitors: *William A. Crump* and *Son*; *Thomas Cooper* and *Co.*

July 27 *and* 28, 1920.

(Before HILL, J.)

THE TRANMERE. (*a*)

Fog—Speed—Signals—Ferry traffic—Local practice as to ferry signals—Breach of art. 15 (*a*) *of Regulations for Preventing Collisions at Sea.*

A tug in fog with a flotilla in tow of the length of about 500*ft. was proceeding up the river Mersey on her wrong side. She collided with the ferry boat* Tranmere. *Both vessels were held equally to blame, the tug for being on her wrong side, the ferry boat for proceeding at excessive speed in fog.*

Hill, J. found that both the tug and the ferry boat were sounding inappropriate fog signals, and that neither were justified in so doing under the Regulations for Preventing Collisions at Sea.

Hill, J. also considered The Lancashire (2 *Asp. Mar. Law Cas.* 202; 29 *L. T. Rep.* 927; *L. Rep.* 4 *A. & E.* 198) *and refused to lay down any rule of law as to the duty of ferry boats in the Mersey to cease running in dense fog.*

ACTION for damage by collision.

The steamship *Dagmar*, while proceeding up the river, bound for Runcorn, with seven flats in tow, and the luggage ferry boat *Tranmere*, while crossing to the Liverpool from the Woodside luggage berth, came into collision.

The plaintiffs alleged that the *Tranmere* failed duly to sound her whistle for fog and failed to proceed at a moderate speed, and was negligent in crossing the river at all having regard to the weather.

The defendants alleged that the *Dagmar* failed duly to sound her whistle for fog and failed to proceed at a moderate speed, and failed to keep to that side of the fairway which lay on her starboard side.

A. T. Miller, K.C. and *Dumas* for the plaintiffs.

Laing, K.C. and *R. E. Gething* for the defendants.

HILL, J. (after stating the respective contentions):—I am unable to accept in full the evidence on either side. In some respects I think neither side was giving the court true evidence, but there is sufficient for me to arrive at the conclusion that both vessels are to blame. I find that the place of collision was well to the east of mid-river, and therefore the *Dagmar* was on her wrong side. I deal next with the signals that were being given for fog. Was either ship sounding at all? Each says she did not hear the other, and she asks the court to infer that the other ship was not sounding. Each, on the other hand, says she was sounding a signal the nature of which I will deal with later. What is the truth of this matter? Is it that neither ship was sounding a fog signal, and that that is the explanation of the other ship not hearing it; or is the truth that each was sounding a fog signal and the other ship did hear it, but comes to the court to say that she did not hear it in order to excuse her for not having acted upon it? I am in doubt as to a good deal of the evidence on both sides, but I find that both vessels were sounding fog signals, and I am very doubtful whether either side is speaking the truth when it says it did not hear the fog signal of the other.

I will now deal with the nature of the fog signal. The *Dagmar* had a long trail of flats in tow. The total length of the flotilla was about 500ft. The *Dagmar* was going up the river, sounding a single long blast instead of the signal prescribed by art. 15 (*a*) of the Sea Regulations—one long blast followed by two short blasts. The master of the tug confessed that when towing craft in fog he always sounded the single long blast and not the prescribed signal. If that be so, he persistently broke the regulations. It is of very great importance that a vessel towing another or others should sound the proper signal. The indication that the *Dagmar* gave to other ships was that she was a single steamship all by herself coming up the river,

(*a*) Reported by SINCLAIR JOHNSTON, L... Barrister-at-Law.

whereas she was a tug with a long line of flats 500ft. in length. It is said that it made no difference, as it was not a matter which caused or contributed to the collision. If I am right in disbelieving the *Tranmere's* evidence that she heard nothing at all, perhaps it is immaterial; she heard the single long blast, and the collision was not brought about by the length of the tow. On the other hand, if I am wrong in disbelieving her and the fact be that she did not really hear anything, then it may well be that a towing fog signal, one long and two short, might have arrested the attention of people who were careless to a single long blast. It shows the importance of obeying the regulation. As to the *Dagmar*, therefore, I find that she was sounding a signal which might have conduced to the collision.

As to the *Tranmere*, she also was sounding a signal which was not in accordance with the regulations. She was sounding two blasts of moderate length, something between a long blast and a short blast, instead of one long blast. It has long been the practice of the ferry boats on the Mersey to sound special signals according to the particular ferry course they happen to be on, and this practice is well known on the Mersey. The evidence of all the witnesses, except the master of the *Dagmar*, who professed to be ignorant of it, was that the practice is well known. I have no doubt that it was as well known to the master of the *Dagmar* as it was to everyone else. But this departure from art. 15 (*a*) is not justified under the Sea Regulations nor under any special rule which has been made for the Mersey. It is a breach of the regulation, but in this particular case it is impossible to say that it contributed to the collision; for if, as I find, two fairly prolonged blasts were being sounded instead of one long blast, they certainly gave as good a warning as the one would give. If the two were not heard at all, then one would not be heard. If two were heard they gave quite as much, or rather more, information to the *Dagmar* than if only one had been blown.

There remain two questions the answers to which I think depend upon very similar considerations. It is argued that the *Tranmere* contributed to the collision by excessive speed, and it is also argued that she ought not to have been under way at all. I will deal first with her speed immediately before and at the time of the collision. I find against the *Tranmere* upon the question of speed; I find it was not less than four knots, and I think it was probably rather more. [His Lordship here examined the evidence, and, having found that the *Dagmar* had only very slight way, continued:] In the circumstances the *Tranmere's* speed was excessive, because the circumstances were such that the two ships only became visible to each other at a distance of 30ft.—*i.e.*, at so short a distance that it was impossible for the *Tranmere* to do anything to avoid the collision. It is contended that that speed was not wrong for the ferry boat, which had already reached the east side of the river, because she had no reason to anticipate that the *Dagmar* would be improperly coming up the river in her wrong water, and that there was nothing to inform the *Tranmere* that the *Dagmar* was so coming up. That brings one back again to the question of the whistle signals, and as I have found that the *Dagmar* in fact was sounding a long blast—although not the right sort of blast—it was a signal which informed the *Tranmere* that there was a ship coming up on the wrong side of the river. Therefore a speed which would not have been justifiable further out in the river or in crossing the river was not justifiable when the *Tranmere* was approaching her berth. This leads me to the conclusion that the *Tranmere* is to blame for excessive speed contributing to the collision; and in my view, having discussed the matter with the Elder Brethren, it brings me to the same point as the question whether she ought to have been under way at all. Mr. Miller invited me to find in law that in a dense fog the ferry boat was not entitled to be under way, and that it was negligence to be under way at all, and he referred me to *The Lancashire* (2 Asp. Mar. Law Cas. 202; 29 L. T. Rep. 927; L. Rep. 4 A. & E. 198). Now *The Lancashire* was decided in 1874, and the importance of the ferry traffic to Liverpool, Birkenhead, and the whole industry of the Mersey, of course has altered very much since that time. Speaking for myself, I should not be prepared to lay down any rule of law as to the duty of these ferry boats to cease running under any circumstances; and I do not think, if *The Lancashire* is looked at fairly, it is a decision in law that the ferry boats are negligent merely because they are running in dense fog or that they run in dense fog at their own risk. It was not necessary in *The Lancashire* to lay down any such law. *The Lancashire*, the ferry boat, was under way, and was in collision with a ship which was at anchor and found to be ringing her bell. The *Lancashire* therefore was to blame without anything more being said about it. Moreover, I think the judgment of Sir Robert Phillimore, in dealing with the duty of a ferry boat not to be under way in the circumstances, was a decision given with reference to the circumstances of the case which he sets out. From that view I express no dissent; there may be circumstances, owing to fog and other things, which make it impossible for a ferry boat to be under way and at the same time navigate with such care as is required in fog; and in this particular case I think it is probable that at the time in question it was impossible for the ferry boat to make her passage from Woodside to Liverpool except at a speed which in the dense fog was excessive. There was a three-knot tide which she had to overcome and at the same time get down the river on her way to Liverpool. She could not do it unless she was making at least four knots, which in so dense a fog was an excessive speed. Therefore in this case it may well be that it was improper for the ferry boat to be under way at this particular time; but the fault which she committed as against the *Dagmar* was excessive speed, and it is for that I condemn her.

The result is that I pronounce both ships to blame, and I see no reason to draw any distinction in the degrees of fault.

Solicitors: *Hill, Dickinson* and *Co.*, Liverpool; *F. Venn* and *Co.*, for *James Fearnley*, Birkenhead.

PRIZE COURT.

March 3 *and* 16, 1920.

(Before Sir HENRY DUKE, P.)

THE RANNVEIG. (*a*)

Prize Court—Agreement by allies with neutral country conceding right to trade in conditional contraband—Cargo of conditional contraband destined for German base of supplies—Seizure during Armistice.

On the 30*th April* 1918 *an agreement was made between the U.S.A. and Norway, and was assented to by the United Kingdom, under which Norway agreed not to export to Germany foodstuffs except fish in quantities not to exceed* 48,000 *tons per annum. This quantity was duly exported by Norway under Norwegian governmental licence, the monthly total exported being reported by Norway to the United Kingdom. The* R. *during the Armistice under such licence and within such condition was on a voyage to Stettin, admittedly a German base of supplies, and both ship and cargo were taken as prize by H.M.S.* V.

Held, (1) *that the cargo was contraband, the Norwegian trade with Germany in fish provided for by the agreement being that trade only which was consistent with neutrality;* (2) *that as the Armistice did not reopen German trade it gave no immunity;* (3) *that both ship and cargo were liable to condemnation.*

ACTION for condemnation of ship and cargo.

The facts and arguments are set out in his Lordship's judgment.

Sir *Erle Richards*, K.C. and *Balloch* for the owners of the *Rannveig*.

Leck, K.C. and *Roland Burrows* for the owners of the cargo.

Sir *Gordon Hewart* (A.-G.), *Pearce Higgins* and *Hubert Hull* for the Procurator-General.

The following cases were cited:

Usparicha v. *Noble*, 1811, 13 East, 332;
The Hakan, 14 Asp. Mar. Law Cas. 161; 117 L. T. Rep. 619; (1918) A. C. 148;
The Goede Hoop, 1809, Edw. 327;
The Vryheid, 1778, Hay & Marriott 188;
The Acteon, 1815, 2 Dods. 48;
The Twende Brodre, 1801, 4 C. Rob. 33.

Sir HENRY DUKE, P.—His Majesty's Procurator-General claims the condemnation as prize of the Norwegian steamship *Rannveig* and her cargo of 8898 barrels of salted herrings which were captured by H.M.S. *Vidette* on the 6th March 1919, in the course of transit by sea from the Norwegian port of Trondhjem to the German port of Stettin. At the time of the capture foodstuffs were conditional contraband under His Majesty's proclamations of Dec. 1914 and subsequent dates, and Stettin had been found in this court to be a German base of supplies; and the Armistice concluded between the Allied Powers and Germany on the 11th Nov. 1918 was in operation. Claim for the release of the vessel with damages and costs is made by the Norwegian owners on two grounds—that the cargo of fish was being carried to Stettin with the knowledge, permission, and consent of His Majesty's Government, and was being carried to Germany under licence issued by the Norwegian Food Department in pursuance of an agreement made between the Norwegian Government and the Government of the United States with the assent of His Majesty's Government, dated the 30th April 1918, according to the provisions of which Norway is entitled to export to the Central Powers and their allies fish and fish products up to 48,000 tons per annum. The claimants to the cargo, who also claim damages and costs, are the Reichs-fischversorgung Gesellschaft of Berlin, who allege themselves to be the true owners of the cargo, and assert that "the goods were being imported into Germany under permit." The appearance of these claimants was received on the 4th July 1919, during the war, under reservation by the Procurator-General of his right to contend that the claimants had no right to enter an appearance. At the time of appearance this was, no doubt, a well-founded reservation. No objection was, however, raised at the hearing to the appearance of counsel for the claimants, and Mr. Leck argued the case on their behalf.

Sir Erle Richards, on behalf of the shipowners, did not dispute that Stettin must be regarded by me as a German base of supplies or that foodstuffs in transit thither by sea in March 1919 were *primâ facie* subject to capture and condemnation. He proved, however, an agreement made between the United States of America and Norway on the 30th April 1918 with regard to trade between Norway and various belligerents, assented to by Great Britain and other Allied Powers; and upon the terms of this convention he founded the claim for exemption from capture upon which his clients rely. The agreement in question is expressed as being made for the duration of the war, subject to provisions for determination which did not affect this case. The main subjects of the agreement are the supply to Norway of commodities from the United States and the disposal by Norway of the exportable surplus of certain classes of Norwegian produce. With regard to fish and fish products it was agreed as follows: Art. 3. "Norway will not export to the Central Powers or their allies foodstuffs of any kind except fish and fish products. Fish and fish products may be exported in quantities not to exceed 48,000 tons per annum. . . . The quantity of fish and fish products which may be exported to Germany and her allies shall not exceed 15,000 tons in any three months. The export of each class of fish and fish products is to be made in the form in ordinary commercial use in the past." . . . Art. 4. "The quantities which it is expected will be available for export to the United States and the countries associated with the United States in the war are substantially as follows: . . . (5) "Fish and fish products, 48,000 tons." The claimants show by their evidence that the surveillance of the export of fish to Germany under the agreement was left by the United States and the Allied Powers to the Government of Norway, that the Norwegian Government set up with the knowledge of the Powers a system of control of the export and reported to them monthly the totals of the shipments actually made, and that the fish laden on board the *Rannveig* was in point of quantity within the limits of 48,000 tons per annum and 15,000 tons per quarter exportable to Germany under the agreement. The *Rannveig* was a steamship which had been during the war constantly employed in trade between Norwegian and German ports, including the fish trade, and she had been expressly excepted from the operation of an agreement of the Norwegian Shipowners Association

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

whereby the Allies secured the services of their trade of other Norwegian tonnage.

Mr. Samuelson, managing director of the Aktieselskabet Osterjolingen, stated, and the fact no doubt is, that all shipments of fish to Germany under the agreement of the 30th April 1918 were made under licences which were controlled by the Norwegian Customs, and that the cargo in question was loaded under such a licence. In par. 8 of his affidavit he sets forth the conclusions and acts on his part which led to the dispatch of the *Rannveig* on the voyage upon which she was captured. He says: "I was of opinion (*a*) that by reason of the British Government having accepted the benefits of the tonnage agreement, subject to the exception of the named ships, including the *Rannveig*, so long as they continued in the same trade, and (*b*) that by reason of conditions of the American agreement, I was entitled to carry cargoes to Germany in the *Rannveig* within the ration. But after the Armistice was announced, and it became known that British war vessels were in the Baltic, presumably for the purpose of controlling trade with Germany, and a system of control was established, it occurred to me that it was possible that the commanders of the vessels had not been informed of the arrangements made, especially those in relation to the *Rannveig*. I therefore asked the Norwegian Shipowners Association to address a request to the British authorities that they should call attention to the arrangement so that the said ships should not suffer detention, and I am informed that on the 18th Nov. 1918 a communication to this effect was addressed by the Norwegian Shipowners Association to the British Legation at Christiania; I was afterwards informed by the Shipowners Association by telegrams of the 27th Nov. and the 2nd Dec. that the British Legation contended that the ships were liable to capture while carrying cargo to Germany. As this, in my opinion, must be wrong, as the Legation could not say that England having the benefit of the tonnage agreement and of the American agreement nevertheless should deny the ships to proceed and thus disregard one of the conditions of the said agreements, I consequently had nothing else to do than to let my ships go without any special permit." On the 18th Nov. 1918 the director of the Norwegian Shipowners Association wrote to the British Legation at Christiania this letter: "We beg to inform you that we have been approached by owners of vessels running to German Baltic ports during the war (for instructions) whether they could continue in the trade after the change in the situation in the Baltic as a result of the general armistice of the 11th inst. We have replied that in accordance with arrangements in connection with the tonnage agreement, certain named vessels were allowed to continue in the said trade and that such vessels which have not been removed from the German trade may continue to trade on German ports. We expect that the following steamers will remain in the Norwegian German service: Steamship *Rannveig* and steamship *Gunvor III.* We would thank you in case you should find it necessary to call the British authorities' attention to this arrangement, so that these steamers are not going to be detained by the British warships or authorities, which may now control the traffic in the Baltic." He received a reply, the purport of which appears from the following telegram which he forwarded to the managing owner of the *Rannveig*; "B. Samuelson and Son, Bergen.—*Rannveig, Gunvor III.*—British Legation inform us that the ships are liable to capture if cargo is carried to Germany. England interprets our tonnage agreement on this point that they would not demand these ships' transfer to Allied trade." It was at the end of Feb. 1919 that the *Rannveig* was loaded in a Norwegian port and dispatched from Trondjhem, and on the 6th March that she was captured in the Baltic and sent to Leith in charge of a prize crew.

Sir Erle Richards contended that the agreement of the United States of America with Norway made with the assent of Great Britain had the effect of a treaty binding upon His Majesty's Government for a period of its duration, whereby the Norwegian herring trade with Germany to the extent limited by the agreement was exempt from interruption by British naval force. He argued also that there was acquiescence by the Allied Powers in the mode of conducting the fish trade of Norway with Germany during 1918 which ought under the agreement to be held to render the capture unwarrantable. Seizure of a vessel engaged regularly in the trade in question was, he said, an act which must render the agreement in favour of the trade practically inoperative. On the subject of condemnation it was further submitted that at any rate the shipowners had honestly supposed the trade in which they engaged their vessel to be a licensed trade, and they ought therefore to be free from the extreme penalty of confiscation. For the cargo claimants, reliance was placed on the facts already mentioned, and also upon the fact that the seizure took place during the Armistice. There being a suspension of hostilities, it was insisted that the dispatch of foodstuffs to a German base of supply raised no presumption that the same were destined for military use, and that the claim of the Crown ought to fail for want of express proof to that effect. The first question involved in the decision of the case is that of the efficacy under international law of the agreement of the 30th April 1918 and the extent of its operation as an insurance of the allowance of the Norwegian trade with Germany in fish and fish products to which it refers. There is no novelty in the concession or recognition by treaty of special trade privileges or immunities for a contracting party who remains neutral as against another contracting party who becomes or is a belligerent. Numerous treaties to which England was a party in the seventeenth and eighteenth centuries contain stipulations of this kind, and they have been sometimes discussed in our courts. (See *The Goede Hoop* (*ubi sup.*); *The Vryheid* (*ubi sup.*); *The Acteon* (*ubi sup.*); and *The Twende Brodre* (*ubi sup.*) The sovereign will of the powers engaged affords the only measure of the possible extent of such concessions. A judge exercising jurisdiction in prize has only to determine their meaning and effect when they bear upon claims for condemnation or release—*i.e.*, for some decree or relief which is within the scope of his authority. Treating the export of fish by the *Rannveig* for the moment as an act of trade by a Norwegian trader, the question which arises upon the facts is not whether the agreement is in its terms effective to sanction export of fish to Germany, but whether while Germany was a belligerent against the Allies it was effective to sanction the carriage of contraband to a German base of supply. To license such a transaction on the part of an alien friend would be to license an unneutral act whereby he must of necessity lose his character of friend. There is nothing in the terms of the agreement

which shows an intention to authorise Norwegian traders to do any act inconsistent with neutrality. The Norwegian trade with Germany in fish which is provided for is, in my opinion, that trade only which is consistent with neutrality and not trade which is contraband.

Applying every day rules of construction, I come to a like conclusion with that which Sir James Marriott expressed in 1778 in his judgment in the *Vryheid* (*ubi sup.*)—namely, that a treaty right to trade with the enemy in goods which conditionally are contraband must in the absence of express stipulation be limited to "goods going in the ordinary course of merchandise and for merchantile purposes." I therefore hold that the conveyance of fish from Norway to Stettin so long as foodstuffs were conditionally contraband was not by the agreement of the 30th April 1918 permitted to Norwegian traders. Whether the Armistice, which was concluded on the 11th Nov. 1918, suspended the operation of the then subsisting Proclamations as to contraband can be determined by reference to the actual terms of the Armistice without entering upon any detailed discussion of the implications which may or must arise from the conclusion of an armistice. Art. 26 of the terms of the Armistice is in these words: "The existing blockade conditions set up by the Allied and Associated Powers are to remain unchanged, and all German merchant ships found at sea are liable to capture. The Allies and United States contemplate the provisioning of Germany during the Armistice as shall be found necessary." I take it to be a sound proposition that an armistice does not necessarily imply the right to re-provision a beleaguered area or to remove the blockade of a coast: (see Hall, 7th edit., p. 585; Halleck, 4th edit., vol. 2, p. 351), but I think the question need not be examined in this case, since the terms here agreed upon preclude the contention that the Allied Powers had conceded to Germany any privilege of free importation of foodstuffs to her bases of supply. So far as regarded traffic by sea to Stettin, the Armistice did not grant anything to the enemy. Only by opening German trade could it have enlarged the rights reserved to Norwegian citizens under the agreement, and since it did not reopen German trade it is ineffectual as an independent ground of immunity for the present neutral claimants. Whether a Norwegian owner of fish might have raised effectual objection against rights by capture arising under a blockade set up after the agreement was concluded I need not consider. These claimants are not Norwegian subjects. They were not within any class of traders for whose benefit this agreement was made by the Norwegian Government. They are simply a German corporation who had purchased foodstuffs in Norway for the German state and were engaged in conveying the same by sea to a German base of supply. It is hard, if not impossible, to find any ground of principle on which a claim on their part can be founded. As to the cargo, therefore, I have come to the conclusion that the claim of the Procurator-General must prevail and there must be a decree of condemnation of the herrings as foodstuffs captured in course of transit to an enemy base. The cargo of the *Rannveig* being contraband, what is the position of the owners? They dispatched their ship not only with full knowledge of the character of the burden and of its destination, but after the plainest warning of the risks they ran in doing so. There is no ground for the submission that they were misled. Under such circumstances none of the considerations arise which relieve from the penalty of confiscation shipowners who innocently carry contraband. Having regard to the rule laid down in *The Hakan* (*ubi sup.*) it is my duty to pronounce condemnation of the *Rannveig* as good and lawful prize.

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

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

Solicitors for the cargo owners, *Waltons* and *Co.*

Tuesday, March 23, 1920.

(Before Sir HENRY DUKE, P.)

THE DROTTNING SOPHIA. (*a*)

Practice — Investment of proceeds of sale pending action for condemnation—Terms of bail bond upon release to claimant of goods unsold pending action for condemnation — Prize Court Rules 1914, *Order I., r. 2; Order XI., r. 2; Order XXVI., r.* 1 *—Supreme Court Fund Rules* 1915, *rr.* 73, 74, 74 (*a*).

Claimants to goods seized as prize had obtained orders from the registrar (1) *that the proceeds of sale of certain of the goods should be placed on deposit in the joint names of the claimants and of the Procurator-General, or, alternatively, be invested in Government funds; and* (2) *that unsold parcels should be released on bail. The Procurator-General contended as to* (2) *that the costs and charges of seizure and detention already incurred should be paid unconditionally as a condition of release.*

Held, that the proceeds of goods sold pending the hearing of an action for condemnation should not be placed on deposit or invested.

Held, further, that where goods are released on bail the claimant should not be required as a condition of the release to pay unconditionally the costs and expenses already incurred; and a claimant who pays costs and charges of seizure and detention upon receiving delivery of such goods ought to have credit for the payment as against the security which represents the full value of the goods in the event of his failure in the litigation, and that the bail bond should be expressed in terms which will evidence this right.

APPEAL SUMMONS.

The facts and contentions herein are fully set out in his Lordship's judgment.

C. W. Lilley (Sir *Gordon Hewart*, A.-G., with him) for the Procurator-General.

Sir *Robert Aske* for the claimants.

Sir HENRY DUKE, P.—In this group of cases certain goods brought in for condemnation as prize and claimed by various claimants have been sold, and the proceeds, amounting to about 85,000*l.*, are in court. Certain other goods similarly brought in and claimed remain unsold in the custody of the marshal. In these circumstances application has been made in chambers for directions that the proceeds of sale of the goods first mentioned be placed on deposit in joint names to be agreed, or alternatively invested

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

in the public funds, and that the goods unsold be released to the claimants upon giving security for the ascertained value of the same less the amount of the costs and charges payable on delivery in respect of the seizure and custody thereof. Upon the application for placing the fund in court on deposit an order has been made in the registry against which the Procurator-General appeals. A question of principle is involved. Sir Robert Aske, on behalf of the claimants, admitted at the hearing of the appeal that the order could not be claimed as of right. He contended, however, that such an order is within the discretionary power of the court, and ought, on equitable grounds, to be made.

The Prize Court Rules 1914 direct that sale of prize shall be followed by payment into court of the gross proceeds of sale (Order XI., r. 3; Order I., r. 2), and that funds and moneys paid into court in prize matters, and securities placed to the credit of such matters, shall be dealt with in the exercise of the ordinary jurisdiction of that court: (Order XXVI., r. 1). Reference was made before me to the Supreme Court Funds Rules 1915, rr. 73 and 74, but, in view of the terms of rule 74 (*a*), the provisions there made cannot, I think, be taken to strengthen the case of the claimants upon this application. The question is to be determined upon considerations of the established procedure of this court and the circumstances of the particular case. The application is novel in character. It was suggested on behalf of the claimants that an investment which ought to be sanctioned, having regard to the nature and liabilities of the fund, was an investment in Government stocks. Counsel did not, however, take account of the fact that an order for such investment would have the effect of making the public funds of the United Kingdom chargeable with interest in favour of successful claimants of goods seized as prize, even though the case should prove to be one in which the court does not think fit to award damages. Interest by way of damages can be awarded against captors under the general jurisdiction of the court in cases of unjustifiable capture or of misconduct after capture, but there is, I believe, no other ground on which such an award has been customarily made.

The common form of order in past times where between capture and release sale took place was, I think, an order for payment out of the proceeds of sale, subject to any proper deductions in respect of costs or expenses. During wars when prize was by statute or by Order in Council granted to captors, an order for investment certainly could not have been made at the discretion of the judge without consent of the parties. Investment in a fund of fluctuating capital value might have left captor or claimant exposed to serious risk of receiving a diminished fund, or making good a diminution in value. Having regard to past practice, and to the effects which would follow the introduction of orders for investment of prize funds, at the instance of either captors or claimants, I am not ready to introduce or adopt a novel procedure in this case. It is true that in *The Kronprins Gustaf Adolf* (1917, 2 Br. & Col. P. C. 418) the late President, Sir Samuel Evans, ordered payment of interest by the Crown, but this was done under exceptional circumstances, as Lord Sterndale pointed out in *The Hallingdal* (14 Asp. Mar. Law Cas. 467; 121 L. T. Rep. 477; (1919) P. 204, 227). Except for a long delay in bringing the cause to hearing, for which I cannot hold the Crown to be in fault, there are no exceptional circumstances in this case, and this order appealed against must be set aside.

The difficulty which exists in respect of the order sought by the claimants for release against a bail bond of the goods unsold is due to the form of draft bail bond which they have tendered. The claimants seek a decision upon a question of principle which has lately come under consideration in various instances. They ask that the practice of the court shall be defined as to cases in which goods under detention in prize are ordered to be released to claimants on bail, and that the terms of the security to be given to the court shall be so expressed as, in the event of present payment of costs and expenses of detention, to exonerate them and their sureties from further liability. There are certain events of prize proceedings in which the liability for costs and charges and the nature of the security for that liability are already well ascertained. Apart from any exceptional circumstances, goods and proceeds of goods which are the subject of proceedings in prize are, according to the ordinary practice of the court, subject to a charge for costs and charges of seizure and detention. If the captor obtains a decree for condemnation, his interest in the goods or fund, the subject of the decree, is charged with these costs and expenses. If the claimant succeeds in the cause, the decree in his favour leaves him to bear the like burden. In an unreported case of *The Adonis* Lord Sterndale recently stated the position to this effect: "If goods are condemned, the Crown bears the expense of keeping them out of the fund got by condemnation; where the goods are released the expenses are taken out of the fund which is released; where bail has been given and goods are condemned there is simply an order of condemnation, and no order is made as to the repayment of the expenses, but that has been the custom in the registry, and no case in which the question arose whether it was right has come before either the judge or the registrar."

The substantial question now at issue is that which was left undecided in the case of *The Adonis*—namely, whether a claimant who obtains release on bail of a captured ship or goods should be required as a condition of the release to pay unconditionally the costs and expenses already incurred.

On behalf of the Crown it was argued that he should do this in consideration of such advantage as he may derive from having the use of the goods before trial. In theory the amount payable under this bail bond in the event of condemnation is the market value of the ship or goods, and this value—which is subject to the charge already mentioned—is the whole thing in litigation between captor and claimant. I say nothing of costs of the cause. To add to the loss of the confiscable subject the loss of an amount which is properly only a charge upon that subject seems to me inconsistent with the general practice of the court in relation to the release of captured property. It would also, in my opinion, be inconsistent with the form of prize bond which is found in Appendix A to the Prize Rules 1914. The effect of that bond is to provide security for payment by the claimant of "what shall be adjudged against him in the cause with costs." If under such a bond the

sureties for a claimant become liable for payment of the full value of the captured property in question, then, save as to costs of the litigation, they, and consequently he, become liable for no more.

On the whole, I come to the conclusion that a claimant who pays costs and charges of seizure and detention upon receiving delivery of goods ought to have credit for the payment as against the security which represents the full value of the goods in the event of his failure in the litigation, and that the bail bond may be expressed in terms which will evidence this right.

Solicitors: *Treasury Solicitor; Botterell* an *Roche.*

April 15, 16, *and* 28, 1920.

(Before Sir HENRY DUKE, P.)

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL. (*a*)

Ships on time charter not amounting to demise carrying contraband — Degrees of knowledge of owners, charterers, and masters—Liability to condemnation.

A German subject carrying on business since 1900 *in New York and president of an American steamship line chartered in* 1912 *and* 1913 *on behalf of that line on time charters for terms of nine or ten years three Norwegian vessels. The Norwegian owners retained* (inter alia) *the right to appoint and dismiss the master. At the outbreak of war the ships were directed to New York, and the president organised a regular service of vessels from the U.S.A. carrying foodstuffs consigned to agents of the packers in Copenhagen, in which service the three vessels were engaged when captured. It was found by inference by the court that the service was organised as a means of furnishing to the German Government through Copenhagen necessary supplies. At the time of capture one of the vessels had on board a small quantity of rubber falsely described as gum. Two of the owners were proved to have, and the third did not disclaim, knowledge of the voyage.*

Held, on the broad facts as to the whole undertaking, the knowledge of the master, and the knowledge of the charterers, the ships were liable to condemnation.

ACTIONS for condemnation of neutral steamships for carriage of contraband.

The facts and arguments are fully set out in his Lordship's judgment.

Sir *Gordon Hewart* (A.-G.), *R. A. Wright*, K.C., and *J. Wylie* for the Procurator-General.

Balloch for the shipowners.

The following cases were referred to:

The Hakan, 13 Asp. Mar. Law Cas. 479; 115 L. T. Rep. 389; (1916) P. 266; 117 L. T. Rep. 619; (1918) A. C. 148, 155;
The Alfred Nobel, 14 Asp. Mar. Law Cas. 378; 119 L. T. Rep. 320; (1918) P. 293;
The Ran, 14 Asp. Mar. Law Cas. 486; 122 L. T. Rep. 245; (1919) P. 317;
The Hillerod, 14 Asp. Mar. Law Cas. 190; 118 L. T. Rep. 268; (1918) A. C. 412;
The Dirigo, 14 Asp. Mar. Law Cas. 467; 121 L. T. Rep. 477; (1919) P. 204;
The Zamora, Lloyd's List, April 2, 1919;
The Alexander, 1801, 4 C. Rob. 93;
The Adonis, 1804, 4 C. Rob. 256;
The Panhagia Rhomba, 1858, 12 Moo. P. C. 168;
The Carolina, 1802, 4 C. Rob. 256;
The Orozembo, 1807, 6 C. Rob. 430, 435;
The Friendship, 1807, 6 C. Rob. 420;
The Neutralitet, 1801, 3 C. Rob. 295, 297.

Sir HENRY DUKE, P.—In these cases consolidated for trial the Crown claims condemnation of three Norwegian steamships which in Nov. 1914 were captured in course of the voyage from New York to Copenhagen with cargoes mainly consisting of foodstuffs, and brought into the custody of the marshal. Causes for condemnation of the ships and their cargoes were instituted, which, after release of the vessels on bail, came to a hearing in July and Aug. 1915, with the result that a large part of each of the cargoes was condemned as conditional contraband destined for delivery at an enemy base of supply. A parcel of rubber from the cargo of the *Kim*, which was described in the ship's papers as gum, was also condemned as absolute contraband shipped for an enemy destination under a false description. The President, Sir Samuel Evans, adjourned the hearing of the claims for condemnation of these ships, and of another neutral steamship, the *Fridland*, which had been captured under like circumstances, and which subsequently was released for reasons not now material.

At the hearing before me discussion as to the character of the several cargoes and the circumstances of the various shipments was limited to such aspects of the matter as relate to the liability of the ships to confiscation, applying to the case the principles stated by the Privy Council in *The Hakan* (*ubi sup.*) and by this court in two recent judgments.

Some evidence was adduced with regard to the several cargoes and the circumstances of the shipments which was not before the court at the hearing of the cause with regard to the cargoes. This included evidence as to flour and grain on board the ships, which came before Lord Sterndale in *The Dirigo* (*ubi sup.*), and other evidence as to consignments of which release was shown in *The Alfred Nobel* (*ubi sup.*) to have been obtained at the hearing before Sir Samuel Evans by means of a concocted case. Counsel for the Crown proved also a variety of acts on the part of the Gans Steamship Line, who were the charterers of the three ships, John H. Gans, president of that concern, the owners and masters of the ships, and the shippers of various consignments of cargo, which necessitates a reference in general terms to the case which was established.

The Crown was able to show, from statements of Mr. John H. Gans and his associates, and from the nature of the transactions, that shortly after the outbreak of war Mr. Gans organised as a new undertaking a line of steamships from New York to Copenhagen for the purposes of carrying on upon a large scale a new trade organised by him chiefly in hog products, wheat, and flour, and that in this trade the Gans Steamship Company engaged not only the ships in question, of each of which they were charterers for a term of years, but other neutral shipping of the same class. Mr. Gans, who died in the summer of 1915, was a German subject who had been engaged in the shipping business in New York since 1900. The

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

evidence showed him to have been from the outbreak of the war an enemy agent of formidable activity, and one of a group of such agents who were resident in New York.

The vessels here in question were all in Norwegian ownership. The *Kim* was of 5857 tons gross, registered at Tonsberg, in Norway, and owned by P. Johanssen of that port; the *Björnstjerne Björnson*, of 5268 tons gross, the property of a company at Bergen; the *Alfred Nobel*, of 4769 tons gross, belonging to a company at Flekkefjord. The *Kim* was chartered in May 1912 and delivered in March 1913; the *Björnstjerne Björnson* was chartered while building in June 1912, and delivered in Oct. 1912. The charters were for terms of nine or ten years. At the outbreak of war all the ships were engaged in various parts of the world in general trade, and they were directed to New York by the charterers. By each charter-party the ship named therein was agreed to be let for a term of years from the date at which she should be put at the disposal of the charterers, ready to receive cargo, and with full complement of officers and crew, and was to be so maintained during the continuation of the charter-party. She was to be "employed in carrying lawful merchandise" between all ports, with certain specified exceptions here immaterial, as the charterers or their agents should direct. The owners were to appoint the master and to provide and pay officers and crew, to pay for insurance, and to maintain the ships in an effective condition. The hire was agreed at a fixed monthly rate. The master was to be under the orders of the charterers "as regards employment, agency, and other arrangements," and it was provided that if the charterers shall have reason "to be dissatisfied with the conduct of the captain, officers, or engineers, the owner shall, on receiving particulars of complaint, investigate the same, and, if necessary, make a change in the appointment." The charterers were given the option of sub-letting. The charter-party of the *Björnstjerne Björnson* had as a term that the steamer should "only be employed in strictly neutral trades, contraband, blockaded ports, and ports where hostilities in progress excluded."

The sailings of the new line into which the three ships were directed by Mr. Gans began on the 20th Oct. 1914. The first four vessels appropriated to the service, including these three and the *Fridland*, left New York respectively on the 20th Oct., the 27th Oct., the 28th Oct., and the 11th Nov. Some knowledge of the scale of the undertaking and the character of the arrangements is to be derived from the facts as to the consignments of meat products. These three ships carried between them meat products, for four firms of meat packers, consigned to agents of the packers in Copenhagen, to the extent of upwards of 19,000,000lb. The Hamburg firm of Neumann, who had sent one of their members to New York, shipped large consignments of grain and flour. Mr. Gans organised the service and conducted personally the engagements of freight for the new line, and took an active part in the detail of the arrangements. For example, he arranged that consignments of rubber, which were invoiced as rubber, should be shipped as gum, not only in the case of the *Kim*, but in various other cases.

Evidence in considerable detail as to the activities of Mr. John H. Gans was furnished in an affidavit of Mr. Woods, Secretary of the Prize Department of the Procurator-General. From the outbreak of war Mr. Gans was engaged at New York in the organisation and use of neutral shipping for the belligerent purposes of Germany. As an instance it is sufficient to mention a clearance of neutral vessels from New York upon perjured affidavits for the purpose of delivering supplies to German warships at sea, a transaction which resulted, shortly after the death of Mr. Gans, in the prosecution by the United States Government and the conviction of some of the persons who were engaged with him in the transaction. Mr. Woods' affidavit also gives evidence of occasions in which Mr. Gans was the means of dispatching to Europe early in the war large consignments of foodstuffs purchased by the German Government in the United States.

Taking into account the activity of Mr. Gans in every field in which he was able to give active assistance to the enemy, I have no doubt that the true inference from the facts as to the Gans line to Copenhagen is that he organised it as a means of furnishing to the German Government through Copenhagen the regular service of necessary supplies, which, as is notorious, and as the intercepted messages show, they were unable to obtain through previously existing means of transport.

The part which was played by the charterers, through Mr. John H. Gans, in the organisation and management of the contraband service in which the *Kim*, the *Björnstjerne Björnson*, and the *Alfred Nobel* were engaged by them is aggravated by numerous false statements made, no doubt on instructions of the charterers, contained in the letter of their solicitors dated in Dec. 1914, in which the solicitors discuss the charge of "shipment of conditional contraband by indirect routing through Scandinavian countries"; and the three affidavits made early in 1915, in which Mr. Gans himself dealt with the same matter.

The knowledge of the charterers being of the complete kind which arose from organisation and conduct of the undertaking, the facts as to the personal knowledge of the owners and the knowledge of the several masters require to be considered. Neither of the owners gives in his affidavit any explicit statement as to the information he had before his ship left New York of the voyage in question and the nature of the cargo. Neither of them denies such knowledge, and two of them are shown to have had it. The respective masters had very complete knowledge of what was going on, as their affidavits show. They signed the bills of lading, other than the through bills of lading, and superintended the shipment of the cargo. They knew the novelty of the trade, and must, I think, have been aware of the position and activity of Mr. Gans. At a time when precautions, by insistence on consignment to named neutral consignees in neutral countries and guarantees for neutral consumption, were being called for by cautious owners, they were aware that the Gans line dispensed with any such precautions. The messages exchanged between the masters and owners of the *Kim* and *Björnstjerne Björnson* are an index to some of the questions which necessarily arose. The masters of the several ships were inevitably aware, in my opinion, of the meaning and effect of the wholesale shipments to Copenhagen in which they were taking part of goods which were conditional contraband.

As to the *Kim*, it is to be added that her master took part in the misdescription of the consignment of rubber which she carried.

The facts being as I have stated them, counsel for the Crown claimed condemnation of the three ships on the ground, in the first place, upon which judgment was given in this court by Sir Samuel Evans in *The Hakan* (*ubi sup.*)—namely, that there is a rule of international law whereby neutral vessels carrying contraband which by value, weight, volume, or freight value forms more than half the cargo are subject to condemnation. They contended also that there was proof as in *The Hakan* (*ubi sup.*) of a time charter which enabled the charterers to use the ship for a contraband trade and made tha acts of the charterers acts for which liability attached to the owners, and that the ships were subject to confiscation by reason of the undoubted participation of the masters in the contraband transaction. They also argued thar there was evidence of actual knowledge of the owners. As to the *Kim*, a further ground of condemnation was alleged in respect of the carriage of contraband—namely, rubber—under a false description intentionally placed upon the ship's papers by the charterers and the master.

That the cargoes of the three ships in question came within the rule as to half contraband which Sir Samuel Evans stated in *The Hakan* (*ubi sup.*) is unquestionable. I prefer, however, to deal in the present case with the question which was the chief subject of argument before me, that, namely, of the degree and nature of the "knowledge" which renders a ship liable to confiscation for carriage of contraband. Sir Samuel Evans found actual knowledge of the owners in *The Hakan* (*ubi sup.*), and the case was decided in the Privy Council on that ground. "Knowledge on the part of the owners," it is said, "is sufficient to justify condemnation—at any rate, when the goods in question constitute a substantial part of the cargo." These words were also used which tend to limit the operation of the rule: "There can be no confiscation without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo." The judgment in *The Hakan* (*ubi sup.*) does not of itself supply a conclusive test for application in the present case.

Since the decision in *The Hakan* (*ubi sup.*) the cases of *The Dirigo* (*ubi sup.*) and *The Ran* (*ubi sup.*) have been argued and determined in this court. Each of them has a direct bearing on the problem now under consideration. *The Dirigo* (*ubi sup.*) was a case of a whole cargo of contraband, and condemnation was claimed on that ground apart from the facts which showed knowledge on the part of the owners. Lord Sterndale, however, thought it well not to act on that contention, but to examine whether there was such knowledge, taking in this respect the same course as he had taken in *The Zamora* (*ubi sup.*). Upon a finding of knowledge on the part of the owner the *Dirigo* was condemned. The knowledge which was found to have existed was knowledge of one G. W. McNear. The ship was the property of a corporation—G. W. McNear Inc.—whose affairs in the relevant transactions were conducted by G. W. McNear.

In *The Ran* (*ubi sup.*) the owner of a Norwegian vessel chartered her to an American firm in Oct. 1914 for a single voyage from New York to Scandinavian ports between Bergen and Malmö, including Copenhagen. She loaded a miscellaneous cargo which included some parcels of copper, thirty-three cases of crude rubber, 2010 bundles of aluminium ingots, and 357 cases described as "gum," but in fact containing rubber. Lord Sterndale was not satisfied that the charterers had knowledge that the rubber in the thirty-three cases was misdescribed, and he said this: "It is to be remembered that knowledge of the misdescription is not of itself enough; there 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. I can find no case in which such knowledge on the part of a charterer, even if it existed, has been held sufficient to justify the condemnation of the ship." Lord Sterndale also examined the grounds of the judgment of Sir Samuel Evans, P. in *The Hakan* (*ubi sup.*), when that learned judge, speaking of a charter for the Baltic trade during the war, declared it to be no obstacle to condemnation "if owners in time of war and in waters favourable to contraband trading enter into time charter contracts." Lord Sterndale's commentary upon this view of the law is expressed in the following words: "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 the vessel over to the charterers." Lord Sterndale distinguished the case of *The Ran* (*ubi sup.*) from that of *The Hakan* (*ubi sup.*), and pointed out that the *Hakan* was chartered for the purpose of the trade in the Baltic, including German ports, in which she was engaged at the time of seizure, whereas the *Ran* was chartered for a specific voyage from neutral port to neutral port, was engaged in trade apparently neutral at the time of seizure, and was only brought in question because the charterer "against the owner's wish," included in the lading of the vessel some minute portion of cargo destined for an enemy country.

So far as the present case is concerned Sir Samuel Evans' judgment in *The Hakan* (*ubi sup.*) supports the claim of the Crown against the three ships claimed for condemnation, and its force is not weakened by the words of explanation used by Lord Sterndale in *The Ran* (*ubi sup.*). The judgment is relied upon by the Crown in support of a proposition that the time charter-parties made by the owners of the *Kim*, the *Björnstjerne Björnson*, and the *Alfred Nobel* with the Gans Shipping Company put it in the power of the charterers to make the use which they in fact made of the three ships, and that when the charterers made a hostile use of the ships which the power granted to them by the owners enabled them to make the owners became involved with the charterers in the consequences which that use of the ship entails.

Seeing that the judgments in *The Hakan* (*ubi sup.*) and the other recent cases to which I have referred do not of themselves directly determine the questions involved in the present inquiry, it is permissible to examine the matter in relation to more general considerations. The confiscation

of ships by reason of a hostile part taken as between belligerents, or, as it has been called, "mixing in the war," is not limited to confiscation on account of the carriage of contraband to a belligerent; it extends to various breaches of neutrality. Breach of blockade is one; engagement in the belligerent operations of the enemy covers a variety of others, among which are included transport service and the carriage of persons or stores or dispatches for warlike purposes. In many such cases the question has from time to time arisen which arises here—What is the knowledge on the part of an owner which involves him in liability to confiscation of his ship? When the hostile act in question is the breach of a blockade, the shipowner is bound by the act of the master; the cargo owner is also bound if at the time of shipment the blockade was known or could have been known. Upon this subject art. 21 of the Declaration of London seems to add nothing to the conclusions of Lord Stowell in *The Alexander* (*ubi sup.*) and *The Adonis* (*ubi sup.*) and the judgment of the Privy Council in *The Panaghia Rhomba* (*ubi sup.*). Where the hostile act was the use of a ship as a transport, Lord Stowell in *The Carolina* (*ubi sup.*) decreed condemnation, although, as he stated in a later case, *The Orozembo* (*ubi sup.*), "the master was an involuntary agent acting under compulsion."

In *The Friendship* (*ubi sup.*) and *The Orozembo* (*ubi sup.*) the carriage of persons was the cause of forfeiture. Lord Stowell in the latter case discussed the question of *mens rea*. "It has been argued," he said, "as if the ignorance of the master alone would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons besides the master whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary? Or if those who had been employed to act for the owner had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons as in the owner? . . . The ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him."

Lord Stowell did not, so far as I am aware, determine in a case of carriage of contraband what knowledge on the part of the owner or his representative would warrant confiscation. In *The Neutralitet* (*ubi sup.*), however, he did describe the relaxation of the ancient rule of confiscation upon mere proof of the fact of carriage as resulting from "the supposition that freights of noxious or doubtful articles might be taken without the personal knowledge of the owner."

In each of the present cases the master knew all the material facts at all material times, and was actively concerned in his own ship's part in an enterprise which was calculated and designed to give vital assistance to the enemy. The charterers organised and conducted the enterprise. The owners of the *Kim* and the *Björnstjerne Björnson* are proved to have had knowledge of the voyage. The owners of the *Alfred Nobel* do not disclaim like knowledge. I do not proceed, however, upon distinctions applicable to one or other of the vessels, and I do not apply a separate rule in the case of the *Kim* because of the shipment of rubber under a false description. The broad facts as to the whole undertaking, the knowledge of the master, and the knowledge of the charterers seem to me to make a clear case for condemnation with regard to each vessel.

I decree condemnation of each of these ships, the *Kim*, the *Björnstjerne Björnson*, and the *Alfred Nobel*, as good and lawful prize.

Solicitors: *Treasury Solicitor; Botterell* and *Roche*.

Naval Prize Tribunal.

Jan. 30 *and March* 12, 1920.

(Before Lord PHILLIMORE, Admiral of the Fleet Sir GEORGE CALLAGHAN, and Sir GUY FLEETWOOD WILSON.)

THE FELDMARSCHALL. (*a*)

Naval Prize Tribunal—Joint capture—Co-operation and joint expedition of land and sea forces—Droits of Admiralty—Droits of the Crown—Naval Prize Act 1918 (8 *& 9 Geo.* 5, *c.* 30).

During the final campaign in German East Africa, in pursuance of a concerted operation by naval and military forces, the port of Dar-es-Salaam was captured by naval forces, military forces entering the town some four or five hours after its surrender. The German steamship F. *was at Dar-es-Salaam at the time.*

Held (*Sir Guy Fleetwood Wilson dissenting*), *that the facts proved a joint enterprise; but that the capture of the* F. *was a capture by the naval forces alone, not a joint capture by naval and military forces.*

Held, by the whole tribunal, that the law applicable to the division of the proceeds of joint captures was that that part which ought to be appropriated to the navy is a droit of the Crown and therefore will be directed to be paid to the Naval Prize Fund under the Naval Prize Act 1918; *and that that part which ought to be appropriated to the army is a droit of the Admiralty, and therefore will be paid to the Exchequer to be dealt with as the Crown may be pleased.*

In this case the arguments and facts are fully set out in the judgment.

Pearce Higgins (Sir *Gordon Hewart* (A.-G.) with him) for the Exchequer and the Army.

Sir *Reginald Acland*, K.C. and *Darby* for the Naval Forces.

The following cases were cited in the arguments and judgments:

The Hoogskarpel, Rothery's Prize Droits, p. 25; and see the judgment of Lord Phillimore herein;
The Twee Gesusters, 1799, 2 C. Rob. 284 (*n*);
Le Franc, 1799, 2 C. Rob. 285 (*n*);
The Dordrecht, 1799, 2 C. Rob. 55;
La Bellone, 1818, 2 Dods. 343;
The Stella del Norte, 1805, 5 C. Rob. 349;
The Genoa and Savona, 1820, 2 Dods. 444;
The Tarragona, 1821, 2 Dods. 487;
The Naples Grant, 1818, 2 Dods. 273;

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

The Banda and Kirwee Booty, 1866, 3 Asp. Mar. Law Cas. 66: 14 L. T. Rep. 293; L. Rep. 1 A. & E. 109;
The Rebekah, 1799, 1 C. Rob. 227;
The Galen, 1815, 2 Dods. 19;
The Nordstern, 1809, 1 Acton, 128;
The Belgia, 13 Asp. Mar. Law Cas. 350: 120 L. T. Rep. 252; (1919) P. 41;
The Hertha, 1781-6 (unreported).

Lord PHILLIMORE.—In this case a claim has been preferred on behalf of the Treasury that the capture should be treated as one made by joint captors, the ship having been actually taken by the squadron under Admiral Charlton, but it is suggested that the land forces under General Smuts so far contributed to the success of the operations as to entitle them under the rules of prize law to be considered as joint captors.

The Feldmarschall had apparently been in the port of Dar-es-Salaam since the beginning of the war. Dar-es-Salaam was attacked several times in the earlier stages of the war by British naval forces, and in November 1914 an arrangement was made, the town being incapable of defence at the time, under which a detachment from the British navy was allowed to enter the harbour and dismantle the engines of the *Feldmarschall*, so that she could not proceed to sea, and she remained unable to proceed to sea, but afloat, till the surrender on the 4th Sept. 1916.

In the summer of 1916 General Smuts decided on a definite forward movement from north to south, first of all upon the railway that runs nearly due west inland from Dar-es-Salaam and then onwards towards the southern confines of German East Africa. Arrangements were made that the fleet should co-operate with his forces, and Colonel Price was actually on board the flagship; but the navy was held back to a certain extent, as it was not desirable to drive the German forces out of the seaport itself until a sufficient advance had been made by the main force about one hundred miles inland to cut them off.

General Smuts' force were divided into three columns; the east column under Colonel Price; the central column, which moved southwards, under General Smuts himself; and a column starting from a point much further west and marching south-east under General Van Deventer.

The first success was the capture in July of Tanga by the army. The next was the capture of Bagamoyo by the squadron on the 15th Aug. The next important act was the defeat of the enemy by General Smuts' central column on the Wami river which led to the occupation of the railway at Morogoro on the 26th Aug.

The squadron which held back, as already said, was then allowed to proceed to bombard Dar-es-Salaam, and arrived off that port on the 1st Sept., and made a heavy bombardment on the 3rd. Troops in the meanwhile were advancing from Bagamoyo, which was thirty-five miles to the north, and was left in the evening of the 2nd Sept. On the 4th Sept., about 10.30 a.m., a representative of the civil population came out to the fleet and surrendered the town, stating, as was the case, that all the German forces had left on the 2nd. Therefore the navy landed bluejackets and marines and took possession of the town and of the ship, this being accomplished about noon. The troops from Bagamoyo arrived later in the afternoon at 5 p.m. It is, therefore, in my opinion established that the *Feldmarschall* was captured by the squadron, and by the squadron alone, and that, in fact, the town and harbour and vessel could have been captured many days before had it not been that at the request of the Commander-in-Chief of the army the operations of the fleet were held back.

But it is said that the German forces had been induced to evacuate the town through the fear of being cut off by the main forces of the army, which had before that date already seized upon the line of railway and were in process of moving further south. It is also said that if Dar-es-Salaam had been occupied before the army had been driven from the line of railway, troops might have been sent down from the enemy headquarters at Morogoro, and have turned out any forces which the squadron might have landed. Both these facts may be so; but, at the same time, it remains that the bluejackets and marines which could be landed from the squadron with the help of the squadron's guns could have taken Dar-es-Salaam in the face of all the German force that was there, and could have held the town, at any rate, till a considerable force had been sent down by rail from Morogoro.

The operation in which both sea and land forces were engaged constituted a joint enterprise; but it does not follow from this that a prize taken in the course of a joint or combined enterprise is to be deemed a joint capture. Upon this branch of the law it may be desirable to quote the judgment of the Lords Commissioners of Appeals in Prize Causes in *The Nordstern* (*ubi sup.*). "The sole question upon which this case must be decided, and which has, therefore, in the course of the argument, been principally attended to, is whether it is sufficient to establish a right to share on the part of asserted joint captors that the capture shall take place during the time of a joint enterprise. Upon this we are decidedly of opinion that it is not sufficient that a joint enterprise shall exist at the time, except it expressly refer to the capture in question; or, in other words, that the capture grow out of the purpose and object for which the parties have been united, and be the joint produce of an actual co-operation, and the object of union. We, therefore, confirm the sentence appealed from, and reject the claim on the part of the remainder of the fleet."

The case just quoted, like most cases which are to be found in books upon the subject, is the case of a claim between ships; and with the exception of the passage which has just been quoted, there is not much assistance to be got from the tribunal; but there are many cases in the books of claims by land forces to share with the naval forces of the Crown. And there are many cases of decisions given by higher authorities in the Government, though not actually judicial decisions, as to the claims of different land forces to share in booty captured by one force. There is finally the most important case, that of *The Banda* and *Kirwee Booty* (*ubi sup.*) decided in the year 1866, and from this latter case much assistance can be obtained.

There were two occasions in which ships were captured in Suldanah Bay, actually captured by the fleet, but said to be cases of joint captures by the fleet and the army. On the first occasion, which was in the year 1781, the question was raised as to the ship *Hoogskarpel*, and on that occasion the Prize Court held that it was a case of joint

capture, and some very curious legal results followed thereupon. The second occasion was in the year 1796, and gave rise to the decision in *The Dordrecht* (*ubi sup.*). Sir William Scott, in a very elaborate judgment, decided that it was not a case of joint capture. No doubt in that particular case he decided that there was no pre-concert, and this finding underlies a great part of his judgment; but he lays down the following propositions; that when possession has been taken by one force, and a claim of joint capture is set up, the *onus probandi* lies upon those claiming to be captors; that they must prove actual co-operation, and that there must be a contribution of actual assistance.

In *The Stella del Norte* (*ubi sup.*) the question of co-operation between land and sea forces was raised in a strange manner. The claim actually put forward was a claim on the part of the fleet under the command of Lord Keith to share in the capture of certain vessels, taken by ships detached from the fleet to act in concert with the Austrian forces on the coast of Genoa for the purpose of driving the French forces out of that country. The actual ships were said to have been captured in co-operation with the Austrian forces because the Austrians had driven away the garrison from a battery under the protection of which they had been lying. The claim of the rest of the fleet was endeavoured to be supported in the following manner: There had been an agreement between Lord Keith and the commander of the Austrian forces that all booty made on the expedition should be divided equally between the two forces, and it was accordingly contended that in that way the whole of the fleet could come in and have a share. Sir William Scott points out that an agreement made between A. on the one side and B. and C. on the other, that B. and C. should share jointly with A. in any booty taken, does not, *per se*, give any rights to B. as against C.; but he does proceed to consider, first, whether the case was made out without any reference to the Austrian army and, secondly, whether it was made out with reference to that contention and the effect of their co-operation. He proceeded to hold that if it is treated on the ordinary grounds of capture at sea, the fleet at large had not established a right to share. He then considers whether the Austrian army could have claimed and the fleet through them, and he makes the following observations: "To say that all these services are to be combined in one general co-operation would be to establish a principle of unity in conjunction operations of a very large scale, and far beyond what the court is warranted to do by the authority of any case that has yet been determined. It is said: 'That the Austrian forces were instrumental in driving away the garrison from the forts by which the ships had been protected and that the capture could not have been made by the English ships alone, without the operation of the Austrian army.' That, I think, would not be decisive to support an interest. In the case of the Russian army, which I have already suggested, the movements of the army though without reference to that effect, might tend eventually to the success of an attack on ships on the coast, though the movements were taken only for the accommodation of their own plans; yet, on such a remote and accidental assistance, it would, I think, be very difficult to construct a claim of joint interest, on the principle of co-operation and conjunct expedition." Probably, on the whole, most assistance is to be got from *The Banda and Kirwee Booty* (*ubi sup.*). Dr. Lushington, in his very elaborate and valuable judgment in that case reviewed a great number of authorities, naval and military, and from the general trend of those cases and from his own conclusions it is not difficult, in my opinion, to extract sufficient guidance to enable this tribunal to decide upon the present application. The actual captors of the treasure which was found in the two towns of Banda and Kirwee when they were recovered from the rebels in April and June 1858, were the force formed from the Madras Army, and proceeding under the command of General Sir George Whitlock, but the claims were put in on behalf of several other forces which were engaged in a combined expedition for clearing the rebels out of that part of Central India. As General Whitlock's force moved from the limits of the Madras Presidency northwards to operate in Bundelcund, the force under Sir Hugh Rose, advancing from the Bombay Presidency, was striking towards the Jumna, in the end moving almost parallel with the force under General Whitlock, while in the delta of the Doab on the north side of the Jumna River, a force under General Carthew, called the Futteypore Movable Column, was occupied in patrolling the left bank. There were several claims in respect of other detachments, but the case of the force under Sir Hugh Rose is that which most nearly approaches the present claim, and Dr. Lushington disallowed it. After speaking of the admission in certain cases of a claim of joint capture, Dr. Lushington proceeded to observe: "But the Prize Court has again and again asserted its resolution not to extend the operation of that doctrine," and dealing with the cases of booty he said: "I am not aware of any instance in which troops have been admitted to share as joint captors solely on the ground of association irrespective of co-operation, irrespective, that is, of service actually rendered. As to the question of association in that particular case, he found that the two generals, Sir Hugh Rose and Sir George Whitlock, held co-ordinate commands, and that though both received instruction from a common political officer, and though it was a common enterprise, still this did not constitute military association. He then proceeded to deal with the question of co-operation and he concluded that in a certain sense Sir Hugh Rose assisted General Whitlock, but he found that, as far as regards the capture of Banda, the principal services rendered by Sir Hugh Rose were so long before in point of time and so far away in point of place, as to be too remote to be considered; that no doubt as Sir Hugh Rose continued to advance, he gave support to General Whitlock, but that this support was of a kind which one division gives an other, and was insufficient to support a claim to share in booty. He went so far as to say that it was "certain that on more than one occasion Sir Hugh Rose diverted the enemy from General Whitlock," and, even so, he rejected the claim preferred by Sir Hugh Rose and his force to share as joint captors.

In the case before the tribunal there can be no question that, at any rate, any time after the capture of Bagamoyo the squadron could have bombarded Dar-es-Salaam so as to make it untenable, or have landed forces under cover of a bombardment, which would have occupied the town and harbour and taken possession of the *Feld-*

marschall. Their guns could have outranged any that the Germans had at Dar-es-Salaam. All that can be said as to this stage of the proceedings is that possibly if the enemy had not been pressed all along the line by the military forces they might have sent larger forces to try and hold the town.

It is then suggested that though they could take possession they would not have been able to hold it if the forces under General Von Lettow had not been otherwise employed; that he could have sent troops down by rail and turned the marines and bluejackets out. It is a possible supposition, but the object of capture is perhaps not so much the acquiring of booty as the destruction of the enemy's resources, and though the *Feldmarschall* could not have been worked out of port because her engines were disabled, and though the bluejackets and marines might have been driven out of the town and harbour by superior forces, they would have had ample time and opportunity to insert explosives into the ship and destroy her. I think that the claim put forward on behalf of the army to share as joint captors is not established.

If the tribunal comes to this conclusion upon the particular facts of the case, it becomes unnecessary to decide what would have been the legal consequences if it arrived at a different conclusion and determined in favour of the contention that the and forces made out a claim as joint captors. But as it seems not improbable that prizes taken in some other locality during the Great War may be determined to have been taken in such circumstances that military and naval forces are to be deemed as joint captors, and as the matter has been present to our minds from an early stage of the sittings of the tribunal; was the subject of preliminary discussion in the Duala cases; and has been carefully argued in the present case, I think it expedient to state the conclusions of law to which we have come, and which will regulate the application of any prize money in such a case of joint capture. The authority to which reference is always made is *The Hoogskarpel*, already mentioned. The grant of prize in the war then raging was made by statute (21 Geo. 3, c. 15). Sect. 1 of that Act, after reciting the Order in Council of the 20th Dec. 1780, ordering general reprisals against the States General of the United Provinces, enacted, that the officers and seamen of every one of His Majesty's ships should have the sole interest and property in every ship which they should take during the continuance of hostilities after the same should have been finally adjudged lawful prize. Commodore George Johnstone and Major-General Meadows were appointed respectively commanders-in-chief of the squadron and of the land forces to be employed at the Cape, and they received instructions that in order to prevent disputes concerning the distribution of such booty as should be gained by their operations the booty was to be divided between the land forces and the sea forces in two shares according to the numbers mustered in each service. When the *Hoogskarpel* came before the Prize Court, Sir J. Marriott, the judge of the High Court of Admiralty, first condemned the ship and cargo as prize, reserving the question who were captors, and later on the 28th May 1785, pronounced "for the interest of the army agreeably to the spirit of His Majesty's instructions to be distributed according to the directions of His Majesty's instructions." Thereupon an appeal was preferred to the Lords Commissioners of Prize on behalf of Commodore Johnstone and the rest of the fleet, their contention being that the Act of Parliament had given this prize to the navy, and that His Majesty's subsequent instructions could not overrule the Act of Parliament. From the proceedings on the appeal, the papers of which we have seen, it would appear that it occurred to the Lords Commissioners that possibly neither party had a claim of right as to prize. They accordingly directed the law officers to appear before them to represent the interest of the Crown, and ultimately decided that as it was a case of joint capture it did not fall within the then Prize Act, but was a reserved droit of the Crown, and that neither the land nor the sea forces had made out any title; and they varied the decree of the Prize Court by condemning the prize to the Crown. According to the statement in Mr. Rothery's book on Prize Droits, at p. 25, Commodore Johnstone and the fleet took various steps to get this decision set aside, and failed; and the Crown having then asserted its right, proceeded to divide the prize as a matter of bounty in the way indicated in the King's instructions to the commanders-in-chief. Mr. Rothery treats this decision as laying down a general rule that where there is a joint capture by land and sea forces the case is one of the reserved droits of the Crown.

We have to consider whether this is or not too wide an inference. Subsequent prize acts made special provisions for such cases as joint capture, and for the distribution of the prize money. The last statutory provision upon the subject is 27 & 28 Vict. c. 25, s. 34 which provides that ships and goods taken by naval and military forces conjointly become subject to the jurisdiction of the Prize Court, and may be condemned as prize, but gives no indication as to how the proceeds should be distributed. It was not easy at first to discover upon what principle the Lords Commissioners arrived at the conclusion to which they came in *The Hoogskarpel.* If a vessel is captured by any public servant such as a master or a revenue cutter, or a custom house officer, or a police officer it counts as a capture by an non-commissioned captor. We have had occasion in the course of the sittings of this tribunal so to decide in *The Belgia* (*ubi sup.*) and *The Hertha* (*ubi sup.*). In *The Rebekah* (*ubi sup.*) Sir William Scott expressed himself as follows upon the question of a capture by the armed land forces of the Crown. "Thus if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that would be a droit of Admiralty, and the garrison must be content to take a reward from the bounty of the Admiralty and not a prize interest under the King's proclamation. All title to sea prize must be derived from commissions under the Admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take upon that element for their own benefit." To pursue the matter further. If there be a joint capture by a commissioned and non-commissioned ship, and the same principle would seem to apply, if, instead of a non-commissioned ship we read "a for this purpose non-commissioned force," the authorities show that the prize is divided; a part is a droit of the Crown, and part is a droit of Admiralty; and for the purpose of the division the proportions are taken as if it was an ordinary case of joint captors, and then that portion which would go to the non-commissioned captors is treated as a

droit of Admiralty. This was decided by the Lords Commissioners in *The Twee Gesuster* (*ubi sup.*), and by a judge of the Prize Court in *Le Franc* (*ubi sup.*) both reported in a note to *The Cape of Good Hope*. In the first case two armed cutters one being commissioned and the other non-commissioned took the vessel and the Lords Commissioners so decided. In the second case six private ships of war, five of which had letters of marque, and the sixth of which was non-commissioned, took a prize and the share which would have fallen to the non-commissioned vessel was declared to be a droit and perquisite of Admiralty. From this it would seem to follow that upon general principles if a prize is the result of joint capture by land and sea forces the proceeds should be divided, and that part which would be appropriate to the land forces should be determined to be a droit of Admiralty and fall as such to the Exchequer to be dealt with thereafter by the Crown as it might be advised, and the rest go to the navy. Bearing this in mind, we have to revert to *The Hoogskarpel*.

The practice of the Lords Commissioners differed from that of the delegates in ordinary appeals from the Admiralty or Ecclesiastical Courts, in that they gave reasons like other judges for their opinions. We have quoted the judgment delivered by Sir William Grant on their behalf in the case reported in 1 Acton. But there is no account in any law report of the reasons given for the decision in *The Hoogskarpel*. A search, however, has been made at our request, and it appears that there is a short report in newspapers of the day. The keeper of printed books in the British Museum has furnished the tribunal with a paragraph which he certifies to have appeared in the same form in the *London Chronicle*, the *General Evening Post*, the *Whitehall Evening Post*, and the *Morning Chronicle* in issues of various dates from the 29th June to the 4th July 1786, and the paragraph is as follows: "A very curious and interesting cause was yesterday determined in the Cockpit by an appeal to the Lords of the Council from the Court of Admiralty. The question related to the prize or capture made by Commodore Johnstone last war. It was whether the capture was prize or booty, and consequently whether the property then taken by the fleet and land forces under his command came within the Prize Act. As the destination of the armament was against the Cape of Good Hope, and a considerable land force under the command of General Meadows was aboard, and shared in the action; their Lordships determined that the case in question did not come within the Prize Act. The consequence is, that the whole property is claimed by the Crown, and the captors relinquish their hopes of prize money and depend on the Royal bounty for whatever compensation His Majesty may think proper or competent." In *La Bellone* (*ubi sup.*) Sir William Scott, who was one of the counsel in *The Hoogskarpel*, introduces an account of that case into his judgment. His statement of the reasons of the Lords Commissioners is as follows: "They laid it down that conjunct expeditions were entirely out of the statute with respect to both services; and that the whole property captured was at the disposition of the Crown, whose equity and liberality in justly estimating the merits of both could not be doubted. The same arguments were urged then as have with great propriety and with great ability been urged now—such as that the co-operation of the army could not divest the title of the navy, that their interest will still be preserved, for that they were takers in a sufficient degree to answer the descriptive terms employed in the statute. But these arguments were urged in vain, the property was condemned to the Crown." This seems to explain the decision. Speaking respectfully, one may say that it was rather a narrow construction, but it may be put in this way: The fleet, asserting a claim under the statute in contravention of the instructions given by the Crown, must be confined to the literal construction of the statute; they may have their pound of flesh, but no more. We, the Lords Commissioners, construe the statute as being that if you are the only takers you may have the prize, but if you and others are the takers you do not come within the statute. If this be the *ratio decidendi*, then for us, to whom that particular Prize Act does not apply, the matter is to be decided upon general principles of law, and our view is that if a case of joint capture should, at any time, be proved before us, that part which ought to be appropriated to the navy will be a droit to the Crown; but that part which ought to be appropriated to the army will be a droit of the Admiralty, and, therefore, not a droit of the Crown, and, therefore, will not be directed by us to be paid to the Naval Prize Fund. What the Crown may be pleased to do with the part which falls to the Exchequer as a droit of Admiralty it is not for us to say. Before we part with this matter we should perhaps observe that if the apparent inclination of Mr. Rothery's view was right, and that as a general rule of law apart from the construction of the particular statute a joint capture always became a reserved droit of the Crown, it might then be argued that under the Naval Prize Act which gives us our authority the whole would, notwithstanding the fact that it was a joint capture, accrue to the navy. It might be said that if it be a droit of the Crown of any sort it should go to the Naval Prize Fund, because the schedule speaks of any money being droits of the Crown, with no limitation upon those words, and this might be sufficient to cover reserved droits as well as those usually granted to the navy.

Admiral of the Fleet Sir George Callaghan.—I concur in the judgment of Lord Phillimore. It seems clear that the *Feldmarschall* was not a joint capture, although the capture was the result of joint operations. The navy took possession of the ship four or five hours before the arrival of the land forces. These forces were not in sight at the time of the capture. In old days only those actually in sight at the time could claim a share in the capture, and I take it the same principle would apply in this case.

Sir Guy Fleetwood Wilson.—The case of *The Feldmarschall* was brought before the tribunal as a test case in which to obtain a decision upon the right of the army to share in the proceeds of sale of a prize captured as a result of joint operations by the army and navy. It raised questions of fact and law. The question of fact was whether the vessel was a joint capture made as the result of the joint operations of the two services in circumstances which, if there were no legal impediment, would entitle the army to share. The question of law was whether this vessel was a droit of the Crown, and, if so, whether the effect of the Naval Prize Act 1918 and the proclamation made thereunder on the 15th Aug. 1918 whereby droits of the Crown

were granted to the fleet was to cede this vessel to the fleet so as to deprive the Exchequer of the right hereto reserved by prize acts of granting the proceeds of sale of joint captures to the army and navy.

The alternative proposition of law was that in so far as the naval forces contributed to the capture the proceeds of sale were droits of the Crown, but in so far as the land forces contributed to the capture the proceeds of sale were a droit of the Admiralty. I agree in the judgment of Lord Phillimore in so far as the questions of law are concerned, and I do not desire to add anything to his observations upon these matters. I regret, however, that I do not find myself in agreement with the conclusion reached by him and Admiral Callaghan upon the question of fact. Evidence was given before the tribunal by Admiral Charlton on behalf of the navy and by Lieut.-Colonel Grant, D.S.O. on behalf of the army. Admiral Charlton was senior naval officer in command of the Cape station and was present at the surrender of Dar-es-Salaam in his flagship, the *Challenger*. Lieut.-Colonel Grant was second senior officer on the staff of General Smuts, who was in supreme command of the naval and military forces operating against German East Africa. Both officers were, therefore, fully acquainted with the scope and intentions of the operations. A map was produced based upon the evidence given by Colonel Grant, which illustrated the advance of the columns under General Smuts which were operating against the line of the central railway of which Dar-es-Salaam is the terminus of the sea-end. General Smuts was advancing from the north through Handeni to Morogoro. General van Deventer was advancing in a south-easterly direction through Mpapwa against Kilosa. Morogoro and Kilosa are on the railway. In conjunction with these main movements a subsidiary movement had been initiated, parallel to the main operations, to clear the coastal area and capture the lower part of the central railway and Dar-es-Salaam. The operations to clear the coastal area were in the general charge of General Edwards, Inspector-General of Communications and Admiral Charlton, the naval commander-in-chief, jointly. The command of the land columns was entrusted to Colonel Price, whose headquarters we were told were in Admiral Charlton's flagship. The scheme of operations for which these two officers were jointly responsible must have been pre-conceived in the closest collaboration and provision made for its execution from a common fund of initiative and skill. That reliance was placed on both land and sea forces is established by the progress of the operations.

The column moving against Bagamoyo reached Mandera on the 15th or 16th Aug., the object being to effect the joint naval and military attack on that place. Before the arrival of the column, however, within striking distance of the town, the navy undertook, single handed, the capture of Bagamoyo which was successfully effected on the 15th Aug. At the same time a column was advancing down the coast from Sadani and on the 15th Aug. was south of the Wami river. On the 21st Aug. 1916 van Deventer reached Kilosa and cut the railway. On the 26th Aug. 1916 General Smuts occupied Morogoro. A column had been detached from Colonel Price's forces at Bagamoyo to occupy the Ruvu bridge. The effect of these successful operations against the railway was that the German commander von Lettow was no longer able to reinforce Dar-es-Salaam and the evacuation of the town by the garrison was at once commenced.

Admiral Charlton stated in his evidence that on the 4th Sept., the date on which the town was occupied, he was informed by the residents who remained that the evacuation had begun a fortnight earlier. This approximately coincided with the cutting of the railway at Kilosa by van Deventer and with the imminent occupation of Morogoro by General Smuts. At the beginning of September the occupation of Dar-es-Salaam was decided on. The town was defended by fortifications which were armed with one 6-inch gun and two or three 4.1 guns. The latter guns were naval guns removed from the cruiser *Konigsberg* and temporarily mounted in the forts. The sailors from the *Konigsberg* were assisting in the defence of the town. On the 3rd Sept. the navy bombarded the fortifications surrounding the town for the purpose of drawing fire and ascertaining whether the place was still defended. On the 4th Sept the demand for surrender was sent in, signed by Admiral Charlton and Colonel Price and the town was surrendered about 10.30 a.m., the naval forces entering two or three hours later after the obstructions in the harbour had been cleared. A boarding party was put on board the *Feldmarschall* at about 2.30 p.m. The column at Bagamoyo had started for Dar-es-Salaam two days before. The distance to be covered was about thirty-five miles through a hot and dry country which rendered it necessary to march by night. By the 4th Sept., the day on which Dar-es-Salaam surrendered, the column was resting outside the town and entered two or three hours after the naval forces had entered the port. Admiral Charlton in his evidence submitted that the naval forces could have compelled the surrender of the town on the 23rd Aug. 1916 and stated that he had in fact prepared a form of surrender. I do not think that this is the relevant consideration, for, in the conduct of war-like operations the interest of one service as against that of the other or of an ally must of necessity be subordinated to the general scheme of operations, and it is not proper to take into account possibilities, the success of which at best must be a matter of speculation, especially in so hazardous an attempt as a cutting-out expedition, in a port which could be readily reinforced by the enemy. Moreover, in my opinion there would not be an effective capture if the vessel were in the possession of the captors for a period of time only sufficiently long to permit of her disablement and destruction and were then abandoned and retaken by the enemy. No argument in favour of the fleet can be based on the seizure of a prize which is afterwards abandoned and recaptured by the enemy. On the 4th Sept. 1916, when Dar-es-Salaam surrendered, the position was that the town had been rendered untenable by reason of the advance of General Smuts and General van Deventer's forces across the railway.

It is true that the operations of these forces which were strategically decisive in compelling the evacuation of Dar-es-Salaam were then being carried on at a considerable distance from the sea and it may be a matter of doubt whether there can be said to have been that degree of co-operation between them and the fleet which in *The Stella del Norte* (*ubi sup.*), to which Lord Phillimore refers, is laid down as the test of the right of the army to share. Each case must be decided upon its own

facts, and it is material to remember that little assistance can be obtained from the precedents of old wars because the modern developments of transport and communication by railways, aircraft, telegraphs and wireless telegraphy render co-operation between distant forces much closer and more real than was possible in former times when these facilities were not at their disposal. In the present case, however, the surrender of Dar-es-Salaam was as much due to the advance of Colonel Price's forces along the coast as to the immediate attack by the navy. Admiral Charlton agreed that it was a joint operation, and stated that he did not think the town would have entirely surrendered without a good deal more fighting unless the military had been there. Moreover, two telegrams sent by Admiral Charlton to the Admiralty, reporting the surrender of Dar-es-Salaam, were put in evidence before us and read as follows: "From C-in-C. Cape Zanzibar. To Admiralty. 4th Sept. 1916. Dar-es-Salaam surrendered 9 a.m. 4th Sept. to combined naval and military forces which are now taking possession." "Naval C-in-C. Cape, to Admiralty. 5th Sept. 1916. Dar-es-Salaam surrendered on the 4th Sept. on demand by Challenger following close attacks by whalers at daylight on the 3rd Sept. and subsequent heavy bombardment by ships of gun positions north of town in advance of troops moving south from Bagamoyo, these being strongly reinforced by landings at Konduchi and Maassani. After surrender Colonel Price, O.C. landed with seamen (——) and British colours were hoisted with full honours in the presence of troops entering the town from northward . . ." I think these telegrams fairly represent the view taken at the time by the naval commander-in-chief who did not in his evidence seriously dispute that the surrender of the town was due to the combined operations of the naval and military forces. Whether the forces under General Smuts and General van Deventer are entitled to claim is, as I have already stated a question upon which I feel considerable doubt, but, having considered *The Stella del Norte* (*ubi sup.*) and *The Banda and Kirwee Booty* (*ubi sup.*), I am disposed to think that they are not so entitled. The naval and military operations were conducted with a common purpose and under the directions of a common chief, General Smuts, and there was undoubtedly co-operation which materially assisted the forces operating in the coastal area and at sea in their task of occupying the town of Dar-es-Salaam by rendering it strategically untenable by the enemy. According to the cases cited, however, this is not sufficient to entitle these land forces to share and, as I do not think there can be said to have been that "service actually rendered" which is a necessary element of their claim, the numerical strength of these forces should not be taken into account. It is clear that at the time the demand for surrender was made the military was encamped immediately outside the town waiting for the cool of the day to take part in the attack if the demand was not complied with. I have examined *The Dordrecht* (*ubi sup.*). I am satisfied that the operations against the town were conducted upon a preconcerted plan devised by General Headquarters and carried into effect by Admiral Charlton and Colonel Price acting in collaboration in the flagship with the naval and military forces under their commands; and the land forces rendered not only very material, but essential service in securing the surrender of the town without very considerable loss of life. There was a contribution of actual assistance by the land forces as well as a preconcerted plan, and in my opinion, therefore, the facts fall fairly within the principles laid down in *The Dordrecht* (*ubi sup.*), and are such as to entitle the force operating along the coast to put forward a claim to share in the proceeds of this vessel.

Solicitor for the Exchequer and Army and for the Naval Forces, *Treasury Solicitor*.

House of Lords.

Feb. 11, 17, and *April* 18, 1921.

(Before Lords BIRKENHEAD, L.C., FINLAY, CAVE, ATKINSON, and SUMNER.)

BRITISH AND FOREIGN MARINE INSURANCE COMPANY *v.* GAUNT. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine Insurance—All risks—"Casualty"—Bales of wool damaged by water—Deck cargo—Usage—"In the absence of any usage to the contrary"—Proof—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 55, *sub-s.* 2 (*a*); *s.* 78, *sub-s.* 4; *sched.* 1, *r.* 17.

Under an "all-risk policy" it is sufficient for the plaintiff to prove that the loss was caused by some fortuitous circumstance or casualty without proving the exact nature of the accident or casualty which, in fact, occasioned the loss.

The expression in rule 17 *of the rules in the first schedule to the Marine Insurance Act* 1906 "*in the absence of any usuage to the contrary*" *deck cargo must be specifically insured and not under the general denomination of goods contemplates a usage in a trade and not a usage in the insurance business, and the rule is not intended to alter, and has not altered, the common law on the subject.*

Therefore, where there is a usage to carry goods of a particular kind on deck, the insurer is liable to the insured although deck cargo is not specifically insured.

Decision of the Court of Appeal (14 *Asp. Mar. Law Cas.* 560; 122 *L. T. Rep.* 406; (1920) 1 *K. B.* 903) *affirmed.*

APPEAL from an order of the Court of Appeal (reported 14 Asp. Mar. Law Cas. 560: 122 L. T. Rep. 406; (1920) 1 K. B. 903) reversing a judgment of Rowlatt, J.

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

Sir *John Simon*, K.C., *Mackinnon*, K.C., and *R. I. Simey* for the respondent.

After consideration their Lordships dismissed the appeal.

The following cases were referred to:

Schloss Brothers v. *Stevens*, 10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 605;

Jacob v. *Gaviller*, 7 Com. Cas. 116;

Nigel Gold Mining Company v. *Hoade*, 6 Com. Cas. 268;

Dudgeon v. *Pembroke*, 3 Asp. Mar. Law Cas. 393; 31 L. T. Rep. 31; 9 L. Rep. Q. B. 581, at p. 594;

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

Rohl v. *Parr*, 1 Esp. 445 ;
Hunter v. *Potts*, 4 Camp. 203 ;
Merchants' Trading Company v. *Universal Marine Company*, 2 Asp. Mar. Law Cas. 431 ; L. Rep. 9 Q. B. 581, 596 ;
Ross v. *Thwaite*, 1 Park 23 ;
Backhouse v. *Ripley*, 1 Park 24 ;
Da Costa v. *Edmunds*, 4 Camp. 162 ;
Blackett v. *Royal Exchange Assurance*, 2 C. & J. 249 ;
Rogers v. *Sarl*, 30 L. T. 13, Ex. ;
Miller v. *Titherington*, 9 L. T. Rep. 231 ; 30 L. J. 217, Ex. ;
Apollinaris Company Limited v. *Nord Deutsche Insurance Company*, 9 Asp. Mar. Law Cas. 526 ; 89 L. T. Rep. 670 ; (1904) 1 K. B. 252.

Lord BIRKENHEAD, L.C.—This is an appeal from an order of the Court of Appeal reversing a judgment of Rowlatt, J. in favour of the appellants in an action brought against them by the respondent in respect of a partial loss to wool insured with the appellants.

The wool in question was produced in Patagonia by the Sociedad Explotadora del Tierra del Fuego. The respondent, by direct and sub-purchases, had acquired part of the 1916-1917 clip under four contracts, all of which were on the terms f.o.b. Punta Arenas. The insurance up to delivery on ocean steamer at that port was effected by the Explotadora Company and after such delivery by the purchaser, but no question now arises as to the insurance of the risks of ocean transit.

The policies sued upon were taken ou by the Explotadora Company and by them assigned to the respondent after the wool had reached his mills at Bradford and a few days before the writ was issued. These policies have been modified so as to carry out the terms of a general cover note dated the 15th March 1916, and must therefore be read as containing a clause to this effect : " 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 . . . with liberties as per bill of lading."

The wool reached Bradford in a damaged condition. The evidence did not establish with any certainty when or how the damage was done, but made it clear (and Rowlatt, J. so held) that it occurred at some period between the shearing of the sheep and shipment at Punta Arenas—that is to say, during the period covered by the policies issued by the appellants.

The general manager of the Explotadora Company gave evidence that he could not recall a serious claim in respect of damage to wool occurring during the transit to Punta Arenas, and that the statements in the manifests of the local steamers showed that something abnormal had occurred. The mates' receipts and bills of lading issued by the ocean steamers contain notes that a number of bales were wet ; and the oral evidence was to the effect that the wool was damaged before it was taken on board the ocean steamers. There was no evidence as to any particular bale or bales, or as to the exact circumstances or cause of the damage.

In construing these policies it is important to bear in mind that they cover " all risk." These words cannot, of course, be held to cover all damage, however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on the point, but the decision of Walton, J. in *Schloss Brothers* v. *Stevens* (10 Asp. Mar. Law Cas. 331 ; 96 L. T. Rep. 205 ; (1906) 2 K. B. 665), on a policy in similar terms, states the law accurately enough. He said, at p. 673, that the words " all risks by land and water," as used in the policy then in question, " were intended to cover all losses by any accidental cause of any kind occurring during the transit. There must be a casualty." Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.

Rowlatt, J. accepted this view, but was of opinion that the evidence proved a state of facts which was consistent with the damage having occurred " without the intervention of anything fortuitous, of anything accidental, or of anything which could be called a casualty within the meaning of an insurance contract." I agree with the criticism of the Master of the Rolls upon this finding. The damage proved was such as did not occur, and could not be expected to occur, in the course of a normal transit. The inference remains that it was due to some abnormal circumstance, some accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies ; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss. In this case the respondent established that the loss must have been due to some casualty, and consequently the judgment of the Court of Appeal upon this point is right.

A further point arises, namely, whether the policies insure such part of the wool as was carried on deck, the appellants urging that some at least of the bales were damaged whilst being so carried.

There is, it is true, evidence suggesting that some of the damage occurred in the case of bales carried on deck, and the appellants rely on the seventeenth rule of construction in the first schedule to the Marine Insurance Act 1906, which applies to this policy by virtue of sect. 30 (2) of that Act. The latter part of the rule reads : " In the absence of any usage to the contrary deck cargo and living animals must be insured specifically and not under the general denomination of goods."

It was proved that the Explotadora Company were aware of a practice of carrying bales on deck and, in fact, had complained, but the owners meeting this protest with an assertion of right it was not persisted in. There was certainly a usage in the trade to carry on deck. Nor in my view did the rule under consideration make any change in the law as it existed when the Act was passed. Deck cargo and living animals must be insured as such, the policy containing words which inform all interested parties that the goods insured are to be carried on deck or are living animals, as the case may be, unless there is a " usage to the contrary."

It was contended for the appellants that the " usage " contemplated by the rule was a usage in

the insurance business as to the description for the purposes of insurance. This cannot be so. In the first place this construction would involve such a departure from the principles of law existing when the Act was passed that we ought not to so construe the words unless such an alteration was most plainly intended; secondly, inasmuch as an insurer is bound to know the usages of trade, if a usage exists in the trade to carry goods of a particular kind on deck, he knows that such goods are likely to be so carried, and there is little reason for requiring a specific statement that such a method of carriage will or may be employed. The "usage," therefore, must be a trade usage, and it was abundantly established in the case which your Lordships are considering. There was, therefore, no need to insure the wool specifically as deck cargo, and the omission to do so does not afford any defence to the appellants.

For these reasons I am of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

Lord FINLAY.—This appeal relates to the question of the liability of the appellants upon policies covering wool from various stations in Tierra del Fuego and on the mainland of Patagonia to Punta Arenas, the port of embarkation for Europe. The wool arrived in this country in a damaged condition. An action was brought upon policies covering the wool on the ocean voyage from Punta Arenas, and in that action it was held that the underwriters were not liable for the damage upon the ocean policies, and there is no appeal from that decision.

The present appeal relates to policies of insurance from the sheeps' backs at several stations to the ocean steamers at Punto Arenas. Rowlatt, J. held that the plaintiffs in the present action failed to establish any right to recover on these policies. The damage was by wet, and the learned judge was of opinion that there was no evidence of any casualty causing the wetting so as to make the policy attach. The Court of Appeal, on the other hand, held that the circumstances show that the loss was covered by the terms of the policy as resulting from some casualty, and gave judgment for the plaintiffs, the amount to be assessed by a referee. The amount has been assessed at 19,125*l.* 13*s.* 11*d.* The insurance company on this appeal ask that the judgment of Rowlatt, J., in their favour should be restored.

The wool had to be conveyed from a number of sheep stations to Punta Arenas, partly by land and partly by water, in coasting vessels. The insurances are to be read as containing the following clause:—"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 warehouse in Europe, with liberties as per bills of lading."

I take this clause from the letter of cover of the 15th March 1916, it being admitted that the policies are to be read as containing a clause to this effect.

The bales of wool, on arrival at Bradford, were found to be seriously damaged by water, and the action was brought. A commission was issued to Punto Arenas, and the evidence taken on commission and at the trial left no doubt in the minds of the court of first instance and of the Court of Appeal that the wetting took place after shearing and before the bales were put on board of the ocean steamer at Punta Arenas. There was no specific evidence to show how the wetting had taken place. Rowlatt, J. held that the whole of the evidence was consistent with the goods having been injured "without the intervention of anything fortuitous, of anything accidental or of anything which could be called a casualty within the meaning of an insurance contract." He repeated the *ratio decidendi* of his judgment in another sentence near the end:—"It seems to me that the policy insures the assured only against risks and any evidence which does not show that the damage was due to something fortuitous does not support the case when the underwriters are sued."

The evidence showed that the wool was made up into bales at the stations and that these bales were carried down to the place of embarkation on the small coasting steamers by which they were carried to Punta Arenas, where they were stored in hulks until embarkation could be made upon the ocean steamers.

No details were available as to the transit of particular bales, but the Master of the Rolls in his judgment in the Court of Appeal thus summarises the evidence:—"It was, however, shown 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 the 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 overcrowded and some of the wool had to be stored outside. Mr. Burbury, the manager of the Explotadora, 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 Punto 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."

The Master of the Rolls proceeded to state the risks insured against, and referred to the decision of Walton, J. in *Schloss Brothers* v. *Stevens* (10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 665). That was the case of a policy somewhat similar to that in the present case, and Walton, J. said, at p. 673 in the Law Reports (Asp. p. 334): "I think they" (the words of the clause) "were intended to cover all losses by any accidental cause of any kind occurring during the transit. Does the loss suffered, in fact, come within that category; Was the damage from some accidental cause? There must be a casualty."

The Master of the Rolls said that in the present case there was exceptional damage such as did not

arise under the normal conditions of such a transit, and that in his opinion it might be inferred that it proceeded from a casualty or something accidental. With reference to the judgment of Rowlatt, J, he remarked :—" I think he 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."

I agree with the Master of the Rolls in thinking that there was sufficient evidence to justify the inference that this loss was due to something accidental. Of course, no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. But I can find no justification for the contention which the appellants put forward at the Bar of your Lordships' House that in order to recover upon such a policy for damage resulting in the goods getting wet by rain it would be necessary to establish that there was an extraordinary or unusually heavy fall of rain. It would be quite enough if, owing to some accidental circumstances, the goods were left uncovered when rain was falling. This might happen by some want of care on the part of the men whose duty is was to keep the goods covered with the tarpaulins which were provided for the purpose. If, from any of the accidental circumstances which are incident to a journey, the goods are damaged by a risk covered by a policy, the element of casualty or accident is supplied. There is nothing in the present case to show that the damage was due to any wilful misconduct on the part of the assured. As Atkin, L.J. put it in his judgment, I think that the facts show that the wetting might probably be caused by some fortuitous accident or casualty.

I agree with this finding. This disposes of the main question on this appeal. There is, however, another point to be dealt with.

The appellants allege that some part of the bales were damaged while being carried as deck cargo on board the coasting steamers, and that the policy does not cover deck cargo.

They rely for this purpose on the Marine Insurance Act of 1906 s. 30, and the seventeenth of the rules of construction in the schedule.

Sect. 30 is as follows : " (1) A policy may be in form in the first schedule to this Act ; (2) 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."

The seventeenth of the rules for construction is as follows : " 17. The term ' goods ' means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. In the absence of any usage to the contrary deck cargo and living animals must be insured specifically and not under the general denomination of goods."

The construction of this rule has given rise to a great deal of controversy, and it is now necessary that we should endeavour to settle this vexed question of construction. Rule 17 is very oddly worded, but it appears to me that on its true reading it leaves the law as to insurance of deck cargo very much as it was before the Marine Insurance Act passed.

The rule prescribes that deck cargo and living animals must be insured specifically in the absence of any usage to the contrary. What is the meaning of the provision that deck cargo and living animals "must be insured specifically"? I think "specifically" in this connection means " as such." In the case of deck cargo there must, in addition to the ordinary description of the goods, be an intimation in the policy that the goods are to be carried on deck, by inserting " for carriage on deck," or other similar words. In the case of " living animals " the description must convey an intimation that the animals are alive and not mere carcasses, that is, if there is any ambiguity in the description there must be added to it the word " live," or some equivalent expression.

There are, of course, special risks attaching to deck cargo and to live animals, and the rule is, I think, intended to secure that the underwriter must have express information of the existence of such risks " in the absence of any usage to the contrary."

What is the meaning of these words as to usage which are prefixed to the second part of rule 17 ? In the case of deck cargo, I think that these words would be satisfied by proof of a usage in a particular trade, or generally, to carry on deck goods of a particular kind. The underwriter is bound to know of the existence of such usages, and the description of particular goods as of the class to which such a usage applies gives him the information that the goods will or may be carried on deck. If there is such a usage there is no reason for requiring a statement that goods which fall within it are, in fact, to be carried on deck, as the mere description of the goods gives the necessary intimation. Such a usage may be fairly described as " a usage to the contrary." I cannot adopt the appellants' contention that the usage must be a usage not in the carrying trade with regard to such goods, but in the insurance world with reference to the manner in which they are to be described for insurance purposes. Such a usage as to insurance may, of course, grow up in any trade in which deck carriage of certain articles prevails, and if such a usage in the business of insurance has grown up it will be a usage to the contrary. But in my opinion no such usage in the business of insurance is necessary to dispense with the specific description of deck cargo as such. Any such construction of rule 17 would bring it into acute conflict with the law as to insurance of deck cargo as it existed up to 1906, and is not, in my opinion, warranted by the wording of the rule.

In the case of " living animals " the words " in the absence of any usage to the contrary " may have been introduced to guard against the conceivable case that in a particular trade in which the goods carried were almost exclusively live cattle or sheep there might be a usage that such live stock should be merely described as " goods." The contingency is not a very probable one, but Parliament, if it considered the wording of this rule, may have thought that to provide against any possible usage to the contrary could do no harm and might conceivably be useful.

The concluding words of the paragraph that deck cargo and livestock are not to be insured

simply as goods appear to be quite unnecessary, but do not militate against the construction of the paragraph which I am disposed to adopt.

As both the Master of the Rolls and Atkin, L.J. point out, there was abundant evidence of a usage that in this trade bales of wool should be carried on deck. The "usage to the contrary" was therefore established, and there was no necessity to ensure the bales specifically as for carriage on deck.

Upon the whole, I think that the appeal should be dismissed with costs.

Lord CAVE.—I agree and have nothing to add.

Lord ATKINSON.—I concur.

Lord SUMNER.—With one exception mentioned later on I concur in the conclusions drawn from the evidence by the Court of Appeal. The damage was fresh-water damage; it occurred after the winter rains had begun. There is some evidence that bales are exposed to rain at Puerto Prat, when the sheds are full, and on the decks of the coasters, where it is proved to be the usage to carry such cargo as this, and on the hulks at Punta Arenas. It is proved that tarpaulins are provided by the shippers at their sheds and that their men sometimes neglect to use them. On coasters and hulks tarpaulins ought to be at hand and used, and it is not shown that either were unseaworthy for want of them. Proper tarpaulins properly used would protect the wool from damage by rain. Evidently a substantial amount of the damage was done while the goods were on deck and would have been prevented if proper care had been used.

The perils insured against in the printed form of policy are enlarged by those in the cover notes, "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. . . ." Both clauses, therefore, the additional clause as well as that in the regular form, describe risks or perils intended to be insured against: (*Nigel Gold Mining Company* v. *Hoade*, 6 Com. Cas. 268; *Jacob* v. *Gaviller*, 7 Com. Cas. 116). The words closely resemble those in *Schloss* v. *Stevens* (10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 665), where Walton, J. refused to read "all risks by land and by water" as limited to the risk peculiarly incidental to carriage in a ship, in boats or in craft, and held that it must be "read literally as meaning all risks whatever." There is nothing abnormal in this; in fact, "against all risks whatsoever, anything printed or written herein to the contrary notwithstanding" was a clause known in practice over thirty years ago, and a great variety of clauses in policies on cattle, employing the words "all risks," "all risks of mortality," and "all risks of mortality . . . from any cause whatsoever" may be found by the curious in Sir Douglas Owen's Marine Insurance Clauses. "There must be a casualty," added Walton, J.; the words were "intended to cover all losses by any accidental cause of any kind occurring during transit." The appellants argue that getting wet, when not under cover, is a thing that will happen to bales whenever it rains, and the injured bales started on their journey after the rainy season had begun; in a word, they say the loss arose from "no unusual cause": (*Dudgeon* v. *Pembroke* (3 Asp. Mar. Law Cas. 393; L. Rep. 9 Q. B., at p. 594). It is, however, to be remembered that discussions about wear and tear and leakage and breakage generally arise when the issue is whether the loss is or is not a loss by perils of the sea, *e.g.*, in *Rohl* v. *Parr* (1 Esp. 445), *Hunter* v. *Potts* (4 Camp. 203), and *Merchants Trading Company* v. *Universal Marine Company* (2 Asp. M. C. 431, at p. 432), where Lush, J. observes, "the silent natural action of the water on a floating body is, not a peril of the sea, but it is wear and tear." The more widely the category of perils insured against is extended, the more nearly is it true to say that not only perils of the sea but perils on the sea are insured. "All risks" has the same effect as if all insurable risks were separately enumerated; for example, it includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of the loss by wetting. It appears to be what happened. For wool to get wet in the rain is a casualty, though not a grave one; it is not a thing intended, but is accidental; it is something which injures the wool from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

There are, of course, limits to "all risks." They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description "all risks" does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils.

I think, however, that the quasi-universality of the description does affect the onus of proof in one way. The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that is is not by something else. When he avers loss by some risk coming within "all risks," as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, so as to show exactly how his loss was caused. If he did so, he would not bring it any the more within the policy. These considerations answer the appellants' complaint that the plaintiffs were meagre with their proof. So they were, but it was enough for them to prove some casualty insured against. Rowlatt, J., as I venture to think, attached too much importance to the absence of any kind of marine disaster. If the casualty was fortuitous, it needed not to be a calamity.

As a good deal of the damaged cargo was on deck, there arises for decision a point upon the Marine Insurance Act, which was strongly pressed upon your Lordships. The first schedule sets out a Lloyd's form of policy and a series of rules for its construction "where the context does not otherwise require," and, out of seventeen following rules,

in all but one the meaning of some particular term is expounded. The schedule in fact contains a typical document with an elaborate interpretation clause. I can conceive no subject on which the Legislature is less likely to have wished to make a change or to declare that what people have hitherto meant in business shall be their meaning no longer. Theretofore all concerned, when they said "goods" simply, meant goods under deck or goods in and over all according as the usage of the trade in which the goods were to be carried did not or did include a usage to carry on deck. Why should a Codification Act abolish that habitual meaning and make the word mean the one or the other according as there is or is not a drafting usage among those who prepare and those who sign policies? No one has suggested any reason for such a change.

Even if the schedule has changed the law, does it affect this case? Sect. 30 (2) is an interpretation section. It says "the terms and expressions mentioned in sched. 1 shall be construed as having the scope and meaning in that schedule assigned to them." Now this policy, as expanded by the covers, does not contain any term or expression mentioned in art. 17 of sched. 1; it says, "wool," "wool clips," or "bales of wool," not deck cargo or cargo or goods. Next, the rule does not apply "except where the context does not otherwise require." Now the form is for a voyage in a named ship, "beginning the adventure upon the said goods, from the loading thereof aboard ship," but the context consists of additional words, which make the adventure begin from the sheep's back and continue by land and/or water in coasters and hulks and while awaiting transhipment. I greatly question, if this context does not require something different from the mere insurance of deck cargo specifically. In any case, if this rule of interpretation is new, the appellants find considerable difficulty in making it apply to this policy on any strict construction, and unless the construction is to be very strict, there is no ground for questioning that the rule is not new, but only embodies the existing law. This cargo is insured specifically, for it is described as wool "clips" and "bales of wool." To say that it is not insured specifically, though it is described specifically, unless it is insured as on deck however described, conflicts with the rest of the sentence. Clearly living animals have to be insured specifically as living animals, and not under the general denomination of goods. From the specific description the underwriter must take notice of the place of stowage, where a usage as to the place of stowage of such goods is, or is deemed to be, known to him.

Then there are the words "in the absence of any usage to the contrary." Rule 17 is a direction as to the apt mode of drawing up a policy, that is primarily as to the use of words. The rule in construing and therefore in drawing contracts is that the words must be understood with reference to the circumstances in the light of which the parties contract. When there is a usage to carry all or any goods on deck, which both parties know or are deemed to know, their words may be selected and will be construed with reference to it. In such circumstances even a general word, "goods," will derive its meaning from the usages of the carrying trade known to the contracting parties, just as much as from any usage known to both, as to the meanings of terms in the general vocabulary of commerce. Now the word "usage" is not expressly limited, and a usage to carry on deck is a usage like another; only the context, therefore, can restrict it to a usage of drafting policies. What is that context? Goods on deck are still "goods," and "goods" are specifically described for insurance, when the policy says what they are specifically. It is not a specific description to say where they are. So much for mere language. What makes "goods" insufficiently specific for an insurance on deck cargo is not any usage of underwriters to use words in a technical sense, but the usage of carriers to stow goods under deck, as being the safest place. A usage to carry on deck is a usage to the contrary to that, and, therefore, where it exists, its presence prevents any misdescription from arising. If in all carrying trades cargo was carried in and over indiscriminately no one would ever have distinguished between one position and the other any more than between one hold and another. No doubt, if ever a usage arises among those who draw and sign and accept policies to mean by "goods" any kind of goods, stowed anywhere, that also might be proved as a "usage to the contrary," but the respondents' point here is not that the "usage to the contrary" can never be such a usage as the appellants say it must be, but that it is not exclusively so, for a usage to carry on deck is also a usage to the contrary. For my part, I think them right.

Perhaps I might venture to say that in this article the Legislature has used language to express its thoughts with less than its accustomed felicity, but I think that there are special reasons to explain this. It may easily happen to anyone who endeavours to crystallise in a sentence the language of a century's decisions to draw the line somewhat uncertainly between the usual mode of carrying particular goods and the usual meaning of or description of those goods in a policy. In Lord Mansfield's time goods on deck were said not to be covered by a policy "on goods," because, in the language of insurance, goods only meant goods which were merchantable and a part of the cargo. Hence a captain's effects and goods lashed on deck were not covered. Apparently (though not quite certainly) the objection that the goods lashed on deck were not covered by the description "goods" rested on the fact that they were on deck and so not part of the cargo, which normally would be under deck, and not on the fact that they were not merchandise, but were the master's own effects: (*Ross* v. *Thwaite*, 1 Park, 23). In 1802 the opinion was clearly expressed that goods on deck were not within the description of goods in the policy: (*Backhouse* v. *Ripley*, 1 Park 24). Lord Ellenborough held in 1815, that underwriters were bound to take notice of a usage to carry carboys of vitriol on deck "without any communication," and so a policy on carboys of vitriol covered them on deck: (*Da Costa* v. *Edmunds*, 4 Camp. 142). In the general usage of the carrying trade, goods were only properly stowed when stowed under deck, but when, by a particular usage of a particular trade, or referring to particular goods, they were properly stowed though stowed on deck, the underwriter must be taken to know it as part of his business equipment, and to contract to insure goods in that trade or of that description with reference to the usage. Subsequent authorities develop this view. Evidence of a usage of underwriters not to pay for boats when slung on the quarter, though the policy was on "ship, boat and other

furniture," was held inadmissible as contradicting the express language of the policy: (*Blackett* v. *Royal Exchange Assurance*, 2 C. & J. 249), and *Ross* v. *Thwaite* was explained by Lord Lyndhurst, C.B. upon the view that by an implied term of the policy the underwriter is liable for goods insured only when so carried as to be exposed to ordinary and not to extraordinary and uncommunicated perils. Hence "an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy." In commenting on this case in *Myers* v. *Sarl* (30 L. J. Ex., at p. 13), Cockburn, C.J. says that it goes to the verge of permissible exclusion of evidence, and that *Ross* v. *Thwaite* and *Backhouse* v. *Ripley*, cases which had never been questioned, showed that by usage the general terms in the policy had received a limited signification. In the same case Blackburn, J. considered that Lord Lyndhurst meant that, taking the language of the whole contract, it evinced upon the face of it an intention not to use the phrase in question in the particular sense sought to be put on it. In substance this was the view adopted in *Miller* v. *Titherington* (30 L. J. Ex. 217), briefly affirmed in the Exchequer Chamber, 31 L. J., Ex. 363, where on demurrer a plea of a custom of Liverpool underwriters not to pay for general average on timber jettisoned from deck was sustained on a declaration on a Liverpool policy upon ship. It was pleaded as a custom in the North Atlantic timber trade that underwriters were not liable under such circumstances, as both assured and underwriter well knew when they entered into the contract, and Martin, B. assigns as the reason for his decision that *Blackett's* case is really an illustration of the rule first recorded in *Ross* v. *Thwaite*, and that in such cases words are used in particular trades in a particular sense, which the parties may prove by evidence.

As far as I know, questions relating to insurance on deck cargo in actions on a policy for loss of the cargo by perils insured against did not come up for any considerable amount of further discussion in this country till 1903, the propositions laid down in the 2nd edit. of Arnould on Insurance (p. 263) being generally accepted, namely, "goods carried on deck, as they are exposed to a greater hazard than goods carried in the ordinary way, are not covered by a general insurance in the common form of goods and merchandise; if, indeed, they are so carried by virtue of any general and well-known custom of the particular course of trade, on which the insurance is effected, the underwriter is presumed to be acquainted with such usage without having notice, and therefore may fairly be supposed to undertake the risk of their being so carried on deck." In 1903 Walton, J. reviewed the subject in a remarkable judgment (*Apollinaris Company* v. *Nord Deutsche Insurance Company*, 9 Asp. Mar. Law Cas. 526; 89 L. T. Rep. 670; (1904) 1 K. B. 252) and stated these conclusions: "When from the description of the goods or the voyage, or both, it is apparent that in accordance with a well-known practice or usage of trade the goods will or even probably may be carried on deck, then even in the case of voyages by sea, when goods so carried are necessarily exposed to peculiar dangers, still the underwriters will be deemed to have consented to take this risk and will be liable for any loss of deck cargo by perils insured against" (at p. 528, Asp.; p. 258 of L. Rep.). . . "The rule against carrying goods on deck is usually involved in and depends on a larger and wider rule, which is that goods carried on a vessel should not be stowed so as to be exposed to unnecessary and extraordinary peril during transit."

The result would appear to be as follows:— (1) In the absence of proof of a special meaning attaching to the word used, and of contracting with reference to that meaning, anything coming under the description of the subject-matter of insurance which is expressed in the policy is covered; but (2) there is an implied exception from the liability of the underwriter, that he does not cover losses where they are caused by exposure of the subject-matter by those in charge of the adventure to extraordinary perils, of which the risk of deck carriage is one. (3) If the underwriter knows by the special description employed or otherwise, or if he is deemed to know it without notification because of the existence of a usage in the carrying trade to which the insurance refers that the goods may be carried on deck, his contract is taken to assent to that mode of stowage, and then either he agrees to cover such extraordinary perils or they cease to be extraordinary and so are covered. The important thing to notice is that the usage in question is a usage of the carrying trade to do a certain thing, and is not a usage of the business of insurance to attach a special meaning to a particular term, or to recognise a special liability in certain circumstances though only general terms are used. Such, I think, was the law before it was codified by the Act of 1906, and such, in my opinion, it remains. The particular wording of art. 17 obviously is not that which would have been adopted if totally new legislation was being framed. It takes its colour from the decisions, and reference to those decisions shows how the article came to be framed as it was. I think that it makes no change in the law.

The fact which I am not able to find established in the evidence as the Court of Appeal found it is the existence of a custom of underwriters to insure wool on deck during this transit under general terms not specifying that it may be stowed on deck. There was no evidence of actual knowledge that wool was ever carried on deck so far as the defendants were concerned, and their underwriter denied it. There was none of general knowledge of the practice and there was evidence to the contrary. True the cover was many years old and had been annually renewed, but no claims were proved to have been made and paid on the footing of the wool being carried on deck. A man may know that in some instances his cargo is being put on deck without this being evidence against him of a usage to carry on deck, for he may be relying on his right to claim damages for improper stowage if any harm is done. So these underwriters may have renewed the cover annually, relying on their not being on the risk except for under-deck cargo. If so, the renewal of the insurance does not show that they used general terms to cover the cargo whether on deck or not. To make them liable there must be proved, in fact, a usage to carry on deck, which they are deemed to know, and then a liability arises in such circumstances in respect of deck cargo, though unspecified.

There remains an argument based on the reading of sect. 78 (4) of the Act which is very novel. It is one of the disadvantages of codification that new terms used or even unfamiliar sequences of propositions suggest that the law has been changed where those familiar with the old decisions would not have suspected it. The argument affords a striking instance of this. The section obviously refers to suing and labouring. It cannot possibly be read as meaning that if the agents of the assured are not reasonably careful throughout the transit he cannot recover for anything to which their want of care contributes. The point, therefore, fails.

I think the appeal should be dismissed.

Solicitors for the appellants, *Waltons.*

Solicitors for the respondent, *Ballantyne, Clifford,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 29, 1920.

(Before BANKES, ATKIN, and YOUNGER. L.JJ.)

THE KRONPRINZ OLAV. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Limitation of liability—Fund—Claims by cargo owners and others—No claim by owners of the damaged ship — Proceedings pending abroad—Unliquidated claims—Rights of plaintiffs against limitation fund—Time for bringing in claims—Discretion—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.

Early in 1917, *after a collision between two Norwegian vessels, the* C. *and* K., *the* C. *sank. In March* 1917, *the owners of the* C.'s *cargo began an action against the owners of the* K. *in the Admiralty Court. In May* 1919 *both vessels were pronounced to blame, and it was adjudged that the plaintiffs should recover half of the amount of their damage from the defendants. Thereupon the owners of the* K. *commenced a limitation action against the owners of the* C., *the owners of her cargo, and all persons claiming to have received damage by reason of the collision; and in Feb.* 1920 *a decree was pronounced limiting the liability of the owners of the* K. *to* 8*l. per ton on the registered tonnage of the* K., *calculated in accordance with the provisions of the Merchant Shipping Act* 1894; *and it was ordered that all claims be brought in within three months and that claims not so brought in would be excluded from sharing in the limitation fund.*

Claims were filed by the owners of the C.'s *cargo. The owners of the* C. *entered an appearance, but took no further steps in the limitation proceedings. In Feb.* 1919 *the owners of the* C. *had commenced an action in Norway against the owners of the* K., *and in June* 1920, *when the registrar made his report, the trial of the Norwegian action was still pending. The owners of the* K. *subsequently took out a summons asking that the report be not confirmed, and that they might have leave to file a claim against the fund in respect of any liability they might incur under the Norwegian proceedings. Hill, J. dismissed the summons.*

The plaintiffs appealed.

Before their appeal was heard the Norwegian court had pronounced the K. *two-thirds to blame, but had not assessed the damages.*

Held by Bankes and Atkin, L.JJ. (*Younger, L.J. concurring on different grounds*) (1) *that the plaintiffs were not entitled under the limitation sections of the Merchant Shipping Act to have the distribution of the fund stayed;* (2) *that limitation proceedings do not contemplate claims by plaintiffs, and that the owners of the* K. *could not file a claim against the fund in their own right;* (3) (*Atkin, L.J. doubting*) *that if an application had been made in proper form the court would have had a discretion to extend the time before distributing the fund, in order to allow the plaintiffs to ascertain their liability under the pending Norwegian judgment and to apply to the court to adjust the distribution of the fund so that the plaintiffs might obtain credit for the amount to be paid under the Norwegian judgment;* (4) *but that, having regard to the lapse of time since the collision, the court had rightly exercised its discretion in refusing to postpone the distribution of the fund.*

Decision of Hill, J. affirmed.

APPEAL from a decision of Hill, J., who dismissed the plaintiffs' application that the registrar's report in an action of limitation be not confirmed, and that the plaintiffs should be at liberty to file a claim.

The following statement of the facts is in substance taken from the judgment of the learned judge given on the 29th July 1920. On the 2nd Feb. 1917 a collision occurred between the Norwegian steamships *Kronprinz Olav* and *Cuba.* The *Cuba* sank with her cargo. On the 3rd March 1917 the owners of the cargo laden on board the *Cuba* began an action *in rem* in this court against the owners of the *Kronprinz Olav.* On the 13th May 1919 a decree of both to blame was pronounced in that action, and the owners of the *Kronprinz Olav* were accordingly condemned in a moiety of the cargo owners' damages. The owners of the *Kronprinz Olav* thereupon brought a suit of limitation of liability in accordance with the provisions of sects. 503 and 504 of the Merchant Shipping Act 1894 against the owners of the *Cuba,* the owners of her cargo, and all persons claiming to have suffered damage by reason of the collision. On the 2nd Feb. 1920 a limitation decree was pronounced by this court, and that decree contained the usual provisions as to bringing in claims within a certain time (three months) and as to excluding claims not brought in. Claims were filed by the owners of the cargo on board the *Cuba* and by the master and the crew of the *Cuba* in respect of their lost effects. A reference was held in pursuance of the limitation decree, and on the 29th June 1920 the registrar made his report. He found the amount due to the claimants who had filed claims to be in the aggregate 23,725*l.* 12*s.* 6*d.* The amount of the limited liability of the owners of the *Kronprinz Olav* was 9385*l.* 16*s.* 9*d.* That amount has been duly paid into court under the limitation decree. The owners of the *Cuba* did not file any claim in the proceedings under the limitation decree. They entered an appearance, but they did nothing further.

The Merchant Shipping Act 1894 provides by

Sect. 503: The owners of a ship, British or foreign, shall not, where all or any of the following occurrences

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

take place without their actual fault or privity; that is to say . . . (*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of 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 . . . an aggregate amount not exceedings eight pounds for each ton of their ship's tonnage.

Sect. 504: Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court . . . and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such a manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just.

His Lordship proceeded as follows: "I was told that the owners of the *Cuba* are suing the owners of the *Kronprinz Olav* in Norway, and that a decision is expected some time in the autumn." [That action was commenced on the 17th Feb. 1919, and judgment was given on the 30th Sept. 1920, condemning the owners of the *Kronprinz Olav* in two-thirds of the damages of the owners of the *Cuba*.] "In these circumstances the owners of the *Kronprinz Olav* apply by the present summons for an order that the report be not confirmed, and that they, the owners of the *Kronprinz Olav*, be at liberty to file a claim. They fear that as the result of the proceedings in Norway, they may become liable in damages to the owners of the *Cuba*, and if they have to pay the owners of the *Cuba* in Norway they desire to stand in their shoes and prove against the limitation fund in respect of any moneys so paid. The claimants, in whose favour the registrar has reported, object, and assert that they are the only claimants before the court, that the time limited for bringing in cliams has expired, that the owners of the *Cuba* have brought in no claim, and that the owners of the *Kronprinz Olav* are not in a position to bring in any claim.

I think the objections of these claimants are sound. No doubt if the owners of the *Kronprinz Olav* had discharged a liability arising out of the collision to the owners of the *Cuba*, they would in the limitation proceedings be entitled to stand in the shoes of the owners of the *Cuba* and prove against the fund as being subrogated to the rights of the owners of the *Cuba*: (see *The Crathie*, 8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178). But they have not paid anything and are not yet found liable to pay anything. They have no claim against the fund. They have filed no claim within the time limited, and they are to-day not in a position to file any claim or to say with any certainty that they will ever have a claim which could be filed at any time. In these circumstances it would in my judgment be wrong to postpone the right, which the claimants who have proved have already acquired, to have the fund distributed in satisfaction of their claims. I dismiss the summons with costs."

The plaintiffs appealed.

C. R. Dunlop, K.C. and *J. B. Aspinall* for the appellants. — Under sects. 503 and 504 of the Merchant Shipping Act 1894, the appellants are not liable under English law, beyond 8*l.* a ton, *i.e.*, 9385*l.* for damages arising out of the collision. If they are adjudged to pay and do pay under Norwegian law some 16,000*l.* to the owners of the *Cuba*, they ought to be allowed to stand in the shoes of the owners of the *Cuba* and claim against the limitation fund in respect of that payment. The owners of the *Cuba* have made no claim against the limitation fund, although they entered an appearance in the limitation action. That is immaterial, and the appellants are entitled to credit for any sums to be paid to the owners of the *Cuba*:

The Crathie, 8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178;
Rankine v. *Raschen*, (1877) 14 Sc. L. Rep. 725; 4 Rep. 725.

The plaintiffs should be allowed to put in a claim against the limitation fund in respect of their liability to the owners of the *Cuba*, and the distribution of that fund should be postponed. The time for sending in claims may be extended:

The Zoe, 5 Asp. Mar. Law Cas. 583; 54 L. T. Rep. 879; 11 Prob. Div. 72.

If the appellants are not entitled as of right to that extension the court should in the circumstances of the present case exercise its discretion in their favour.

G. P. Langton for the respondents, the claimants against the limitation fund.—The plaintiff's claim is merely contingent; its amount is not at present ascertained, and there are no materials before the court for ascertaining it, and the court has never so far allowed such a claim. In the cases cited the amounts claimed by the plaintiffs in the limitation proceedings were in respect of moneys already paid to persons who had not taken part in the limitation proceedings; here no such payment has been made. The plaintiffs are at fault for their delay; they have long been aware of the action pending against them in Norway, and they took no steps to safeguard themselves in the limitation proceedings from the effects of an adverse judgment in Norway. The claimants should not be required to wait any longer for the distribution of the limitation fund.

Dunlop, K.C. in reply.

Bankes, L.J.—This is an appeal from a decision of Hill, J., and, as put by Mr. Dunlop for the plaintiffs, raises an important question. Mr. Dunlop's claim in substance was that under the circumstances of this case the plaintiffs had a right to an order from the court staying the distribution of the fund paid into court in the limitation proceedings until they had had the opportunity of bringing before the court a claim on their own behalf founded upon the amount which they had been held in a Norwegian court liable to pay to the owners of the *Cuba*.

[The Lord Justice stated the facts and continued]:

Upon those facts the main contention is that the plaintiffs have a right to have the distribution of the fund stayed and a right to bring forward their claim, whenever it is ascertained, to rank as a claim which must be allowed. The foundation of Mr. Dunlop's argument is that under sect. 503 of the Merchant Shipping Act 1894, the plaintiffs have

a statutory right to have the amount of the damages which are payable by them under the decision of the Admiralty Court, limited. There are two observations which it seems to me it is necessary to make in reference to that contention. First, the statute can only affect claims of persons who are affected by the statute, it can have no effect upon a claim by a foreigner in a foreign country, and, therefore, it is not true to say that the statute gives the owner of a vessel any absolute right to limit the amount of his liability; the right is qualified by the fact that it has reference only to the claims of persons who are affected by the statute. Secondly, it appears to me on reading sect. 504 that the claimants there referred to are clearly persons other than the person who is seeking to limit his liability, and that when the application was made to the court below and to this court that the plaintiffs, the owners of the *Kronprinz Olav*, might bring in a claim, their application was wrong in form; the proper form would be an application that they might have the benefit of the statute by being allowed credit, as against the fund, for any amount that they may have to pay in respect of the Norwegian judgment. That is more a matter of form than a matter of substance, but as a matter of form I think that the plaintiffs are wrong in suggesting that they have any claim in their own right which they can bring forward as against the fund.

The decree which was made followed the language of the section, and it not only limited the liability to a certain amount, but it ordered that advertisements should be issued intimating to "all persons having any claim in respect of loss or damage caused as aforesaid that if they do not come in and enter their claims on or before the 3rd day of May 1920. they will be excluded from sharing in the aforesaid amount." The court clearly was competent to make such an order, and if a claimant did not come in and make a claim by that date he was in mercy, and it would be in the discretion of the court as to whether he should be allowed to make his claim in spite of the fact that the time had expired. There is no doubt whatever that the court had jurisdiction to extend the time, and, in my opinion, it ought always, in a proper case, to extend the time if it is shown that for some good reason the claimant was not in a position to make the claim within the time specified. I think the fact that the court has jurisdiction to extend the time is quite plainly established by decided cases: See, for example, *The Zoe* (5 Asp. Mar. Law Cas. 583; 1886, 54 L. T. Rep. 879; 11 Prob. Div. 72). I am of opinion, therefore, that assuming the plaintiffs had made their application to the learned judge in the proper form and had asked him for an extension of time, it would have been within his jurisdiction to grant the application, not because the plaintiffs had an absolute right to an order as a matter of course, but because the court would, in my opinion, have had jurisdiction to allow the plaintiffs to put forward a claim in proper form, although the owners of the *Cuba* had not themselves put forward any claim in time or at all, and although possibly some considerable time may have elapsed since the date fixed for bringing in claims.

Some question may arise as to whether there is any difference between the case in which the shipowner who has successfully established his right to limit his liability is called upon to meet a claim by a claimant resident abroad and has either established, or is seeking to establish, his right abroad. I do not think it is necessary to decide that question on this particular appeal, but, speaking for myself, I think that it is difficult to see why any distinction should be drawn between the two cases if the object of the court is to give to the applicant the relief which as between himself and the claimants to the fund, the statute seems to me to contemplate that he should have.

I do not think it is necessary to decide that point definitely on this particular appeal, because Mr. Langton for the defendants has satisfied me that, having regard to the dates, the order of the learned judge was in substance right.

This collision took place as long ago as Feb. 1917. The plaintiffs have known of these proceedings in Norway ever since Feb. 1919. The decree in the limitation action was not made till Feb. 1920, and the plaintiffs were apparently content, as is stated in their affidavit, to take their chance of the proceedings in Norway turning out in their favour. They did not at the time at which the decree of limitation was made, or at any subsequent stage until after the report of the registrar, attempt to bring forward or indicate that there was this contingent liability in respect of claims which the owners of the *Cuba* might establish in Norway. The plaintiffs allowed time to run on and did nothing until this very late stage in July 1920, when the application was made to the judge to further hang up these proceedings. I am satisfied that although it was the intention and the object of the statute to protect an owner by allowing him to limit his liability in the manner indicated by the statute, it was also the intention that within some definite time, to be fixed by the court at the time of the decree, those persons who would be entitled to any distribution of the fund in court should have the amounts paid out. It seems to me that quite sufficient time has elapsed, and that it does not lie in the mouths of these plaintiffs, who have done nothing for so long and have been content to trust to the Norwegian decision being in their favour, to come at this last stage and to endeavour to hang up these proceedings for a further indefinite time; for, even now, the amount of the damages is not ascertained and there is no indication as to when it is likely to be ascertained.

For these reasons I come to the conclusion that the learned judge's order was in substance right, and that the distribution of this fund ought not any longer to be delayed. It is a matter entirely in the discretion of the court whether the distribution shall be further postponed, and in my opinion the right view is that the time has come when the fund should be distributed. Under these circumstances it does not seem to me necessary to discuss either of the two decisions to which we have been referred, *The Craithie* (8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178) and *Rankine* v. *Raschen* (1877, 4 Rep. 725; 14 Sc. L. Rep. 476), because the facts in those cases were so different. In both cases a sum of money had in fact been paid to claimants, and they were, I think, bound by the provisions of the statute. I do not think it is possible to extract from either of those decisions any real assistance in reference to the proposition which has been propounded by Mr. Dunlop for the plaintiffs.

In my opinion the appeal fails and must be dismissed with costs.

Atkin, L.J.—This application arises out of a collision which took place in 1917 between two Norwegian-owned vessels, the *Kronprinz Olav* and the *Cuba*, in which the *Kronprinz Olav* sank the *Cuba*. Neither of those parties, being Norwegians, are subject to the operation of English statutes, but by sect. 504 of the Merchant Shipping Act of 1894, it is provided that "where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods . . . the owner may apply" for a limitation of proceedings. What the exact restriction is upon the rights of the owner of a foreign ship in that respect, if any, it is unnecessary to say, but certainly those are very large rights given to foreign owners. The owners of the *Kronprinz Olav* commenced proceedings in the Admiralty Court with a view of having their liability limited. They did not do so until the owners of the cargo on the *Cuba* had commenced the ordinary Admiralty proceedings against the owners of the *Kronprinz Olav*, and an award had been made in favour of the plaintiffs in that action. Thereupon the owners of the *Kronprinz Olav* commenced their proceedings for limitation of liability against the owners of the *Cuba*, the owners of the cargo, and all other persons who were said to have sustained damage. Those proceedings were commenced in 1919, and on the 2nd Feb. 1920 a decree was made in the ordinary form.

[The Lord Justice read the decree and proceeded:]

The registrar and merchants proceeded to deal with the claims that were brought in, and duly made their report on the 29th June last. Upon that report, if the parties accepted it, in accordance with ordinary practice, I think the amounts would be paid out; there would be no express motion to confirm the report, but an application might be made to confirm it or an application might be made complaining of it, and in this particular case on the 7th July the plaintiffs in the action took out this summons "that the registrar's report be not confirmed and the plaintiffs be at liberty to file a claim." It appears to me that this was an unfounded application. What the plaintiffs had in their minds was, that ever since the beginning of 1919 the owners of the *Cuba* had been taking proceedings *in personam* against them in the Norwegian courts for damages in respect of the loss of the *Cuba*, and the owners of the *Cuba* had not brought in any claim before the registrar and the merchants. They preferred to rely upon their own courts in respect of that liability which they were entitled to enforce in Norway, as they clearly were not subject in their own courts to the restrictions imposed upon them by the English statutes, and those proceedings were still pending at the time that this summons was taken out. What the plaintiffs desired was that they should have the benefit of any claim made in the Norwegian action which they might have to settle, so that the distribution of the proceeds in the Admiralty Court might be made upon the footing that the owners of the *Cuba* had made a claim which in fact they had not made, and that the plaintiffs should have credit, in the proceedings here against the total sum paid into court, in respect of the claim made by the owners of the *Cuba*.

To my mind it is entirely wrong to say that proceedings in limitation actions contemplate any claim by plaintiffs. The contention seems to me to be a contradiction in terms; the claims are claims against the plaintiffs, claims to enforce liability against the plaintiffs; the claims can only be paid out of the fund; and, therefore, for the plaintiffs to apply to be allowed to file a claim, is an application for something to which it seems to me they were not in the least entitled. Nevertheless, it may be that they were entitled to make an application on the ground that the fund in court ought not to be distributed except upon the footing that certain claims not in this country had been made; and the question is whether that application ought to be acceded to, made in that form in this particular case. It is plain I think that the distribution of the fund in court is not dependent upon the claims that are brought in and assessed before the registrar and merchants, because it may be that a claim has already been settled by the plaintiff, and, if so, it is his duty to bring that fact before the court in order that the sum which has already been paid should be taken into account in relief of his liability to which, on the hypothesis that his liability is limited to 8*l.* per ton on the registered tonnage of his vessel, he is entitled. I say the distribution is not on the claims as brought in before the registrar, because when the court is informed that the plaintiff has paid such a claim as that, unless all parties accept it the registrar and merchants have to ascertain what was the true amount of that claim if it had been brought in; otherwise a serious injustice might be done to the other parties by the claim being taken into account on a larger footing than in fact it deserved, and therefore it may involve an investigation by the registrar and merchants.

I know of no case where the registrar and merchants, or the court, in dealing with something which is not the subject matter of a claim brought in before the registrar and merchants have dealt with it except upon the footing that payment has actually been made by the plaintiffs. The suggestion here is that the court has a further power to consider not only a claim in fact made within the jurisdiction and settled, but a contingent claim that is being made or may be made abroad, in respect of a party who is not subject to the restrictions of the particular section of the Merchant Shipping Act. I have been in very considerable doubt whether such a claim can be considered at all, because the benefit that is given under this statute is given, I think, to persons who come within the jurisdiction of the statute; it is a restriction upon the rights of persons, who, on this hypothesis, have got a claim larger than in fact they are going to be paid, and that restriction does not apply at all in the case of foreigners who are in a position to make their claim outside the jurisdiction. I see nothing to compel them, at any rate, to come here and make their claims, and if there is nothing to compel them to make their claims here I find it very difficult to conceive that the court can order the fund to be adjusted upon the footing that such a claim was made. I do not propose to determine that matter, however, as I think it is unnecessary.

One of the features, and a necessary feature, of the procedure under the Act is that there is a period of time to be fixed by the court within which claims must be brought, otherwise they are excluded. I agree that in special circumstances there may be grounds for extending that time, but the object is plain enough. It is to enable the amounts that

are to be paid out of the fund in court to be ascertained, because the portion which each claimant will be entitled to receive out of the fund in court depends upon the precise assessment to a shilling of all the other claims which have to be brought into account, and it is obvious that if claims are left outstanding there will be a delay in ascertaining how much each person can receive. It would be a very hard position if, in spite of the decree made in accordance with the Act fixing a period of time after which claims are excluded, the registrar and merchants, for the purpose of assisting the court to determine how much money is to be paid out, are to take into account contingent claims which in fact have not been made at all, but which may yet be made because of a right in the future. In this case a claim was made in Norway within two years of the collision, but supposing the limitation suit had been commenced, as might very well have happened, within a month or two of the collision. The suggestion that the court must wait until a person who has a foreign claim has first of all delayed until the extreme period of limitation, whatever it may be—it may be two years under the Maritime Conventions Act—before he makes his claim at all, and then that the court must wait until that claim has been assessed in the foreign court, has been further revised by the registrar and merchants in order to see that it is fair and that it does justice to the other claimants, makes it fairly obvious what the inconvenience and real injustice to the other claimants of such a procedure would be. To my mind the circumstances in this case would do the same injustice, though not to the exaggerated extent that I have suggested as possible. The claim was in 1917; no proceedings were taken promptly; the cargo-owners did not get their decree until 1919; then the limitation of liability proceedings were commenced. During the whole of that time the present plaintiffs were aware of this claim, for proceedings were commenced in Norway in Feb. 1919. During the whole of that time they refrained from referring to the claim in their statement of claim: they did not get the decree moulded with reference to the claim; and they made no application that it should come before the registrar and merchants. They waited until after the report of the registrar and merchants; and indeed they waited, as appears from their affidavit, because they were of opinion that the claim in the Norwegian Court was not likely to be successful. After the whole of that delay they then proceed to make an application which in my view, as I have said, is quite unfounded, that they should be at liberty to file a claim themselves. I am not quite sure that one is doing the application full justice in saying that before the learned judge they limited their claim in that way. I think it is possible they may have applied to the learned judge to exercise his discretion in their favour, by ordering that a payment out should be made to them on the footing that the claim had been made by the owners of the *Cuba*. If they did not, then they are in the further dilemma that they have failed to ask any court to exercise a discretion in their favour until they come to this court, a still further delay. To my mind it clearly was the intention of the Legislature that these claims should be brought in reasonably promptly so as to enable a distribution to be made of the sum which the claimants are at any rate entitled to have, and I think it would be a very bad precedent to allow plaintiffs to delay, and delay for a very considerable period as in this case, and then at the last moment to come in and hold up a distribution of the fund for many months. If this application were granted, the decree in the Norwegian Court even now does not fix the true amount of the claim of the owners of the *Cuba*, and even when that has been ascertained in Norway it does not bind the other claimants, who might still desire to have it referred to the registrar and merchants to determine the true amount of the collision damage done in 1917.

Under these circumstances it appears to me that it would be quite wrong for us to exercise our discretion, if we have it, to allow this application, and I agree that the appeal ought to be dismissed.

Younger, L.J.—One cannot, I think, read sect. 503 of the Merchant Shipping Act without seeing that one purpose of the Legislature, which by that section limited a shipowner's liability in respect of certain cases of loss of life, injury or damage, was to make that limitation as absolute, as effective, and as complete as it could be made. The privilege is extended to a foreign owner as well as to a British owner, I presume, because the Legislature saw in the exemption granted to a foreign owner the application of some high maritime policy which it was desirable for this country to give effect to; and when one looks at sect. 504, which gives to the owner who is liable the right to have the limitation of the liability made effective, it appears to me that on the construction of that section, which is expressed in the widest terms as regards the power of the court, it is the duty of the court to do its best to make that limitation of liability as complete as the Legislature intended that it should be. Of course, the British Legislature had no authority, by any statute that it may enact, over claimants out of its jurisdiction, and unless they come within the jurisdiction it matters not for this purpose whether those claimants are foreigners out of the jurisdiction or are British subjects; but, nevertheless, although the statute cannot by its terms restrict the activities of these persons exercised beyond the jurisdiction of the statute, if it is the purpose of the statute to limit the liability as effectively as possible, it will be, as I read these sections, the duty of the court, when it can, to make the statute effective over such persons as I have above described. Very similar principles to those which I think apply here are frequently applied in debenture holders' actions in the Chancery Division, where claims in respect of the property to which the debenture-holders are entitled, but which may be situate outside the jurisdiction, are made by persons over whom the court here has no jurisdiction, and while the court recognises that it has no jurisdiction over such persons and perforce has to accept that position, it nevertheless uses any power it has to limit that disadvantage by taking steps to see that if and when those persons come within the jurisdiction they may be made to do such justice in the matter as the court sees ought to be done. An excellent example both of the court's limitations and of its functions in such matters is to be found in *Re Maudslay, Sons and Field* (82 L. T. Rep. 378; (1900) 1 Ch. 602).

In this case, the Norwegian owners of the *Cuba* have not come into, and there is no power to compel them to come into, those proceedings; but their claim against the owners of the *Kronprinz*

Olav is one which, so far as it is a valid claim, would have been a claim to be brought in under the limitation proceedings and dealt with there, if it had been filed in due time. In respect of that claim not brought in, the plaintiffs in the limitation proceedings, as it appears to me, are powerless. They had to submit to any decree against them which the Norwegian court may make and enforce, and they must do the best they can with that decree. To my mind they have not, and never will have, in respect of that outstanding liability, any claim which, as plaintiffs, in the limitation proceedings, they can bring in those proceedings. The only right or claim that they ever could bring in these proceedings, as it seems to me, would be this: Having paid to the Norwegian owners a claim which might have been brought in the limitation proceedings here by these owners, the plaintiffs would be entitled, or might be entitled, standing in the shoes of those owners whom they had paid, to make in the limitation proceedings the claim which the owners themselves might have made. But until they have paid something to the owners of the *Cuba*, and until they have got something which amounts to an assignment of the rights of the owners of the *Cuba* as against the fund here, it appears to me that the plaintiffs are not in a position to come forward and by the strength of their own right arm make any claim at all against the fund in the English proceedings. I think the observations of the learned judge in deciding this case are absolutely correct.

[The Lord Justice read the observations of Hill, J. set out above, and proceeded:]

In my judgment, all the observations of the learned judge which I have read, apart from the conclusion which I will refer to in a moment, were well founded, and if there were no more in the case as it is now presented to us by Mr. Dunlop for the plaintiffs I should, speaking for myself, say that the learned judge's decision was beyond criticism and that it must stand. But Mr. Dunlop has put forward a second line of argument, and as I read the learned judge's judgment he has not dealt with that at all, and probably it was not before him. I desire now to deal with that part of the case, and then to explain why I think that none the less this appeal must be dismissed.

The case that is now made is based on these principles: sect. 504 of the Merchant Shipping Act, it is said, gives to the court the fullest possible discretion with regard to the time which is to be fixed for the bringing in of claims, and in exercising that discretion it is the duty of the court, remembering the main purposes of ss. 503 and 504, to hold the balance equally between the parties to the limitation proceedings, to see on the one hand that the plaintiffs are not vexed beyond the stated liability that is prescribed by the statute, and on the other hand that in the exercise of its power to protect the plaintiff beyond the amount which the statute fixes as his liability the court is not delaying unduly the satisfaction of the claims which, to the extent to which the fund in court will suffice to meet them, have to be satisfied out of that fund. Those are the two rights which the court has to respect as best it can, and to my mind it has a duty to adjust both of them. The provision with regard to the date which is fixed by the order of the court, and which under sect. 503 has to be fixed, is a class of provision which occurs in many other statutes besides the Merchant Shipping Act, and on a matter *in pari materis* it occurs among other places in sect. 169 of the Companies' Consolidation Act 1908, where the section is to this effect: "The court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved." It has always been the rule that a claim may, notwithstanding that section, be brought in after the time has been fixed, the only disability on the person delaying being that his subsequent claim is not to disturb prior dividends; but with regard to any fund available for distribution he is entitled to his share of it, even to the extent of excluding the other creditors until he has received the same satisfaction as they and notwithstanding that his claim is made late. I apprehend that may well be the position under this statute if the court, before a fund is distributed, is made aware that there is a claim which is not yet brought forward and which will affect the final distribution.

The court, in those circumstances, ought and would consider that. Now what is the position with regard to the plaintiffs here in that aspect of the case? The plaintiffs in England have been sued in Norway and a judgment has been given against them in the Norwegian Court for a sum which is not yet ascertained. There has been an inquiry there to ascertain the precise amount of that liability, and a sum is named which will represent its maximum amount. The plaintiffs might, therefore, in the proceedings here put forward their case from this point of view. They might say: We have not paid anything, so we are not entitled to claim as claimants, but we ask to be allowed to rank against this fund to-day, because the persons to whom we are under liability in Norway have not claimed; we have not paid and we cannot claim on their account, but, nevertheless, there is a judgment against us in Norway which, in the course of some period of time which we are not able now to specify, will materialise in a claim against us for a Norwegian sum representing x pounds, and we ask the court, therefore, so to mould or modify the order which has been already made, that, without disturbing the distribution that may be made among the other claimants as regards the balance, there shall be set aside in court the sum for which we apprehend we shall be liable; if it turns out that we are liable for that sum then we ought to get that in respect of the Norwegian claim; if, on the other hand, it turns out that we are not liable for that sum then that amount will be distributed among the other claimants, and any costs put upon them by reason of the delay will be compensated by interest which we will pay. That is the proposal made by Mr. Dunlop, and the question is whether, if the learned judge's attention had been called to the case in that way, he ought in the exercise of his discretion to have acceded to that argument. I am not so satisfied as my learned brothers are, that the plaintiffs, in making that claim now, are too late. It does not appear to me that anything that has happened in Norway, so far as they are concerned, has delayed the application here. It is not suggested that the proceedings in Norway, so far as the plaintiffs are concerned, have not been carried on as expeditiously as possible. But, nevertheless, I am much impressed by the circumstances to which my learned brothers have drawn attention, and that is the great length of time which

has taken place since this collision and the fact that these claimants are still without their money, even limited as it is to the amount paid into court; and I think, taking all the circumstances into consideration, there has just been that passage of time which, holding the balance equally between the plaintiffs and the claimants, requires the court now to say that the time has come when the claimants ought to get their money.

Accordingly, although my reasons are different from the reasons stated by the other members of the court, the conclusion I come to is the same, and I concur in thinking that the appeal ought to be dismissed.

Appeal dismissed.

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

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

Dec. 1 *and* 2, 1920.

(Before Lord STERNDALE, M.R., WARRINGTON and SCRUTTON, L.JJ.)

THE KARAMEA. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Navigation of entrance to Montevideo Harbour — Rounding the whistling buoy — "Keeping course and speed"—Whistle signals —Apportionment of blame—Discretion of Court of Appeal to review apportionment—Regulations for Preventing Collisions at Sea, arts. 19, 21, 25, 27 *and* 28—*Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57) *s.* 1.

When the judge of the Admiralty Court has apportioned blame under sect. 1 *of the Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *and the Court of Appeal agree with him on the facts and in his conclusions as to the actions of the ships, they will not lightly interfere with his apportionment, though they have power to do so. But if the court differs from the judge in these respects the court will review his decision as to the proportions of blame.*

The K., *when outward bound from Montevideo, sighted the green light of the H., on her port bow when the* K. *was nearing the whistling buoy at the entrance to the harbour. The vessels were on crossing courses. When the* K. *had the buoy abeam on her starboard she starboarded to make the turn for the sea, the turn being usually made at the buoy. The* H., *when first sighting the* K. *at a distance of two miles, ported slightly but did not blow her helm signal, although she was altering not only for the buoy but also in order to manœuvre for the* K., *nor did she at once open her red light. After the* K. *starboarded, the* H. *hard-a-ported to avoid a collision, but did not reverse her engines, and a collision occurred.*

Hill, J. held that the K. *was three-fourths and the* H. *one-fourth to blame. Both vessels appealed.*

Held, that under art. 21 *of the Regulation for Preventing Collisions at Sea it was the duty of the* K. *to keep her course and speed; and there were no special circumstances to relieve the* K. *from obeying the rule; and that under art.* 19 *it was the duty of the* H. *to keep out of the way of the* K. *The* H. *was to blame not only for failing to reverse her engines, but also for not blowing her whistle when she originally ported, as it might have been heard by those on the* K., *and have acted as a warning to them not to starboard. Art.* 28 *requires a vessel to sound helm signals when in sight of another vessel; she is only relieved from this obligation under the article when the other vessel is so far distant that she cannot be affected by the manœuvres which the signal indicates. The* H. *and the* K. *held to blame in equal degrees.*

Judgment of Hill, J. (infrà) (1920) *P.* 314) *varied.*

APPEAL and cross-appeal from a decision of Hill, J. in a collision action.

The plaintiffs (appellants on the cross-appeal) were the owners of the Norwegian steamship *Haugland.* The defendants (the appellants) were the owners of the British steamship *Karamea.*

The facts found by Hill, J. in the court below were as follows:

The collision happened shortly after 10 p.m. on the 12th Feb. 1919 to the southward and eastward of the whistling buoy which lies off the entrance channel to Montevideo. It was a fine clear night. The *Haugland,* a steamship of 3194 tons and 324 feet long, in ballast, was inward, and the *Karamea,* a steamship of 5627 tons and 420 feet long, laden, outward bound. The ships were in collision, the port side amidships of the *Haugland* with the stem of the *Karamea.* When they first sighted one another the speed of the *Haugland* was about eight and three-quarter knots, that of the *Karamea* rather less. The latter's engines were at full speed, but she was of deeper draught and passing through mud.

At the time of the collision the *Haugland* was under hard-a-port helm, with engines at full speed ahead; and the *Karamea* was under hard-a-starboard helm, with engines at full speed astern. Before this, according to the *Haugland,* the ships had been brought red to red, and, according to the *Karamea,* green to green.

The *Haugland's* case was that she, on a W. ½ N. course, saw the masthead light, and with glasses the red light, of the *Karamea* to the northward of the whistling buoy three to four points on the starboard bow at a distance of two to two and a half miles. She ported three and a half points to a course of N.W., and brought the buoy nearly ahead and the *Karamea* a little on the starboard bow. The *Karamea,* still showing her red light, crossed the bows of the *Haugland* from starboard to port at a distance of three-quarters of a mile to a mile, and brought the vessels red to red, and so continued until, at about half a mile, the *Karamea's* red light was two and a half to three points on the *Haugland's* port bow. The *Haugland* then starboarded a little to bring the buoy a little on the starboard bow. Then at a distance of a quarter of a mile the *Karamea* opened her green light about two points on the *Haugland's* port bow. The *Haugland* hard-a-ported, keeping full speed ahead, heard two short blasts, and replied with one short blast. The red light of the *Karamea* was shut in, and the collision followed.

The *Karamea's* case was that she was on a S. by E. course, shaping to pass the whistling buoy close on the starboard hand at a speed of seven knots; that when about three-quarters of a mile above the buoy she saw the masthead light of the *Haugland* three points on the port bow at an estimated distance of one and a half to two miles, and, though seeing no green light, recognised that the *Haugland*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

was a steamer heading up channel, *i.e.*, on a crossing course ; and that when the buoy was abeam on the starboard hand the *Karamea* starboarded, and after beginning to swing saw the green light of the *Haugland* about a point on the port bow. She gave two short blasts, hard-a-starboarded, and brought the green light about ahead. She gave a second two short blasts, and the red light of the *Haugland* opened one point on the starboard bow at about a quarter of a mile. She went full speed astern, heard one short blast, and the collision followed.

The *Karamea* further contended that, upon the vessels first sighting each other, the *Haugland* did not port sufficiently to open her red light at once to the *Karamea*, and did not blow her helm signal.

The *Haugland*, in reply to the latter contention, contended that she did not then blow her whistle as the distance was too great to allow of its being heard.

Regulations for Preventing Collisions at Sea 1897 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.

Hill, J. (after stating the facts as above set out, and adding that as to the helm action of the *Karamea* there was some variation in the evidence, the master saying that the orders were starboard and then hard-a-starboard, and the man at the wheel saying it was hard-a-starboard from the beginning, continued).—The first question is : Did the crossing rule apply, and, if it applied, was the rule obeyed ? The *Haugland*, bound for Montevideo from the sea, intended to pass the buoy on the starboard hand and then turn in under port helm. The *Karamea*, bound from Montevideo for the sea, intended to pass the buoy on the starboard hand and at the buoy to turn out under starboard helm. The *Haugland*, while still a good distance away from the buoy, which was on the *Haugland's* starboard bow, saw the red light of the *Karamea* broader on the starboard bow and that the *Karamea* was coming down towards the buoy, that is, to the southward. The *Karamea*, while still to the northward of the buoy and a good distance away from the *Haugland*, saw the masthead light of the *Haugland*, and recognised that the *Haugland* was heading to the westward.

There was considerable evidence and discussion as to whether the *Haugland's* green light was an efficient light. It is immaterial on the question of liability, for the *Karamea* without the guidance of the light knew that the *Haugland* was heading to the westward. The ships were, in fact, crossing ships, and each knew it. If the rules applied, the *Haugland* was the give-way ship, and the *Karamea* was the keep-course-and-speed ship. I am advised, and I am myself of opinion, that there was nothing which made the crossing rules inapplicable, or which could justify the *Karamea* in changing her course at the buoy, or which could justify the *Haugland* in not taking timely and sufficient measures to keep clear of the *Karamea*, and pass under her stern. When no other ship is concerned, the buoy may be a convenient point at which to make the turn, but according to the evidence the turn is often made before the buoy is reached, and I am advised that there is no reason why it should not be made after the buoy is passed. The Elder Brethren can see, and I can find, no special circumstances which relieved the ships, on sighting one another, from obeying the crossing rules, or which could entitle the *Karamea* to say that in starboarding at the buoy she was keeping her course, I therefore apply the crossing rules to the case.

Applying the crossing rules, it is obvious that the *Karamea* was to blame for starboarding, and that that fault was a cause of the collision. She saw the *Haugland* approaching on the port bow, and when abreast of the buoy she starboarded. According to the evidence she answered her helm slowly ; she was dragging in the mud. I am advised that it is very likely that she would get across on to the *Haugland's* port bow before she had swung sufficiently to open her green light. I find that that happened, and that the ships were never green to green. The lights were the green of the *Haugland* to the red of the *Karamea*, then red to red, and at the last the red of the *Haugland* to the green of the *Karamea*. The *Karamea* is to blame for starboarding and continuing to starboard. Her starboarding was wrong and brought about a position of danger. She never converted that into a position of safety by bringing the vessels green to green. She continued to starboard while the *Haugland* rightly ported, and she so brought about the collision.

I now have to consider the conduct of the *Haugland*. Accepting the plaintiff's case in full, it is impossible to acquit the *Haugland* of blame. When the green light of the *Karamea* opened on the *Haugland's* port bow, the helm of the *Haugland* was hard-a-ported, but the engines were kept full ahead, instead of being put full speed astern. This was all the more wrong because the officer in charge of the *Haugland* had observed that the *Karamea* was starboarding before the *Karamea* opened her green light. He then knew that the *Karamea* was intentionally taking action, which, if persisted in, would create a position of great danger, and when the green light opened he knew that a position of great danger had been created. I am advised that he ought to have at once reversed, and I entirely agree.

There still remains the question of whether the *Haugland* committed any earlier or other fault. [His Lordship dealt with the evidence on these points, on which he found in favour of the *Haugland*, and proceeded :] The main fault for the collision rests with the *Karamea*. The *Haugland* is also to blame ; her blame is not reversing when a position of danger was brought about by the *Karamea*.

In the circumstances, it seems to me that the proportions of blame of the two vessels are not equal, and I pronounce the *Karamea* three-fourths to blame, and the *Haugland* one-fourth to blame.

Both vessels appealed.

Bateson, K.C. and *Alfred Bucknill* for the owners of the *Karamea* (the appellants).

Stephens, K.C. and *Dumas* for the owners of the *Haugland* (the cross-appellants).

Lord Sterndale, M.R.—This is an appeal from a judgment of Hill, J., in which he held both the vessels to blame. I agree that both vessels were to blame, and so far I agree with Hill, J. But

another question arises. Hill, J. held the vessels to blame in the proportions—the *Karamea* three-fourths and the *Haugland* one-fourth; and it has been argued before us that, even if both vessels are to blame, those proportions of blame are wrong. On that two questions arise. It was argued for the respondents that, even although we might differ from the learned judge, unless we differ from him on a principle of law we cannot, or, at any rate, ought not, to interfere with his judgment as to the proportions of blame. I confess I cannot follow that argument at all. If we agree with him on the facts, and come to the same conclusion as to the actions of the two ships, I think it would take a very strong case indeed to induce us to interfere with his discretion as to the proportion of blame. We have power to do it, but I do not suppose we ever should do it. But if we differ from him on the facts as to the actions of the two ships, and find the one of them was more to blame in respects which actually had something to do with the causing of the collision, it seems to me we should not only be at liberty, but we should be bound, to review his decision as to the proportions of blame, because, if his decision is formed upon a judgment as to the actions of one of the vessels with which we do not agree, it is obvious that the very elements on which he formed his decision are disturbed. [His Lordship stated the facts, and continued:] As the *Karamea* was coming down from the whistle buoy, and as the *Haugland* was approaching it, the port light or the port side of the *Karamea* would be to the starboard side when they saw the starboard light of the *Haugland*. They were, therefore, crossing ships, and the crossing rule would apply, unless there was something in the circumstances of the case to prevent that rule applying. Now I am quite clear that there was nothing to prevent the crossing rule applying. There is no question of narrow channel. That is admitted; and the only thing that could be said was that it was a habit of ships to turn at the whistling buoy if they were outward bound and going eastward, and they were to turn under a starboard helm. If they were inward bound and going into the port, this turn under the port helm would be made somewhere about the whistle buoy. But even if this were a regular and recognised turning point, I think there is authority for saying that the circumstance does not prevent the crossing rule from applying; and in this case any such ground of rejecting the crossing rule seems to me to be disposed of by the evidence of the master of the *Karamea* himself, who said it was not necessary to turn at the turning point, though they did generally turn there. There was nothing in the shape of another ship, and nothing in the state of the water or of anything else, to prevent an outward-going ship going further south of the whistling buoy and starboarding there if it were a right and proper thing to do so. Therefore it seems to me there is no question that the crossing rule applies; and therefore it was the duty of the *Karamea* to keep her course and speed, and of the *Haugland* to keep out of the way of the *Karamea*.

The *Karamea* undoubtedly did not keep her course and speed. She did starboard there, as she intended to do, in order to make her course to the eastward, and I can see no reason to say that she is not to blame for that. But there is a considerable conflict as to the way in which the collision happened. The *Karamea* says that, although she had starboarded there, and even assuming it might be a wrong thing to do, she had produced a position of safety, of green to green, before any risk of collision really arose. I mean any serious risk of collision, not technical only; and in that position the *Haugland* ported into her, and therefore was entirely the cause of the collision. On the other hand, the *Haugland* says that nothing of the kind took place, but that she, having acted to a certain extent under a port helm, partly to get her head more to the buoy and partly because she saw the *Karamea* coming down, had got the *Karamea* for some considerable time on her port side, red to red, and on her port side about two or three points; and after they had been some considerable time in that position the *Karamea* without any cause at all starboarded into her, or starboarded across her bows. The learned judge has not accepted either of those stories. He has accepted the story of the *Haugland* to a greater extent than that of the *Karamea*, but he has not accepted it altogether. The conclusion that he has drawn—and I do not see any reason for differing from him—was this: He says the position into which the vessels got shortly before the collision was this, and that they did it in this way. The *Karamea* was coming down and intending to alter under a starboard helm, somewhere about the whistling buoy; and I will take it that she was to the eastward of it, and had it on her starboard hand. She was admittedly dragging to a certain extent through the mud, as there is always mud about that place; and therefore she was not making the speed she otherwise would have done, nor was she answering her helm in the way that she otherwise would have done. But she was going her full speed, and the learned judge came to the conclusion that what happened was this: The *Haugland* had altered a little under the port helm—partly for the *Karamea*, and partly to get her position better for the buoy. The *Karamea* did not answer, in consequence of her dragging through the mud, her starboard helm as was intended and as was expected; and therefore she went further ahead to the southward than she would have done if she had answered her helm, with the result that she drew to a certain extent across the bows of the *Haugland*. They did come for a time red to red, but all the time the *Karamea* was still acting to a certain extent, and intending to act, under a starboard helm. She continued to do that, with the result that, although she had got for a short time red to red with the *Haugland*, acting more, and perhaps rather more quickly, under her starboard helm, she came across her bows and had her green light to her; and so the collision was caused by the *Karamea* striking the *Haugland* somewhere nearly amidships, and at somewhere about a right angle. That is what the learned judge has found to be what happened, and I do not see any reason to differ from him at all as to that. There is no question that, if you take as absolutely accurate the estimates of distances and bearings which are given by the two vessels, and especially by the *Haugland*, there may be a difficulty in producing the effect which the learned judge has found was produced; but that is subject to what has been so often said with regard to those cases that you may get very much misled if you proceed upon the assumption that all the estimates of the bearings and distances are absolutely accurate. They

are estimates, and they are not always right, and I do not see any ground for differing from the learned judge. He has held on that state of things, of course, that the *Karamea* was to blame. But he has also held that the *Haugland* was to blame, and for this reason—that, when she saw what the *Karamea* was doing, instead of reversing she still continued full speed ahead under a hard-a-port helm. I think he was right there also. That was a wrong manœuvre of the *Haugland*, which took place at the last moment, and at the time when the *Karamea* had put her in a position of very considerable difficulty; and holding that to be the only respect in which the *Haugland* was to blame, he considered that one-fourth of the blame only was attributable to her.

But another case was made against the *Haugland* which the learned judge rejected, and that was this: When she sighted the *Karamea* she did port—I think she says half a point, or, at any rate, it was a very slight porting; she did not port sufficiently to open her red light at once to the *Karamea*. She brought the *Karamea* very much finer upon her starboard bow, but she did not actually get her on the port bow at that moment, and she trusted to the *Karamea* keeping her headway and crossing her head in order to get the position of red to red which was afterwards produced. She was then at a distance of somewhere about two miles. She did not blow her helm signal, and I can see no excuse for that. If she had been altering simply for her own navigation, apart from anything to do with the *Karamea*, there would be something to be said for it. But avowedly she was altering, not only for the buoy, but also in order to manœuvre for the *Karamea*; and therefore under the strictest definition which you can have of a vessel in sight the *Karamea* was in sight of the *Haugland* for the purpose of manœuvre, and she did act for her. Now, in those circumstances, the rule is express—that the vessel which is acting ought to blow the proper helm signal; and the only reason given for not doing so in this case was that the *Haugland* was so far off—that is, she was about two miles off—that the *Karamea* could not possibly have heard the signal, and therefore it was no use blowing. I ought to say that the wind also was blowing—not strongly, but was blowing from the *Haugland* towards the *Karamea*. Of couse, it is very difficult to say how far a whistle can be heard, unless you know what the whistle is. But we are advised, and I think our experience also teaches us, that two miles is not by any means an impossible distance for a good whistle to be heard, and that does not seem to me to be any reason for not whistling. Now what is said against the *Haugland* is this: You, by your action, contributed to this collision, because you misled, or, at any rate, might have misled, the *Karamea* into thinking that you were not going to alter for her, and that, therefore, she might safely alter and go on her course under the starboard helm. The Elder Brethren advised the learned judge in the court below that, in respect of the absence of the whistle, and the slight porting, and not seeing the red light, the *Haugland* could not be held to blame at all. We have asked our assessors, and I regret to say on the second point the assessors do not entirely agree—namely, whether the *Haugland* ought at once to have opened her red light, and not trusted to the *Karamea* crossing her bow in order to get them red to red. If I had to choose, I think I should myself say that, in the circumstances, it is better that a ship like the *Haugland* should emphasise her position at once, as she is the ship which has to alter for the other; but I do not think it is necessary to come to that conclusion, because both of those who assist us are of opinion that this vessel, undoubtedly altering as she did, ought to have given her helm signal, and they see no reason in the circumstances (so far as they can judge without knowing exactly what the whistle was) why that whistle should not have been heard by the *Karamea*. Taking those two things together, I cannot myself see how the *Haugland* can be held not to blame for her manœuvres at that time. Had she at once opened her red light there certainly was a better chance of the *Karamea* being warned that she must not starboard. It ought not to have been necessary to have warned her, because she had no right to starboard by the rule. Had she heard the helm signal at all she would have had a greater chance of being warned, although the distance was considerable. But as the *Haugland* omitted both to open her red light at once and also to give any sound signal that she was acting for the *Karamea*, I cannot help differing from the learned judge when he says she was not to blame for that earlier port manœuvre. If she were, it seems to me that that is a fault which might very well, and very likely did, contribute to the collision, because it deprived the *Karamea* of the warning that she otherwise would have had, which might have induced her to correct her wrong manœuvre. She did not get that warning, and she did not correct her wrong manœuvre. She came on wrongly, and the *Haugland* also acted wrongly at the last, and they were both continuing their wrong action up to the time of the collision; and therefore it seems to me that, in those circumstances, the *Haugland* is more to blame than the learned judge thought she was, and therefore we have to see whether, in the altered circumstances thus produced the proportions that the learned judge has stated should be maintained. I do not think they should. I think, in the circumstances as we find them, that there is no reason for dividing the blame, except according to the rule that each is to blame half and half; and that, I think, is the judgment that ought to be given.

Warrington, L.J.—I am of the same opinion. The judge below has found both vessels to blame. He has apportioned the blame in the proportion of three-fourths to the *Karamea* and one-fourth to the *Haugland*. He has arrived at that proportion by finding the *Haugland* to blame in reference to one act of hers, and one act only. It is contended on behalf of the *Karamea* the *Haugland* was also to blame for default in the early part of her manœuvres, and we are accordingly asked, if we come to that conclusion, to vary the apportionment arrived at by the learned judge. Now with regard to that I only desire to say this: It is conceded by counsel for the *Haugland* that, if the method of apportionment adopted by a judge is determined by his conclusions on a point of law, then if this court differs from him in the conclusion at which he arrives there is no question that it has the right to alter the apportionment at which he has arrived. I can see no distinction between that case and the case in which the conclusion of the learned judge has been determined by his finding of fact, and this court differs from him in that finding. It seems to me that in either

of those two cases this court necessarily arrives at a conclusion, not merely that the apportionment is wrong, but that the method by which the apportionment is arrived at is wrong, and in that case I see no reason why this court should not vary the apportionment. It may well be, and probably is the case, that, if the court arrives at the same conclusion both in fact and in law, it would not interfere merely because the learned judge in his discretion has given proportions which this court thinks it would not have given. That is another matter altogether. But there may well be an apportionment that depends on either a conclusion of law or a conclusion of fact in which this court differs, and then it seems to me there is no objection to its altering the apportionment. [His Lordship stated the circumstances which resulted in the collision, and continued:] Now what has been said on behalf of the *Karamea* is that the *Haugland* ought, when she originally ported her helm, as I have said, partly with a view to the ship as well as to the buoy, to have gone more decidedly under a port helm so as to indicate to the *Karamea* that she understood that it was her duty to give way, and so to have told the *Karamea* that she was expected to maintain her course and speed, and that, if she had done so, then the collision might very well not have occurred. Further, it is said that the *Haugland* ought, when she did port her helm as she did, to have given the port helm signal, which she failed to do. That she did port her helm there is no question on the story of the *Haugland* herself, nor is there any question that she failed to give the port helm signal. The only reason for not giving it is that she thought that the *Karamea* was too far off. Now the learned judge, under those circumstances, asked the Elder Brethren who were assisting him whether they thought that the *Haugland*, under the circumstances, had done all that was necessary for keeping clear by taking the action that she did, and the Elder Brethren advised him that they thought that she had. We have consulted our assessors on that point, and they do not altogether agree. One of them thinks that the *Haugland* did what was necessary, and that it was not incumbent upon her to make a more decisive turn to port than she actually did. The other does not take that view. But they both agree that there was no excuse for her having failed to give the port helm signal. It is really unnecessary to say with which of the two views as to the helm action of the *Haugland* I agree; but I must say this that looking generally at what happened, I think both ships were bent too much upon maintaining the course which had been laid down for each before the circumstances of danger arose, and did not take sufficient account of the position of the other ship and the possible risks of collision, and if I had to decide it—though I say so with great hesitation—I think I should say that the *Haugland* was to blame for not having taken a more decisive course under the port helm. But, as I say, it may be unnecessary to decide that, as I think there is no doubt that she was to blame for not having given the signal. It comes to this, therefore, that the learned judge having found that the *Haugland* was to blame for one fault only—namely, that of not having reversed her engines and continuing to go ahead at full speed under her hard-a-port helm—we come to the conclusion that the *Haugland* was further to blame at an earlier stage in the proceedings; and having arrived at that conclusion, then I agree that the best course to pursue is to treat both vessels as to blame, and not to make any apportionment except that the damages be divided in two.

Scrutton, L.J.—I agree, and I do not propose to repeat in detail the manœuvres stated by my brethren. I only desire to say a word or two to make clear my own views of the effect of the rules on this case. The *Karamea* was coming south out of Montevideo, but at a certain point would turn east in order to go to sea, going at right angles. The exact point at which she would turn was not settled by any physical object. She might have turned before the whistling buoy. She might have turned somewhere south of the whistling buoy. The *Haugland* was coming from the sea on a westerly course, and would at a certain point turn again at right angles to go into Montevideo; and, again, the exact point at which she would turn was not fixed by the physical conditions, and each ship would turn somewhere in the neighbourhood of the whistling buoy, but had no particular point settled for the turn, either by a rule or by any physical conditions.

Under those circumstances, what is the bearing of art. 19? That article says: "When two steam vessels are crossing, so as to involve risk of collision." I think the authorities have settled that you consider whether the steamships are crossing some time before they cross, or, as has been put by a learned judge, now dead, who used to practise in the Admiralty Court: "So as to involve risk of collision." Looking some way back, you consider the courses prolonged as if they were kept straight on and see if they cross, and if they cross you see when they cross whether the two ships will be somewhere near one another; and if you find that to be the state of things, then *primâ facie* the one on the starboard side must be the give-way ship. You get an exception to that when another rule comes in, and the courses of the ships are prescribed by physical conditions such as that of narrow channel, so that, though the lines, if prolonged, would cross, the position and the rules settle that the courses will not cross, because each ship will keep on the starboard side of the narrow channel; and when you get that position art. 19 does not then apply and art. 25 will. [Art. 25 provides: "In narrow channels every steam vessel shall where it is safe and practicable keep tn that side of the fairway or mid-channel, which lies on he starboard side of such vessel.] This seems to be a sort of halfway case, where you know each ship is going to alter its course. You know they alter their course in about the same place, but there is nothing that definitely settles at what point they shall alter their course. They may go a little further before altering their course in each case. That constantly happens at sea when the ordinary course is to make for a lightship or a buoy, or sometimes for a headland, and then to alter your course. Now, in my view, in a case like that, which is the present case, the crossing rule applies, and you ought to keep the courses as prolonged, and put the burden of keeping out of the way on the vessel which has the other on the starboard side. If that is acted upon it avoids the difficulties that would otherwise arise, and which did arise in this case, particularly at night, when in doubt as to which ship is going to make an alteration in her

course, which you know is going to be made at some time but as to which you are not sure exactly when it will be made. But it appears to me that you are in a somewhat ambiguous position because you know the prolonged course is not the course the other ship is going to make, and that this imposes on the give-way ship the obligation of good seamanship, of making clear what she is going to do. There may be an ambiguous position under those circumstances because the stand-on ship may think, "the other vessel does not understand the stand-on rule, and so I shall be safe to make an alteration which I am going to make anyhow, and which she knows I am going to make." That puts upon the give-way ship the obligation of clearly giving way, and giving the stand-on ship the clearest indication she can that she is treating herself as the give-way ship, and meaning to get out of the way. I am disposed to agree with what I think would have been the view of the learned judge if he had not been advised by his assessors, and with what is the view of one of our own assessors—namely, that the *Haugland* ought to have ported more decisively and shown the red light sooner, and made clear to the *Karamea* that she was treating herself as the give-way ship and getting out of the way.

Though I agree that that is a point of some difficulty, and I can quite understand a difference of opinion about it, I have no difficulty whatever about the second point, as to neglecting to give the signal that she was altering her helm. The rule is when vessels are in sight of one another that a steam vessel under way shall indicate that course by certain signals. Now, of course, very properly, an interpretation has been put upon the words "when vessels are in sight." It does not mean that if on the extreme horizon, with a glass, you descry a vessel in sight you must blow a sound signal which she may possibly not hear. It means, and has been interpreted to mean, when the vessel may be treated as being in sight so as to be affected by the manœuvre you are making. If you put the limitation (which appears to me to be a very proper limitation) on art. 28, then it is quite clear that one of the purposes for which the *Haugland* was making this alteration of course was to avoid the other ship, and anyhow the other ship might think she was manœuvring for that purpose. [Art. 28 provides: ". . . When vessels are in sight of one another a steam vessel under way in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren. . . ."] Under those circumstances it seems to me to have been quite clear that here it was the duty of the *Haugland* to say by her whistle "I am porting," in order that the *Karamea* might have notice of the fact, and shape her course accordingly. The excuse put forward for her seems to me to be futile. It does not matter that the signal you are giving may not be heard; you must give it, and if it can be heard so much the better for the other ship.

The only other point that I desire to mention is that I entirely agree with my brethren in this, that if you agree with the findings of fact and law of the learned judge below, and the only difference is that the Court of Appeal attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships. But when you take a different view of fact or law from that taken by the learned judge, and find certain matters blameworthy which he has not found blameworthy at all, it appears to me there is not only no objection to the Court of Appeal altering the proportions, but that it is bound to alter the proportions, because of the extreme probability that if the learned judge had taken the same view of the facts as the Court of Appeal, he would himself have taken the Court of Appeal's view as to the proportions of blame.

For these reasons I agree with the judgments already pronounced.

Judgment varied.

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

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

April 11, 12, *and* 29, 1921.

(Before BANKES, SCRUTTON and ATKIN, L.JJ.)

LIMERICK STEAMSHIP COMPANY LIMITED *v.* W. H. STOTT AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Baltic and White Sea Conference Uniform Time Charter (Clause 16)*—Icebound port—Port kept open by Icebreakers—Damage by forcing ice—"Nor shall steamer be obliged to force ice"—Manchester Ship Canal—Ship unable to leave Manchester in light draft—"Good and safe port."*

A safe port is a port to which a ship can safely get and from which she can safely return.

By a charter-party, dated the 25th Nov. 1919, *and made on the Baltic and White Sea Conference Uniform Time Charter* 1912 *form, the plaintiffs' steamer was chartered, and it was provided that the steamer should be delivered to the charterers and should be employed between good and safe ports or places within the limits of one Baltic round where she could always safely lie afloat, as the charterers or their agents should direct.*

Clause 16 *of the charter-party provided that "the steamer shall not be ordered to . . . any icebound port" or any port "where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or get out after loading or discharging, nor shall the steamer be obliged to force ice"; should the steamer be detained by any of the above causes such detention should be for charterers' account, but nevertheless, "if on account of ice the captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and/or damaged, he shall have liberty (but not be obliged) to sail to a convenient open port and await charterers' fresh instructions."*

The charterers ordered the steamer to proceed to the port of Abo, which port was kept open in the winter by means of ice-breakers. While proceeding to Abo the steamer encountered ice. Sometimes she was able to force her way through without the aid of an ice-breaker, sometimes she tried and failed; but eventually with the aid of an ice-breaker she got through and arrived at Abo. In the course

(*a*) Reported by T. W. MORGAN and W. C. SANDFORD, Esqrs., Barristers-at-Law.

of her voyage to and from Abo she was very seriously damaged by the ice. After loading a cargo at Abo the charterers ordered the steamer to proceed to Manchester. To reach the port of Manchester the steamer had to proceed up the Manchester Ship Canal. She was able to pass through the canal loaded on her way to Manchester, but after she had discharged her cargo at Manchester, her draft was such that she could not proceed down the canal and clear the bridges without cutting her masts. In a claim by the plaintiffs against the charterers for breach of charter-party,

Bailhache, J. held (1) *that the charterers had committed no breach of the charter-party in ordering the steamer to proceed to Abo, because that port, being kept open by means of ice-breakers, was not an icebound port within the meaning of the charter-party;* (2) *that on the true construction of clause* 16 *of the charter-party the steamer was not bound to force her way through ice; whether she attempted to do so rested in the master's discretion; therefore the charterers were not liable for the damage suffered by the steamer through encountering ice on the way to Abo;* (3) *that Manchester was not a good and safe port within the meaning of the charter-party, because a safe port meant a port to which a ship could safely get and from which she could safely return. The charterers therefore committed a breach of the charter-party in ordering the steamer to Manchester and were accordingly liable for the expense of cutting the masts to enable her to return under the bridges of the Manchester Ship Canal.*

Held on appeal, (1) *that Abo was not an ice-bound port within the meaning of the charter-party; and* (2) (*Atkin, L.J. doubting*) *that the charterers had not ordered the ship to a port on her way to which she was obliged to force ice; and that there had not been a breach of the charter-party in either respect.*

Judgment of Bailhache, J. (infrà); (1921) 1 *K. B.* 568 *affirmed.*

Appeal by the shipowners from the judgment of Bailhache, J. in the action.

The plaintiffs claimed to recover from the defendants damages for breach of a charter-party. The plaintiffs were the owners of the steamship *Innisboffin*, and they chartered her to the defendants, by a charter-party dated the 25th Nov. 1919, for one Baltic round voyage. The charter-party was on the Baltic and White Sea Conference Uniform Time Charter 1912 form, and provided that the steamer should be delivered to the charterers at Huelva, and should be employed between good and safe ports or places within the limits of one Baltic round, where she could always safely lie afloat, as the charterers or their agents should direct. The steamer was to be delivered under the charter about the 30th Nov. 1919.

By clause 2 the owners were to provide and pay for the insurance of the steamer. By clause 3 the charterers were to provide and pay for all other charges and expenses, except certain items already mentioned which are not material to this report.

It was provided by clause 7 that the steamer (unless lost) should be redelivered on the expiration of the charter-party in the same good order as when delivered to the charterers (fair wear and tear excepted), at an ice-free port in charterers' option in the United Kingdom. Clause 9 provided that the captain should prosecute his voyages with the utmost dispatch.

By clause 14 throughout the charter losses or damages arising or occasioned by negligence, default, or error of judgment of the pilot, master, or crew, or other servants of the owners, in the management or navigation of the steamer were absolutely excepted, and by clause 16 the steamer was not to be ordered "to any ice-bound port" or any port where there was risk that in the ordinary course of things the steamer would not be able on account of ice to enter the port or to get out after completing loading or discharging, "nor shall steamer be obliged to force ice. Should the steamer be detained by any of the above causes such detention shall be for charterers' account. Nevertheless, if on account of ice the captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and/or damaged, he shall have liberty (but not be obliged) to sail to a convenient open place and await charterers' fresh instructions."

The steamer was duly delivered to the defendants under the charter-party and came on hire shortly after the date thereof. In Jan. 1920 the defendants ordered her to proceed to the port of Abo in Finland. At that period of the year a great portion of the Baltic Sea is icebound. There are a few ports on the southern shore of the Baltic Sea which are normally free from ice, but the majority of the ports become icebound unless kept open by ice-breakers. The port of Abo was kept open in the winter by ice-breakers.

The *Innisboffin* encountered ice on her voyage to Abo. Sometimes the ice was sufficiently thin for her to force her way through without the aid of an ice-breaker. On one or two occasions she attempted to force her way through without the aid of an ice-breaker and failed. Eventually, with the aid of an ice-breaker she got through the ice and arrived at Abo. In the course of her voyage to Abo and her return voyage from Abo, she was very severely damaged by the ice, the damage so caused amounting to 2600*l.*

After loading a cargo at Abo the charterers ordered the *Innisboffin* to proceed to Manchester. To reach the port of Manchester the steamer had to proceed up the Manchester Ship Canal. She was able to pass through the canal loaded on her way to Manchester, but after she had discharged her cargo at Manchester her draft was such that she could not proceed down the canal and clear the bridges without cutting her masts.

Accordingly the plaintiffs' claim was based on two allegations (1) that the port of Abo was an icebound port, or, alternatively, that it was a port where there was a risk that in the ordinary course of things the steamer would not be able to enter or to leave on account of ice, and further that Abo was a port to enter which the steamer might be obliged to force ice and that consequently the charterers committed a breach of the charter-party in ordering the steamer to proceed to that port and that they were therefore liable for the damage sustained by the steamer by ice in entering and leaving the port and the incidental expenses to which the plaintiffs were thereby put, and (2) they alleged that Manchester was not a good and/or safe port in that the steamer could not leave that port at light draft unless her masts were cut, and that the charterers committed a breach of the charter-party in ordering the steamer to proceed

to that port, and were therefore liable for the cost of cutting and repairing the masts.

MacKinnon, K.C. and *Claughton Scott* for the plaintiffs.

R. A. Wright, K.C. and *W. A. Jowitt* for the defendants.

Bailhache, J.—The question whether or not the plaintiffs are entitled to recover the damages sustained by the steamship *Innisboffin* depends entirely on the construction of the charter-party. The charter-party is on the Baltic Uniform Time Charter Form, and contains a clause, No. 16, which deals with ice. The rest of the clauses are the usual clauses in a time charter, including a clause that the steamer is to prosecute her voyages with the utmost dispatch. I mention that clause because Mr. MacKinnon has laid some stress on that fact.

The clause on which Mr. MacKinnon principally relies is clause 16, which provides that "the steamer shall not be ordered to . . . any ice-bound port or any port . . . where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after completing loading or discharging, nor shall steamer be obliged to force ice. Should the steamer be detained by any of the above causes such detention shall be for charterers' account. Nevertheless, if on account of ice the captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and/or damaged he shall have liberty (but not be obliged) to sail to a convenient open place and await charterers' fresh instructions."

The only thing that is there dealt with is detention, and the clause provides that detention from any of the causes there mentioned is to be for charterers' account—that is to say, that they are to pay the agreed rate of hire for the time during which the steamer is detained by any of those causes. The clause says nothing at all about damage to the steamer. It must be borne in mind that in the Baltic a few ports on the southern shore are normally and naturally open all the year round—that is to say, ice does not form in them, but that in the majority of the ports in the Baltic ice does form in the winter, although certain ports, as, for instance, Stockholm, are kept open during the winter by means of icebreakers.

That is the case with the port of Abo, which is kept open by the Finnish Government by means of icebreakers. As I understand this charter-party, what it provides is this: The charterers are to be at liberty to send this vessel to the Baltic in the winter—indeed, that is what they chartered her for, but they must not send her to a port that is icebound—that is to say, they must not send her to a port that is frozen up so that the vessel cannot enter, the reason being that, inasmuch as the port will be frozen up for several months, the steamer will be delayed for an indefinite time, and the owners do not want their vessel unreasonably detained; for that reason the charterers are not entitled to send the vessel to a port that is, in fact, icebound.

Further, although the vessel is able to enter a port which is normally icebound, still she is liable to be icebound in that port before she can get away and thereby be unreasonably detained. Therefore the owners exclude those two things. The charterers are not to send the vessel to a port that is blocked with ice, and they are also not to send her to a port where, although she may get in, there is a risk that she may be caught in the ice and be unable to get away after completing loading or discharging. The charterers are only at liberty to send her to a port that is not ice-bound. In the Baltic, however, it very often happens that although the port is not itself ice-bound, as it is kept open by icebreakers, yet the passage to the port does become icebound or is partly or entirely closed with ice.

Now, although the charterers are entitled to nominate a port which is not icebound, yet if in the course of her voyage to that port the vessel encounters ice which prevents her prosecuting her voyage, she is not, under the charter-party, bound to force the ice, and therefore it is not a breach of contract on the part of the shipowners if she does not go to that port.

Clause 16 provides for all these eventualities; it also contains a provision for another eventuality, and that is this: If the charterers have ordered the vessel to a port which was not at the time icebound, but she is there so long that there is a danger if she remains longer she will be caught in the ice and not be able to get out, the captain may, if he likes, although he is not bound to do so, leave the port and go to the nearest port when there is free and open water, and then await charterers' instructions. If, however, he does not leave the port, but remains there, and is caught in the ice, then the detention of the vessel from that cause is for charterers' account.

The real context in this case is whether Abo was or was not an icebound port. If Abo was not an ice-bound port, then it was no breach of contract on the part of the charterers to order her there. Abo is a port which, if left to itself, would undoubtedly become in the course of the winter, particularly in January and February, frozen to such an extent that no vessel could possibly get either in or out, but the port is kept open, as I have said, by means of icebreakers. Now is that, within the meaning of the charter-party, an icebound port? In my judgment it clearly is not. It is true that Abo would be an icebound port if artificial means were not taken to prevent it becoming icebound, but artificial means are taken by the Finnish Government to prevent it becoming an icebound port, and it is a port which, so far as the port itself is concerned, a vessel can enter and leave at any time of the year owing to the ice being constantly kept broken. There was, therefore, no breach of contract on the part of the charterers in sending the *Innisboffin* to Abo.

On the way to Abo she encountered ice and was damaged in proceeding through the ice. It is contended on behalf of the shipowners that even if it was no breach of contract on the part of the charterers to send the vessel to Abo, still they are liable for the damage which she sustained in getting there. I find it difficult to understand that proposition. I agree that if it were a breach of contract on the part of the charterers to send the vessel to Abo the damage that she naturally and properly sustained on the voyage to or from Abo, apart from the negligence of the master, would be for the charterers' account. But the charter expressly provides that, although Abo may be a port to which the vessel may be properly ordered,

she is not bound to force the ice to reach that port unless the master chooses. It is left to his discretion; he may force the ice or he may refuse to proceed further by reason of the ice.

In my judgment this action is founded on a misapprehension of what clause 16 provides. That clause, as I read it, does not throw the liability for any damage which the vessel may sustain upon the charterers if they commit no breach of contract with regard to the port to which they order the ship; the clause throws the liability for the detention of the vessel in the events there set out upon the charterers, and gives the owners the option in certain cases not to proceed to ports nominated by the charterers if the ports fall within the terms of clause 16 through being icebound or if the route to those ports is impeded with ice. This disposes of the whole case with the exception of one small item.

The *Innisboffin* left Abo with a cargo for Manchester. In order to get there she had to proceed up the Manchester Ship Canal. Under the terms of the charter-party she could only be ordered to a safe port. When she went through the canal loaded on her way to Manchester her masts were just low enough to clear the bridges, but after discharging her cargo at Manchester she came up in the water, and when she proceeded down the canal from Manchester her masts would not clear the bridges, and accordingly they had to be cut. In my judgment, the expense of cutting the masts must fall on the charterers, because they were only entitled to order the *Innisboffin* to a safe port, which means a port to which a ship can safely get and from which she can safely return. It was therefore a breach of contract for the charterers to order her to proceed to Manchester, and having committed a breach of contract they must pay the damages which flow from that breach of contract.

To my mind, that is the distinction between the damages sustained at Manchester and the damages sustained by the vessel through being ordered to Abo. The charterers committed no breach of contract in ordering her to Abo, and therefore they are not liable for any consequential damage, whereas they committed a breach of contract in ordering her to proceed to Manchester, and therefore are liable for the consequential damages.

The result is that there will be judgment for the plaintiffs for the comparatively small amount involved in cutting the masts in order to enable the *Innisboffin* to get to and from Manchester.

The plaintiffs appealed.

Mackinnon, K.C. and *H. Claughton Scott* for the appellants.—Abo was an "ice-bound port" within the meaning of clause 16 of the charter-party. The object of the clause is not only that the ship shall not be ordered to an ice-bound port, but that she shall not be ordered to a port on the way to which she will encounter ice. Secondly, the words "nor shall the steamer be obliged to force ice" mean that she shall not be ordered to any port to reach which she will be obliged to force ice. In ordering the ship to such a port the charterers acted in breach of the charter-party, and are liable for the damage done to the ship by ice.

Wright, K.C. and *Jowitt* for the respondents, were not called upon to argue on the question whether Abo was an ice-bound port.—The words "nor shall the steamer be obliged to force ice" are a separate term of the charter-party, having no connection with the preceding words, and their effect is that, if the master is called upon to force ice, he may refuse to do so without prejudice to the owners' hire. There was no breach of the charter-party, as the ship was not obliged to force ice.

Mackinnon, K.C. in reply.

Cur. adv. vult.

April 22.—The following judgments were read:—

Bankes, L.J.—In this action the plaintiffs, as owners of the steamship *Innisboffin*, claim damages from the defendants as charterers for injury sustained by the vessel as a result of her encountering ice on a voyage upon which she had been ordered by the defendants. As the case is presented to this court by the appellants there is no dispute as to the facts. The question turns upon the construction of the charter-party. The material facts are as follows. The vessel came on hire shortly after the date of the charter-party. In Jan. 1920, she was ordered by the defendants to proceed to Abo, a port on the coast of Finland. In proceeding on that voyage the master kept close to the east coast of Sweden, and when somewhere north of Stockholm he encountered ice. He endeavoured to force his way through, but failed, and was obliged to wait until an ice-breaker from Stockholm came to his assistance. Having been released by the ice-breaker the master continued his voyage, and eventually arrived at Abo through the channel which is kept open to that port by ice-breakers employed for that purpose by the Government of Finland. The vessel sustained injury from contact with the ice. In respect of that injury the action was brought. Bailhache, J, has held that Abo was not an icebound port within the meaning of this clause, having regard to the fact that the Government of Finland kept a channel to the port open in spite of the ice. I agree with the learned judge's conclusion upon the facts of this case, though I think it undesirable to attempt to give a definition of what constitutes an ice-bound port which could be applicable under all circumstances.

The other point upon the construction of this clause is to my mind one of considerable difficulty. The appellants contend that the clause from its commencement down to the words "to force ice" should be read as one continuous sentence, the whole of which refers to limitations placed upon the powers of the charterers. Thus read, the words "nor shall the steamer be obliged to force ice" are a short form of expressing "nor shall the steamer be ordered to any port to arrive at which she will be obliged to force ice," or some equivalent words. On the other hand, the respondents say that the words "nor shall the steamer be obliged to force ice" should be read as a separate sentence from what precedes them, and relate to the legal or contractual obligation on the part of the steamer, and not to any limitation upon the powers of the charterers. Bailhache, J. has adopted the latter construction. I agree with his view. From any point of view the clause is not skilfully drafted. The use of the word "nor" appears to indicate the the draftsman intended the concluding words to form part of one continuous sentence. On the other hand, if this view is adopted it necessitates

the introduction of words which are not in the sentence as drafted; because the "shall" which follows the "nor" must refer to orders under which the steamer may or will be obliged to force ice, and some words given by the charterers rather than to the obligation imposed on the steamer must be read with the concluding part of the sentence to give it the meaning contended for by the appellants. In my opinion less violence is done to the language actually used by adopting the construction contended for by the respondents than that contended for by the appellants, and it also seems to me that the respondents' construction fits in better with what I conceive to be the general intention of the parties as expressed in the charter-party as a whole than that of the appellants. Reference was made during the argument to clause 7, but I did not understand that the appellants desired to found any claim upon its provisions. I therefore express no opinion upon what is admitted to be a clause always introduced into this form of charter-party but never insisted upon. A point was made by Mr. Jowitt for the defendants that even assuming the appellants' construction of clause 16 was accepted the respondents were entitled to succeed upon the facts, because the evidence proved that the master never was obliged to force ice. I express no opinion on this point, as the evidence was not gone into, and in my view of the meaning of clause 16 it is not necessary to consider it. If clause 16 is to be read as I think it should be read the appellants have failed to establish any breach of the contract contained in the charter-party for which a claim to damages could be made. I desire to reserve any opinion upon the question what damages are recoverable in the event of a breach of the provisions of clause 16 being proved. For the reasons I have given I think that this appeal fails and must be dismissed with costs.

Scrutton, L.J.—The plaintiffs, the appellants, were owners of a ship which was chartered by the defendants, the respondents, in November, to go a Baltic round voyage. She was ordered in January to Abo in Finland, and in the course of the round voyage was damaged by ice. The shipowners then sued the charterers alleging: (1) that they had ordered her to an ice-bound port contrary to clause 16 of the charter, and that in consequence she was damaged; (2) that they had ordered her to a port to enter which might oblige her to force ice, and that in consequence she was damaged. The first claim fails in fact. The judge below has found, and I agree with him, that Abo was not an ice-bound port. It would be if no artificial measures were taken, but in fact by the use of ice-breakers a channel for entrance is kept open from the Aland Islands to Abo. The captain admitted it was kept open the whole year and the defendants' witnesses proved that steamers were running six voyages a week between Stockholm and Abo the whole winter. Such a port kept artificially open the whole winter cannot be said to be ice-bound.

On the second head the facts seem to be that the *Innisboffin*, a steamer thirty-one years old, met on her voyage through the Baltic on a proper route some thick ice some 200 miles from Abo; she tried to get through it by ramming it—that is, to "force" it—but she failed and became fast in the ice. She then, by wireless telegraphy, summoned an ice-breaker from Stockholm, which extricated her, and for the rest of the voyage she ran in channels made by ice-breakers, or open sea. Shortly after this incident her forepeak was found leaking, and her plates were bent in, as appears in the photographs, between the frames. Clause 16 enables the captain to refuse to go to an ice-bound port, and to refuse to force ice which he meets on his voyage, without being guilty of any breach of charter, and without prejudicing his owners' right to hire while he is waiting for proper orders, or for a sea free of ice. He is also allowed, but is not obliged, to leave a port which is likely to become ice-bound; that is, in my view, it cannot be said that the owner loses his right to hire, because the captain elects to stay when he might have escaped. Now whether or not the ship will meet thick ice on this Baltic round seems to be a matter of uncertainty. What the master will do when he meets thick ice seems to be a matter of his navigation. The charterer does not give him any orders as to this situation or "oblige" him to do anything, and he will not prejudice his owners' hire by waiting till he can get through. He is not "obliged to force ice." In this particular case by sending for the ice-breaker he could have got through without damaging himself. I am unable to see what breach of charter the charterers have committed in this case; the damage seems to have resulted from the captain's decision to take a course of action which by the charter he was relieved from the obligation to take. Some damage is supposed to have resulted from storms blowing the steamer on the thick ice at the edge of the ice-breaker's channel. This does not seem to be the charterers' affair.

The question was argued before us whether the charterers who requested the ship to go to an unsafe or an icebound port, to which she was not bound to go, were liable if she went for damage sustained on her voyage. I desire to reserve my opinion on this point. The state of knowledge of shipowner and charterer may be material when the point has to be decided. The action was not based on clause 7 of the charter. It is not clear what this means, as the clause is difficult to reconcile with the shipowners' obligation to maintain the ship efficient under clause 2 and to insure her under the same clause; and with the last part of clause 12. When it is necessary to construe the clause it will be desirable to consider what is covered by "fair wear and tear," and whether the clause applies to damage not caused in any way by the charterer.

In my view the appeal should be dismissed with costs.

Atkin, L.J.—I have found considerable difficulty in construing clause 16 of this charter-party. Unaided I think I should have come to the conclusion that the words "nor shall steamer be obliged to force ice" were intended to impose a restriction upon the charterers' rights to direct the ship to a particular port, a restriction additional to those imposed in the first words of the clause "that the steamer shall not be ordered to any port," &c. The words might reasonably mean "nor shall the steamer be ordered to a port to reach or leave which she finds herself compelled to force ice." It occurred to me that if she were ordered on a voyage in which she found herself shut in by ice, so that for safety she had to force herself through, the damage caused by this action of the ship would be for charterers' account; and I was inclined to think that the express provision

for detention immediately following the words in question treated the obligation to force ice as one of the causes which expressly put detention on charterers' account. I should not have read the words as merely giving a liberty to the ship to abstain from forcing ice. Had I come to the conclusion above suggested I should have thought that there was evidence fit to be considered by the trial judge that in this case there had been a breach of contract by the charterers. I recognise, however, that this meaning of the word "obliged" is not the meaning of the same word three lines lower down in the same clause; and when I find my brother Bailhache and the two other members of the court taking a different view I have not sufficient confidence in my opinion to say that the judgment appealed from is wrong. I agree that Abo was not in the circumstances an icebound port.

Appeal dismissed.

Solicitors: for the appellants, *W. A. Crump* and *Son.*

Solicitors: for the respondents, *Rawle, Johnstone* and *Co.*, for *Hill, Dickinson* and *Co.*, Liverpool.

May 5 and 6, 1921.

(Before Lord STERNDALE, M.R. and ATKIN and YOUNGER, L.JJ.)

THE GULF OF SUEZ. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Steamship coming out of dock—Crossing rule — Porting to counteract ebb tide — Misleading signals—Other vessel not misled—Regulations for Preventing Collisions at Sea, arts. 19, 21, *and* 28.

The G., *leaving the Albert Dock on the Birkenhead side of the Mersey, intended to cross straight to the east side of mid-river and then turn down stream. The* G. S. *was proceeding up river to the west of mid-river, having the* G. *on her starboard bow. The vessels sighted one another at a distance of about half a mile, at the time when the* G. *was leaving the dock entrance; and they came into collision some* 700 *ft. from the Liverpool side. The* G., *on leaving the dock, ported a little to counteract the effect of the ebb tide on her head, and gave a short blast, and subsequently a second short blast. After the first slight porting to counteract the tide, the helm was steadied, and the second short blast was given, and she continued on straight across the river. The question was whether in the circumstances the crossing rule* (*art.* 19) *applied.*

Held, that the question depended on the distance at which the vessels sighted one another, and that they were just sufficiently far apart for the crossing rule to apply. The G. S. *was held to blame for not reversing when the* G. *was seen to be continuing to head across the river.*

In the Admiralty Court the G. *also was held to blame on the ground that she sounded port helm signals when she was not, in fact, "directing her course to starboard"* (*art.* 28).

Held, by the Court of Appeal that, as she did not, in fact, mislead those on board the G. S., *who saw that she was not altering her course to starboard, she ought not to be held to blame.*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

Expressions in The Albano (10 *Asp. Mar. Law Cas.* 365; 96 *L. T. Rep.* 335; (1907) *A. C.* 193) The Huntsman (11 *Asp. Mar. Law Cas.* 606; 104 *L. T. Rep.* 464 *and* The Ranza (19 *L. T. Rep.* 21*n.*) *cited and approved.*

Judgment of Hill, J. varied, the G. S. *being held alone to blame.*

APPEAL by the plaintiff, the Shipping Controller, the owner of the *Gustav*, from the judgment of Hill, J., who held both vessels to blame.

The plaintiff, the owner of the steamship *Gustav*, claimed against the defendants, the owners of the steamship *Gulf of Suez*, damages in respect of a collision that occurred on the 26th May 1920, off the Prince's Dock, in the River Mersey.

The plaintiff by his statement of claim said:

(2) Shortly before 9.33 p.m. (B.S.T.), on the 26th May 1920, the *Gustav*, a steel-screw steamship of 2259 tons gross and 1364 tons net register, 300ft. long, manned by a crew of twenty-eight hands all told, while on a voyage from the Alfred Dock, Birkenhead, to Newport, Mon., in water ballast, was leaving the lock of the Alfred Dock. The weather was fine but slightly hazy, and it was not quite dark. The wind was calm, and the tide ebb of the force of about two and a half knots. The *Gustav* was being assisted by a tug made fast ahead and was heading about E. by N. in order to get to her proper side before turning down the river, and making about four to five knots an hour through the water. Her whistle had been sounded a warning blast when she was about to leave the lock, and this signal was repeated when she was just clear of the lock. Her helm was then ported a little to counteract the effect of the tide. Her regulation underway lights, including a second masthead light, were being duly exhibited, and were burning brightly, and a good look-out was being kept on board of her. (3) In these circumstances those on the *Gustav* observed a steamer, which proved to be the *Gulf of Suez*, showing a masthead and green light about half a mile distant and about four to five points on the port bow. The whistle of the *Gustav* was at once sounded a short blast, and about the same time her tug was cast off. The *Gulf of Suez* answered the port helm signal of the *Gustav* by sounding one short blast. The helm of the *Gustav*, which was still slightly aport, was kept so, and her whistle was again sounded a short blast in reply to the signal of the *Gulf of Suez*, but the *Gulf of Suez*, instead of keeping to her proper side of the channel and passing under the stern of the *Gustav*, as she could and ought to have done, was seen to be altering under starboard helm and causing danger of collision, and though the engines of the *Gustav* were put full speed astern and her starboard anchor was dropped and the *Gustav* by these means greatly reduced her speed, the *Gulf of Suez*, although acting at the last under port helm, came on and with her starboard side abaft amidships, struck the stem of the *Gustav*, doing her damage. (4) A good look-out was not kept on the *Gulf of Suez*. (5) Those on the *Gulf of Suez* neglected to keep out of the way of the *Gustav*. (6) Improperly starboarded and attempted to cross ahead of the *Gustav*. (7) Negligently failed to port in due and proper time. (8) Neglected to ease, stop, or reverse their engines. (9) Neglected to keep that vessel to her own starboard hand side of the channel. (10) Neglected to indicate their course by whistle signal. (11) Those on the *Gulf of Suez* neglected to comply with arts. 19, 22, 23, 25, 27, 28, and 29 of the Collision Regulations, and art. 11 of the Rules for the Navigation of the River Mersey.

By their defence the defendants said:

(1) The defendants deny that the collision and damage . . . were caused or contributed to by the negligent navigation of the steamship *Gulf of Suez*

by the defendants or their servants, but say that the same were solely caused by the negligent navigation of the *Gustav* by those in charge of her . . . (2) Shortly before 8.30 p.m. (G.M.T.), on the 26th May 1920, the *Gulf of Suez*, a single-screw steamship of 1607 tons gross register, and 260ft. long, manned by a crew of thirty-three hands all told, and in charge of a duly licensed pilot for the port of Liverpool, whilst on a voyage from the Mediterranean to Manchester with a general cargo, was steaming up the River Mersey on the west side of mid-channel, and was approaching the Seacombe Ferry Stage. The weather was fine but slightly hazy, with a very light S.W. wind and the tide was ebb, of the force of about two knots. The *Gulf of Suez* was duly exhibiting the regulation masthead and sidelights for a steamship under way, and a fixed stern light and a good look-out was being kept on board of her. The *Gulf of Suez*, which was steering up river at a speed of nine to ten knots, was heading about S. ½ E. magnetic under slightly starboard helm, to give room to a ferry boat which was bound out from Seacombe Ferry Stage. (3) In these circumstances those in charge of the *Gulf of Suez* saw a steamship with a tug ahead of her, proceeding out from the direction of the Alfred Dock at a distance of four to five cables, and bearing about two points on the starboard bow of the *Gulf of Suez*. The hull of the steamship, which proved to be the *Gustav*, was seen, and also her masthead and red lights. At the same time that the *Gustav* came into sight one short blast was heard from her. Those in charge of the *Gulf of Suez* immediately replied with two short blasts, and the helm, which was a-starboard, was kept a-starboard. The *Gustav*, which slipped her tug about the same time as her first blast was sounded, again sounded a short blast, and those in charge of the *Gulf of Suez* again sounded two short blasts and put their helm hard-a-starboard and stopped their engines. The *Gustav* came on at increasing speed, causing great risk of collision, and those in charge of the *Gulf of Suez* put the engines slow ahead and almost immediately afterwards full ahead, and put their helm hard-a-port to try and swing the vessel clear of the stem of the *Gustav*, which vessel continued to come on towards the *Gulf of Suez*, but shortly afterwards the stem of the *Gustav* struck the starboard side of the *Gulf of Suez* in the way of the engine-room, causing her such damage that the *Gulf of Suez* had to be beached. Very shortly before the collision the *Gustav* dropped her anchor, and three short blasts were sounded on her whistle, but her speed was not reduced before the collision. (4) Those in charge of the *Gustav* were negligent in the following respects: (*a*) They did not keep a good look-out; (*b*) they attempted to pass ahead of the *Gulf of Suez* and cross the river at a time when it was unsafe for them to do so; (*c*) they navigated the *Gustav* across the river at an excessive speed and failed to ease, stop, or reverse their engines in due time or at all; (*d*) they failed to comply with arts. 27, 28, and 29 of the Collision Regulations; (*e*) they improperly ported their helm; (*f*) they failed to starboard their helm.

The facts appear from the judgment of Hill, J.

HILL, J.—The collision took place at 8.30. p.m., Greenwich time on the 26th May 1920 in the River Mersey off Prince's Dock entrance, or perhaps a trifle farther down the river. It was dusk at the time and the two ships were exhibiting lights, but their hulls were visible to one another. The tide was ebb, with a strength of two to two-and-a-half knots. The *Gustav*, the plaintiffs' ship, is a vessel of 2,259 tons gross and 300 feet long and was in ballast. She had left the Alfred Dock on the Birkenhead side and intended to cross to the east side of mid-river and then turn down for sea. The *Gulf of Suez* was proceeding up the river for Eastham to the west of mid-river. They sighted one another, both lights and hulls, at about the distance of half a mile while the *Gustav* was issuing from the dock entrance, and the *Gulf of Suez* was somewhere off Seacombe. They were in collision some 600 feet or 800 feet off the dock wall on the Liverpool side. At the time of the collision the *Gustav* was heading about east and nearly athwart the river, and the *Gulf of Suez* about south, nearly straight up. At the time of the collision the *Gustav* had not much way as her engines had been reversed and her starboard anchor dropped. The *Gulf of Suez* engines were working at full ahead, and the engine movements as given in evidence were as follows: The *Gustav* as she left the dock put her engines at slow and immediately full speed, and was gradually increasing speed as she went. Very shortly before the collision, the master says, when his ship was nearer the Liverpool side—more than half way over towards the Liverpool side than mid-river—the engines were put full speed astern and the starboard anchor was let go. The *Gulf of Suez* was coming up at a speed which he puts at 9 to 10 knots, so that it would look, by the time from the log, as if it was perhaps rather nearer. She kept her speed for an appreciable time, and then the following was done with the engines: "Stop," then "slow ahead," and then "full ahead." That is the record in the engine log. Some of the evidence put the slow ahead before the stop; but I accept the evidence of the engine-room log. The helm action and helm signals were as follows: The *Gustav* on leaving the entrance ported a little, to counteract the effect of the ebb tide on her head as she emerged into the tideway, and then gave a short blast. What she did subsequently is not at all clear on the evidence, except that she gave a second short blast; and, according to her documents, she at a later stage ported a point. The log and the deposition of the master practically are in agreement. The log is as follows: "9.25 proceeded into river, sounding one long blast on whistle and shortly afterwards cast off tug (*Cairngarth* ahead). Before casting off tug, after leaving docks sighted steamship *Gulf of Suez* coming up river, her starboard side open to our port side, could see her green and masthead light, she being distant about half a mile and five points on our port bow. We were proceeding towards the Liverpool side of river. The *Gulf of Suez* continued on her course and was coming ahead as if attempting to cross our bow; seeing she was doing this, we sounded one short blast on whistle and altered our course one point to starboard," and so on. According to the evidence of the master, and, I think, the final evidence of the pilot, after the initial porting the helm was steadied and not again altered and was steady at the time when the second short blast was given. A further doubt was cast on the plaintiffs' evidence in the evidence given by the man at the wheel, who, when he was asked how he ported his helm, indicated a movement to starboard, and he also said that he was told after the first porting to steady and that he did steady on the Waterloo Tower. It is left in very grave doubt on the plaintiffs' evidence and documents; but the evidence for the *Gulf of Suez* is that as far as they could see the starboarding did not have the effect of altering her head, and, therefore, I am inclined to accept the evidence of the master and the pilot of the *Gustav*, namely, that after the first porting (a slight porting to counteract the tide as the ship's head came into the tideway) the helm was steadied and was not afterwards moved, and that the second short blast

was given at a time when the helm was steady. As for the *Gulf of Suez*, she was already under some starboard helm for the ferry boat when the *Gustav* was first seen. On hearing a short blast from the *Gustav* the helm was starboarded, and, on hearing a second blast, hard-a-starboarded, and when the engines were put full ahead after the stop and slow the helm was hard-a-ported. There is a dispute as to the whistle signals given from the *Gulf of Suez*. The *Gulf of Suez* says that she gave two short basts in reply to each of the *Gustav's* one short. The *Gustav* says she heard only one short, which was given in reply to the *Gustav's* first one short. On the evidence as a whole, and especially having regard to some of the independent evidence called by the plaintiff, I find that the *Gulf of Suez* did give two short blasts and gave them twice. She certainly starboarded, and it is probable that she should give two short blasts, and there is positive evidence, apart from the ship herself, that she did, and I find that she did. I should add that as the *Gustav* was leaving the dock she gave a long warning blast. It is said that she gave one while she was in the dock as well; she certainly gave one which is spoken to in the evidence as she was leaving the dock, and that, apparently, was not heard on board the *Gulf of Suez*, and it certainly was not reported to the pilot. It is obvious that there was very serious fault somewhere, when two ships sighted one another half a mile distant while they were both on the Cheshire side of the river and so manœuvring as to come into collision within a very short distance of the dock wall on the Liverpool side. It is not seriously disputed that the *Gulf of Suez* is to blame for failure to take timely action with her helm (assuming that on hearing the short blast of the *Gustav* she was justified in concluding that the *Gustav* was going to turn up river under port helm), and was justified in starboarding to give the *Gustav* more soom for that manœuvre, yet a time came when the *Gustav* was seen to be continuing to head across river, and when engine action was called for, and when to go astern would have given time to see what the *Gustav* was really intending. Instead of reversing, what she did was to stop and slow, and then at last full ahead and hard-a-port, to try and throw herself clear. I am advised that the *Gulf of Suez* was certainly to blame for not reversing, and that fault would equally attach to her whether the two ships were under the crossing rules or whether their conduct was to be judged by good seamanship independently of the rule.

Whether the crossing rule applied or not has been much argued, and the argument for the *Gustav* is mainly based on treating it as applicable, for it is said that the *Gustav* did keep her course by keeping a slight port helm to counteract the tide, did get speed by gradually gathering way under engines which were already full ahead, and was bound not to reverse until the point was reached at which a collision was inevitable by the *Gulf of Suez* alone. Whether the crossing rules apply to ships in the relative positions of the *Gustav* and the *Gulf of Suez* depends, in my view, upon the particular facts of the case. I have been referred to *The Sunlight* (90 L. T. Rep. 32; 9 Asp. Mar. Law Cas. 509; (1904) P. 100) and *The Llanelly* (12 Asp. Mar. Law Cas. 485; 110 L. T. Rep. 269; (1914) P. 40). In my view, it all depends on the distance at which the vessels are from one another at the time when one of them leaves the dock entrance. I am inclined myself to think that these two ships sighting one another at half a mile distance came within the crossing rule. But I think it is very near the line, because it seems to me to depend upon this—do they sight one anothe at such a distance that they can each of them reasonably act under the crossing rule and so avoid the collision? These two ships at half a mile distance seem to me to be very near the line, and I will assume—without finally deciding it—that the crossing rule applied, and I will inquire whether, that being so, the *Gustav* can escape blame. I have already pointed out that whether one applies the crossing rule or not the *Gulf of Suez* cannot escape blame. Can the *Gustav* in this case take the benefit of the crossing rule? As she was leaving the dock entrance, coming out into the tideway—that is, before her definite direction could be apparent to the *Gulf of Suez*—the *Gustav* sounded a short blast. At that time she was porting only to counteract the effect of the tide on her head as she left the entrance; she was not taking any course for the *Gulf of Suez*, nor was she, in my view, directing her course to starboard within the meaning of the rule. I think it was a misleading signal. I was not given any case in which this had been definitely decided; but I think if the reasoning of *The Aristocrat* (10 Asp. Mar. Law Cas. 567; 1908, P., at p. 19), be looked at it will confirm the view that I have expressed—that when a ship is merely using helm action to counteract the effect of the tide on her heading she is not directing her course either to starboard or to port, as the case may be, and that she is not justified in giving an approaching ship a signal as if she was directing her course one way or another. The Elder Brethren think that it was a very misleading signal and that a prudent navigator on the *Gulf of Suez* hearing such a signal would rightly conclude that the *Gustav* was going to direct her course to starboard and turn up river and that she wanted the *Gulf of Suez* so to understand it—I do not say necessarily turn right up river, but turn on an up-river heading. On the evidence that short blast was repeated without any helm action at all, and therefore, it was doubly misleading. Those signals did mislead the *Gulf of Suez*, and went far, on the whole, to justify the starboarding of the *Gulf of Suez*. The Elder Brethren think that a prudent navigator would, in such circumstances, rightly starboard to give more room to the *Gustav* to carry out the manœuvre of turning up river which the *Gustav* was indicating by her short blast. The *Gustav* having given these signals, which are equivalent, in the circumstances, to an intimation that the *Gustav* was not going to keep her course, I ask myself, Does it lie in the mouth of the *Gustav* to say that she was bound by the crossing rule and was bound to keep her speed up to the point indicated by the rules? I think not. She has by her fault led the *Gulf of Suez* into the starboard helm action, and brought about the position in which the obligation to take timely engine action to avoid collision rests upon her as much as upon the *Gulf of Suez*. And if she had reversed sooner, the collision would have been avoided. I therefore am of opinion that even if it be rightly argued that, notwithstanding the short blast of the *Gustav*, the *Gulf of Suez* could have avoided the collision, yet there was continuing fault of the *Gustav* which herself contributed to the collision.

I therefore hold that both ships by their negligence have brought about this collision, and that they were both to blame.

The plaintiff appealed.

Bateson, K.C. and *L. F. C. Darby*, for the appellant, contended that the *Gustav* was justified, while porting to counteract the ebb tide, in giving port helm signals; and that, even if she was wrong in so doing, she did not mislead the pilot of the *Gulf of Suez*, and was not to blame for the collision. They referred to:

The Uskmoor, 9 Asp. Mar. Law Cas. 316; 87 L. T. Rep. 55; (1902) P. 250;
The Hero, 12 Asp. Mar. Law Cas. 108; 105 L. T. Rep. 97; (1911) P. 159;
The Aristocrat, 10 Asp. Mar. Law Cas. 567; 97 L. T. Rep. 838; (1908) P. 23;
The Ranza, 1898, 79 L. J. P., 21n;
The Huntsman, 11 Asp. Mar. Law Cas. 606; 104 L. T. Rep. 464.

D. Stephens, K.C. and *Alfred Bucknill*, for the respondents, argued *contra*. They referred to:

The Bellanoch, 10 Asp. Mar. Law Cas. 483; 97 L. T. Rep. 315; (1907) P. 170.

Lord Sterndale, M.R.—This is an appeal from Hill, J. who held both ships to blame for a collision on the Mersey. I am not going into the facts in detail, because he has set them out in his judgment. The plaintiff ship, the *Gustav*, was coming out of the Alfred Dock on the Birkenhead side. The *Gulf of Suez* was bound up river, and she was coming along on her proper side, the starboard side, at or just below the Seacombe stage, just off the north-eastern corner of the stage, and about 700ft. out. She was under a slight starboard helm in order to clear a ferry boat that was coming away from the stage. When she first saw the *Gustav* the *Gustav* had just cleared the stage in the sense that a vessel which was near the stage was able to see her. She could not see her, she said, when she was actually coming out of the dock, because the stage obscured the view; and, if she could see her clear of the stage from where she was, the *Gustav* must, I think, have been at that time clear of the dock.

The first question upon those facts is: Did the crossing rule apply to these ships? I agree with Hill, J. that that must always depend upon the distance at which ships see one another. If the *Gulf of Suez* had only sighted the *Gustav* just when she was coming out of the dock, and the *Gulf of Suez* was close up to her, it would be very difficult to say they were crossing courses. I agree also with Hill, J. that it is rather a near thing in this case, but I also agree with him in thinking that the side of the line on which the case falls is that at the time the vessels sighted one another the crossing rule did apply, because at the time when the *Gulf of Suez* sighted the *Gustav*, she was clear of the dock and was beginning to cross the river. She would have to cross the river to get on to her right side, if she was going down, as I think she was.

The learned judge has held the *Gustav* to blame substantially—indeed I think wholly—for giving a misleading signal, and so inducing the *Gulf of Suez* to do what she did, namely, instead of letting the *Gustav* cross her, by stopping or coming inside her, she starboarded and went on the Liverpool side of the river, where the collision happened. I think there is no question that the *Gulf of Suez* was to blame, and, I think, substantially for the reasons that the learned judge has given, but the question is whether the *Gustav* also was to blame. The learned judge has held her to blame, because she gave a misleading signal, and so produced all or, at any rate, a considerable part of the mischief. What she did was this: When she was just coming out of the dock, of course her starboard bow would be caught by the ebb tide: and she ported a little to counteract the tide, and blew one blast. After that, the learned judge has found she steadied and continued to cross in the same direction. She may have steadied on a little port helm; she may have been carrying a little port helm all the way; but she did not port any more, and she did not alter her direction. She continued to cross the river. It is true that the plaintiffs' documents say that after that first porting to counteract the tide she altered a point under a port helm. The learned judge has accepted the evidence in preference to the documents, and I think in a considerable measure because not only did the witnesses from the *Gustav* say that they did not alter their course at all, but because the witnesses from the *Gulf of Suez* say the same; and they say that, whatever helm signals she blew, it was dusk and it was light enough to see the hulls, and they did see she was going across the river, and was not altering her course to starboard. But the pilot and the master both say that on hearing those blasts they thought that she was going up the river, going south, and that she was porting for that purpose. I should have thought the pilot in charge of the *Gulf of Suez* would have known that it was necessary to port a little on an ebb tide in order to get across the river and to counteract the tide.

It has been strongly maintained by the appellants that the *Gustav* was quite right in blowing those signals: first, because she was counteracting the tide; and, second, it was right to give a port helm signal, because she was still counteracting the tide, although proceeding in the same direction as that on which she had steadied, and as her helm was then aport. It is not in the view I take of the case necessary to decide the point; but, as at present advised, I do not agree with those contentions; and I only say that I am fortified in that by the opinion of a nautical assessor. I doubt very much whether at the first time she could have been said to be altering her course, because she was not on a course at all: she was merely just correcting her heading. On the second occasion, two justifications are given for giving the second blast: one is that they were, as the learned counsel said, talking to one another, using, as he says, very likely the port helm signal to mean this: not "I am directing my course to starboard" but "I am going to pass you on my port side." Well, I cannot accept that as a justification at all. The regulations have fixed what the meaning of the signal is, and I cannot think that it is right or admissible for masters or pilots to use those signals with a different meaning. If they are in the habit of doing so, and each understands what the other means by the signal, no harm may result, but it does not, in my opinion, make it a proper use of the signal; and I think, in saying that, I am only following what has been said in other cases. It seems to me that the statement in Mr. Stuart Moore's Rules of the Road at Sea on art. 28 is accurate; he says (at p. 60) this with regard to what are called the port and starboard helm signals: "It must be remembered, however, that the first two signals are only for the purpose of indicating that a vessel is, at the moment the signal is given, directing her course to port or

starboard. They do *not* mean that the vessel is going to pass on a particular side; nor that her helm is placed in a particular way; nor that the vessel will continue on the course she is taking." The object of them is to let the vessel which has to manœuvre for the one giving the signals know whether that vessel is altering her course or whether she is not; they are not for the purpose of letting the other vessel know what helm action she may be taking to continue on the same course; that does not matter to the other vessel; she has got to manœuvre for a course, and not for any means which may be taken to preserve the course. As the result in this case of the port helm the *Gustav* did continue on the same course, according to all the evidence, and in my opinion the second port helm signal was wrong. I am advised that probably the right thing for her to do on both occasions—and I agree with this—if she wanted to call the other vessel's attention at all, was to blow a warning blast to call her attention, and not to blow a signal which indicated that she was doing something that she was not doing. I think that that was a misleading signal in this sense, that it was a signal which had a tendency to mislead, and, if it had in fact misled, of course the learned judge would have been quite correct.

If the old principle of statutory presumption of fault existed, there might be a considerable amount to be said about that signal, but it does not; and, therefore, in order to hold the *Gustav* to blame for giving that signal, it must be shown not only that it was a misleading signal in the sense that I have mentioned, namely, a signal having a tendency to mislead, but it must be shown that the signal did in fact mislead, and that that misleading was the cause of or a contributing cause to the collision. Now, that is where I think the defendants' case against the *Gustav* is not established in this case, so far as signal goes. Firstly, the evidence is quite clear from the *Gulf of Suez* that, although they heard the signals from the *Gustav*, they saw that she was not altering her course, but was proceeding right across the river; and, secondly, the pilot who was in charge of the *Gulf of Suez* says quite clearly and distinctly that his manœuvres were not affected by those signals. He said, and so did the master, that they thought the vessel was going to the southward when they heard the whistles; but they discovered long before the collision that she was doing nothing of the sort, for they saw her, as I say, going across the river. He was asked in re-examination these questions: (Q.) One other question: I asked you about the port helm signal that this vessel blew, and what you gathered from it? (A.) Well, I was under the impression that she would still keep on her port helm and go well to the southward." I do not quite know, as I have said, why a Liverpool pilot who knows the necessity of porting a little coming out of the Alfred Dock on an ebb tide to counteract the tide, could have formed that opinion at all; but he says he did. Then the next question is: "Did that impression in your mind have any effect upon your manœuvres?" (A.) "No"—then he goes on—"only that if she wanted to come to starboard she had sufficient room over to port or starboard, whether she was bound south or north." Now, when you introduce after the word "No" something with the words "only that," you expect that there will be some qualification upon the "No"; but those words, to my mind, whatever they mean, that follow the "No," although introduced by the words "only that," do not at all qualify the answer "No"; and the learned counsel appearing for the *Gulf of Suez* agrees with me that they do not qualify the word "No." So that, in addition to the fact that you have the witnesses from the *Gulf of Suez* saying that whatever the signals were, they saw she was not altering and was going straight across the river, you have the distinct and positive statement by the man in charge of the navigation of the *Gulf of Suez* that they did not affect his manœuvres at all. In those circumstances it seems to me quite impossible to say that these signals, although in my opinion they were wrong, were a contributing cause of the collision. The man who is said to have been misled by them says he was not misled by them, in this sense, that he was not led by them into doing anything that he would otherwise have not done; or into not doing anything that he would otherwise have done; his manœuvres were not affected by those signals at all. But there is also another fact, I think, namely, that those signals had been given, before the collision, and their effect was gone quite sufficiently before the collision for the pilot and those on board the *Gulf of Suez* to have corrected any wrong impression that might have been induced by them. Therefore, on that ground, on which the learned judge held the *Gulf of Suez* to blame, I regret to say that I cannot agree with him, because it seems to me established by the evidence that they had in fact no misleading effect, whatever their misleading tendency might have been.

But then there is this other point made against the *Gustav*, with which I do not think the learned judge has dealt. The respondents' counsel, after contending that the crossing rule did not apply, and contending that the signal was misleading, said: Well, put those contentions on one side; assume that the crossing rule did apply; assume that the signal did not mislead; still the *Gustav* was to blame for not having done something to avoid the collision—namely, stopping and reversing before she did. And the point was this: the *Gustav* had blown a long warning blast as she came out of the dock, which was heard a very considerable distance. Those on board the *Gulf of Suez* say they did not hear it, and that is one part of the blame which they sought to attach to the *Gustav*. They did not specifically allege any fault in her upon the misleading signal in their pleadings, and, although I think the pleadings most likely covered it, it is of importance that there was no such allegation, because it shows the matter was not considered important. After blowing those warning blasts, she came out and blew the two blasts that I have mentioned. The *Gulf of Suez* blew on two or three occasions the starboard helm signal, and continued to starboard, and was seen by the *Gustav* to be continuing her starboard helm. The *Gustav* said that they did not hear any starboard helm signal; they heard a port helm signal from her. Now the learned judge has found, and I think quite rightly, that she never blew a port helm signal, and she did continue to blow starboard helm signals, and the two vessels went on until if not very near to one another they were approaching one another closer when the *Gulf of Suez* stopped. The *Gustav* still went on, and the *Gulf of Suez* then put her engines ahead again, and came round under a hard aport helm, and so the collision happened. What is said against the *Gustav* is this: They ought to have

heard the starboard helm signals—and I should think they ought; I do not know why they did not—and if they heard a vessel blowing a starboard helm signal and going off under a starboard helm in such a way that if their courses were continued they would meet, the *Gustav* ought to have stopped earlier than she did. Now if I am right in saying that the crossing rule applies, it was the duty of the *Gustav* to keep her course and speed, and I think it is very important that no rule should be laid down by the court which would throw any burden or give any encouragement to the stand-on ship to alter her course or to act in any way before she is absolutely obliged to do so. The statement of the rule in Mr. Marsden's book seems to be quite correct. This rule is perhaps the most difficult of all the regulations for seamen to adhere to. It must always be a matter of difficulty for the officer in charge of the vessel which has to keep her course and speed to determine when the time has arrived to take action, for if he acts too soon, he may disconcert any action which the other vessel may be about to take to avoid his vessel, and be blamed for so doing, and yet the time may come when he must take action. The precise point when he should cease to keep his course and speed is difficult to determine, and some latitude is allowed him in determining this"—those last words are taken from the judgment of Lord Gorell in *The Albano* (96 L. T. Rep. 335; 10 Asp. Mar. Law Cas. 365; (1907) A. C. 193)—"and when it is shown that he was carefully watching the other vessel and endeavouring to do his best to act at the right moment, he will not be held to blame, though it afterwards appears that he waited too long or acted too soon." Those words are taken from the judgments in the *Huntsman* (104 L. T. Rep. 464; 11 Asp. Mar. Law Cas. 606) and the *Ranza* (79 L. J. P. 21n). I think it is important that those principles should be attended to.

Now what was the position here? There is distinct evidence from the *Gustav* to this effect, the pilot of the *Gustav* is saying that he saw the other vessel starboarding, and then he is asked: "Then did he keep on his starboard helm or did he change it?—(A) He kept on his starboard helm." So that whether the *Gustav* heard the two blasts or not, she did know the other vessel was under starboard helm. "(Q.) And then what was the next thing? You went on till when?—(A.) Well, until I thought it was time for me to do something to try and avoid a collision; I came full speed astern. (Q.) Up to the time you came full speed astern, could he quite easily have ported and got away under your stern?—(A.) Most decidedly." And I do not know that there is any evidence to displace that.

Then there is another matter of much greater importance than any speculations or calculations or guesses as to time and distance; and that is this. It is found by the learned judge that at the time of the collision the *Gustav* had hardly any way on her at all; she was going I think about five knots before that. I do not think it is found one way or the other, but there is evidence that not only did she go astern, but she let go her anchor and her anchor held, she had not to pay out any more chain. Both those things show that she must have reversed at quite an appreciable time and distance before the collision, and that she must have done a good deal towards taking her way off, because she had, as the learned judge finds, very little way on; and, secondly, if she had had much way, her anchor would not have held, as it did. I think that is sufficient to show that, giving her the reasonable latitude which it is said she ought to have, she did not delay acting herself too long. It has been laid down over and over again that a stand-on ship is not to act herself so long as the other ship can by her own action avoid the collision. As I have said, there is evidence clear and distinct, and I do not think there is any to the contrary, that up to the time she reversed her engines the other vessel could have avoided the collision by her own action, and I think there is very good ground for saying that when she had once stopped, if she had not put her engines on ahead again there would have been no collision at all.

For these reasons I think that the *Gustav* was not to blame on that head either, and that the learned judge's judgment should be varied by finding not both vessels to blame, but the *Gulf of Suez* alone to blame, and I suppose that will carry the costs both here and below.

Atkin, L.J.—I agree, and I think the first question to be determined in this case is whether or not these two vessels were crossing vessels within the meaning of art. 19. The learned judge has found that they were, after some doubt, and I think that he was right in so finding. It appears to me from a survey of the circumstances—the place at which each vessel saw the other, the position in fact which was obvious at that particular moment—that the vessels were crossing within the meaning of the rule so as to involve risk of collision, which indicates a period before the risk has, so to speak, actually matured; a period at which there is a probability that there will be a risk of collision if the precautions are not taken. Therefore to my mind the *Gustav* intending and proceeding to go across the river from the Birkenhead side, and the other vessel coming up the river, were obviously crossing vessels so as to involve risk of collision. Now it follows from that that there was an obligation under art. 21 upon the *Gustav* to keep her course and speed, it appears to me that that obligation rested upon her until a period arrived at which it was clear that the collision could not be avoided by the action of the *Gulf of Suez* alone. I agree entirely with what has fallen from the Master of the Rolls as to the importance of maintaining that rule, and the danger that there would be in giving any latitude to the stand-on vessel, unless the emergency had arisen which allowed her to depart from the rule; and it appears to me, leaving out of account for the moment the further question that arises as to a misleading signal, that if one had merely to consider the question of these vessels crossing, the learned judge has not found that the *Gustav* under those circumstances took action too late, and it appears to me there is no evidence upon which we ought to come to that finding. On the contrary, in view of the evidence as to what happened when she did take action, and the fact that by the time the collision came about she had almost entirely taken off her way, or at any rate had reduced it very considerably, I think it is impossible to say that the *Gustav* in that respect was to blame. The only other question is the suggestion that here as between these two vessels the crossing rule must be taken not to have applied, because the *Gustav* has misled the *Gulf of Suez* into believing that the *Gustav* was not crossing but was in fact proceeding in a different direction—namely, up the river, and that raises the question of these signals. For my part on this part

of the case I do not think that very much importance ought in any case to be attached to the signals, because both vessels were able to observe one another; it was dusk, not dark, and they both agree they could see each the hull of the other vessel, and what in fact was being done. The *Gustav* coming out of the dock, in order to obviate the effect of the ebb tide, kept a slight port helm upon the vessel, and, inasmuch as she had put her helm to port, she blew one short blast, meaning, "I am directing my course to starboard," and it is said that that was a wrong use of the signal, because in fact she was not directing her course to starboard, but was keeping straight on. And it is said that in any case it would be a wrong use of the signal, at a time when no alteration was given to the helm at all, in respect of the second blast. It does not appear to me in this case to be necessary to decide that point. I am not saying at all that I differ from the view expressed by the Master of the Rolls and also the result upon it; but I prefer to not decide whether or not it would be a wrong use of the signal if in fact a navigator, whose ship would otherwise be directed, we will say, to port, signalled that he was using his port helm so as to keep the vessel in a direction in which she would not be going if it were not for the use of that port helm. That I do not wish to decide. Nor do I wish to decide a further point that arises, which is this: Whether a use of the signal which is not that and does not mean that which is indicated by the rule is in fact in itself an infringement of the rule. That question may arise, because what the rule says is this: that a vessel shall indicate the course by the following signal, one short blast to mean: "I am directing my course to starboard." Assume that a vessel in the course of navigation does blow one short blast not meaning "I am directing my course to starboard," it may well be said that that is not an infringement of the rule, because the rule only indicates what he shall do if he is directing his course to starboard. I am far from saying that a use of these signals in a manner which is not that which is contemplated by the rules themselves, may not be an error in navigation, and such an error in navigation as to amount to negligence; very likely it may be, all I am suggesting is that it may be a different question, and that, instead of establishing under those circumstances, as one might in the one view, a breach of a statutory obligation, the litigant would have to establish that there was in fact negligence, that is to say, faulty navigation amounting to negligence, on the part of those responsible for the ship. But I leave the matter there, I do not think it is necessary to decide it in this particular case, because the case that is made is that this signal did in fact mislead those responsible for the navigation of the *Gulf of Suez*, and that must mean in this case the pilot, so as to lead him to believe that the *Gustav* was not in fact a crossing vessel, and so as, in that way, to prevent the *Gustav* from relying upon the crossing rule.

I think the answer is, with great respect to the learned judge below, that this signal in this case did not have that effect. I have already pointed out that both vessels were able to see one another, during the whole course of the proceedings, and see what was happening, and it appears to me very difficult to suppose that the helm signal in itself would be sufficient to mislead the navigator of the *Gulf of Suez* into taking a wrong course. But, quite apart from that, the signal that was given, if it meant anything at all, meant: "I am directing my course to starboard." Well, it might mean anything; it might mean, as the judge himself pointed out, perfectly consistent with this: "I am going to cross this river, but I am going to one of the docks across the river which are south of the landing stage, in which case a port helm would be necessary." It might mean: "I am navigating under port helm to avoid some obstruction" or for some purpose which it is not necessary to state, which he may not see. It may mean, that "I am going," as the judge said, "under big port helm, I am going right up the river." I should have thought it would be a probable measure at that time and in that state of tide, or at any rate a possible measure. But in any case, if in fact there was a doubt, and there were two equally possible—I think one may say equally probable courses—that might be taken under that helm signal, it seems to me that it would have been wrong for the navigator of the *Gulf of Suez* to make up his mind that it only meant the one thing, namely, that the vessel was going up the river, But, quite apart from that, it appears to me upon the evidence in this particular case the attack on the part of the defendants entirely fails, because I read the evidence of the pilot as a statement that in fact he was not misled. He was asked whether it had any effect upon his manœuvres, and he said, No; and he said, No, it appears to me without any material qualification; and, if that is the true effect of his evidence, it appears to me that there is no evidence upon which the learned judge could find that the action taken by the *Gustav* had any effect so as to prevent the *Gulf of Suez* from being responsible for her undoubted and admitted negligence.

I think for these reasons that the appeal should be allowed, and the order should be made as announced by the Master of the Rolls.

YOUNGER, L.J—I am of the same opinion on all the points dealt with and disposed of by my Lord and the Lord Justice.

Appeal allowed. Judgment varied.

Solicitors for the appellant, *Treasury Solicitor.*

Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Hill, Dickinson,* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 26 *and* 28, 1921.

(Before Sir HENRY DUKE, P.)

THE BORRE. (*a*)

Action in rem — *Bail—Solicitors undertaking to provide bail—Purported withdrawal from undertaking—Arrest of ship—Amount of bail—Nature of bail in Admiralty.*

A solicitor who indorses upon the writ in an action in rem *an undertaking to give bail, thereby securing the immunity of the ship from arrest, undertakes to provide bail in a sum equal to the value of the ship at the time when he enters into the undertaking. This obligation is not affected by subsequent fluctuation in the value of the ship.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

A solicitor who has given such an undertaking cannot afterwards withdraw from it, and invite the plaintiff to arrest the ship, and although the plaintiff does so, the solicitor will not necessarily be released from his obligation to provide bail.

Nature of bail in Admiralty considered and contrasted with that of bail given in criminal proceedings.

Miller *v.* James (8 *Moore C. P.* 208) *held not to apply.*

APPEALS from an order of the assistant registrar directing Messrs. Thomas Cooper and Co., solicitors, for the owner of the *Borre* to furnish bail in an amount of 1400*l.*, in pursuance of an undertaking entered into by them in proceedings *in rem* arising out of a collision between the *Borre* and the barge *Ventnor*.

The facts and the arguments of counsel fully appear from the judgment of the President.

G. P. *Langton* for Messrs. Thomas Cooper and Co.

R. H. *Balloch* for the plaintiffs in the collision action.

April 28.—Sir HENRY DUKE, P. in a written judgment, said:—The parties in this case, which came on for hearing a few days since, are at variance as to an undertaking to put in bail given at the commencement of the proceedings by the solicitors for the defendants, who have been held liable for damages.

Inasmuch as undertakings of the kind in question form part of the usual machinery of the court, and are indeed commonly acted upon as though they were in fact bail bonds and recognised by the court in the rules and in practice as securities proper to be offered to plaintiffs with rights *in rem*, the controversy is of some importance. Moreover, a considerable amount is at stake.

The plaintiffs, on the 22nd June 1920, issued their writ in an action *in rem* against the defendants as owners of the steamship *Borre* to recover damages unliquidated in amount for the sinking in the Thames by the defendants' steamship of the plaintiffs' barge *Ventnor* with a cargo of meat. The defendants' solicitors on the same day endorsed the writ with an undertaking in common form to enter an appearance and put in bail. The *Borre* was within this jurisdiction. The plaintiffs' solicitors, in reliance upon the undertaking, refrained, as it was intended they should, from arresting the *Borre*, and she continued in the owner's service. She suffered damage by collision at sea, and was repaired, but by reason of the collision was reduced in value. She was also affected by the general depreciation in shipping values which has taken place between June 1920 and the present time.

At this date the plaintiffs, with the plaintiffs' advisers, supposed the defendants to be entitled, under the Merchant Shipping Acts, to limit their liability in respect of the collision with the *Ventnor*. The defendants' advisers probably shared this belief. It was founded on a mistake, so far as at present appears.

The only owner of the *Borre* at the time of the collision whose identity has been established was shown at the trial of the action to have been in charge of the vessel and directing her navigation at the time of the collision for which the *Borre* was held solely to blame.

In the belief that the defendants were entitled to limit their liability the parties discussed an amount of bail. The defendants' solicitors suggested 2000*l.* as the amount for which they were bound to find bail, and the plaintiffs' solicitors were ready to accept bail for this sum. Bail, however, was not given, and in March 1921 a correspondence took place which is in existence before me. On the 17th Feb. 1921 the defendants' solicitors wrote to the plaintiffs' solicitors: "Our clients inform us that they are unable to make arrangements for the bail in this case, and as the vessel is within the jurisdiction of the court, viz., at Dover, we hereby withdraw our undertaking for bail and you will no doubt arrest the steamer."

The plaintiffs' solicitors replied on the 18th Feb.: "We are in receipt of your letter of yesterday's date, which was received by us late yesterday afternoon, and having regard to the terms thereof, we, as suggested by you, at once arrested this vessel. We had, of course, no option but to arrest the vessel under the circumstances, but at the same time we reserve all our clients' rights under the undertaking for bail given by you."

On the 21st Feb. the defendants' solicitors wrote: "As you were in a position to arrest the vessel, and, in fact, did so, we regard our undertaking as entirely superseded."

The plaintiffs' solicitors on the 23rd Feb. wrote insisting upon their clients' rights under the undertaking. The next day the defendants' solicitors acknowledged receipt of the letter, adding: "As you know quite well, we have acted in accordance with our rights and in the manner which has been approved by the judges of the Admiralty Court on similar occasions."

On the 28th Feb. the plaintiffs' solicitors gave the defendants' solicitors notice that they had learned the true facts as to the value of the ship and the position of the owners relative to limitation of liability, and they added: "With regard to the question of bail, we propose applying by motion to the judge to compel you to fulfil your undertaking. It is needless to say that such a course would be most distasteful to us."

The answer on the 1st March was: "We have no doubt the judge will follow the course which is recognised as the practice of the court in such circumstances."

The *Borre* was arrested on the 17th Feb., and on the 16th March 1921 was appraised as of a then value of 600*l.*, and the owners, through their solicitors, provided bail in that amount, and the vessel was released. The plaintiffs' solicitors applied on the 12th April by summons for an order "that the defendants' solicitors do forthwith provide good and sufficient bail" pursuant to their undertaking.

Upon the hearing in the registry the correspondence, which evidenced a provisional consent of the plaintiffs to accept bail in 2000*l.*, was read. The assistant registrar also had before him information not on oath as to the opinion of the valuers by whom the appraisement had been made concerning the value of the *Borre* at the date of the writ. This value was probably not less than 4000*l.*, and was certainly much in excess of 600*l.* or 2000*l.*

Treating the correspondence as evidence of an agreement as to amount of bail, the assistant registrar ordered the defendants' solicitors to complete bail in an amount of 1400*l.* additional to the bail for 600*l.* already given.

Both parties have appealed against the order made in chambers. The defendants' solicitors contend that no order ought to have been made,

and the plaintiffs that bail should have been ordered to the full amount of the value of the *Borre* at the date of the undertaking to put in bail.

Both parties disclaim the suggested agreement for bail in 2000*l.* upon which the order already made depends, and the dispute between them must now be decided without regard to that consideration. For the solicitors, Mr. Langton argued before me that they were entitled to determine their liability under their undertaking as soon as the *Borre* was identified by them to the plaintiffs as being within the jurisdiction and subject to arrest. He also argued that the arrest which in fact took place operated as a waiver of the plaintiffs' rights under the undertaking. Alternatively, he insisted that the bail given after the arrest and appraisement was available and sufficient to satisfy the undertaking. The case made by Mr. Balloch for the plaintiffs was that the undertaking bound the solicitors to provide bail to the full value of the *Borre* at the date when it was given, and that it remained in force notwithstanding the subsequent arrest and liberation on bail of the vessel.

Mr. Langton supported his claim to require the arrest of the ship and consequent release of the undertaking by reference to the case of bail given in criminal courts by sureties for the appearance of an accused person to take his trial. I do not think there is a real analogy. The bail in criminal cases is given to secure the due attendance upon justice of the person bailed.

The bail in actions in the Admiralty jurisdiction is given to secure satisfaction of a claim—in full or to a limited amount. The practice as to the surrender or arrest of an accused person and consequent discharge of his sureties is incidental to a different branch of law from that administered here, and throws no light on the matter now in debate.

The first question between the parties is that of the meaning of the undertaking.

Is it an undertaking to produce the ship, and therefore, satisfied if, pending the cause, the ship is offered for arrest under conditions in which arrest can be made? If not, does it require the finding of bail for the value of the vessel at the date when the undertaking is given, or for the value at some subsequent time when the plaintiff or the defendants proceed to an appraisement or inquiry?

To the claim made in February by the defendants' solicitors for release from their undertaking upon their pointing out the *Borre* in a position in which she could be arrested, there are various substantial objections. They undertook to provide bail, and thereby to secure to the plaintiffs a sum of money. In place of a contingent right over the proceeds of a ship in the custody of the Marshal, they gave the plaintiffs a contingent right over a fund in pounds sterling. To call on the plaintiffs, even at once to resume their former situation, would simply be to undo the transaction of which the undertaking was the pledge. To my mind the proposition that the plaintiffs were bound to submit to such a divestment of their right is unarguable. What is actually sought now is, however, something more, namely, that the plaintiffs should be required to accept the ship as security when her value has become insignificant.

Mr. Langton produced no authority for such a demand, and upon inquiry in the Registry I have not been able to find any case in which the court has given effect to such a demand.

I reject, therefore, the contention that the plaintiffs were bound to re-arrest the *Borre* and give up the solicitors' undertaking. The undertaking subsisting, the plaintiffs claim that it shall be fulfilled by the filing of a bail bond, so conditioned that if the defendants do not pay what may be adjudged against them in this action, with costs, execution may issue against their sureties for a sum not exceeding the value of the ship. The defendants claim that the value of the ship having been appraised at 600*l.* the bail already given in that amount satisfies the undertaking. There are some objections to this contention which were not argued, and which I shall not discuss. The question debated before me was that of the date at which the value to be limited in the bond is to be ascertained. The obvious answer seems to me to be that the undertaking speaks as of the date when it was given.

A promise on the 22nd June 1920, to give bail to the amount of the value of the *Borre*, did not mean the value as it was in 1919, or as it should or might be in 1921, but as it then was. To act upon any other view would be to convert into a mere speculation a business transaction which was intended to produce certainty. Cases in which the court has altered the amount of the bail given upon release of a ship relate to error in computation, and do not give any countenance to the suggestion that the liability to give bail for a ship released in an action *in rem* fluctuates from time to time pending the cause. I hold, therefore, that the undertaking requires by its terms the completion of bail to the amount of the value of the *Borre* on the 22nd June 1920.

There remains the question whether the plaintiffs have waived their rights under the undertaking. In support of the affirm view reliance was put upon a case in the Court of Common Pleas of *Miller* v. *James* (8 Moore C. P. 208). There a solicitor, whose client was sued for debt, undertook to procure the client's signature to a *cognovit*.

The effect of this acknowledgment of the plaintiff's claim would have been to entitle the plaintiff to sign and proceed to execution in the action if default in payment were made by the defendant. The plaintiff, upon being told by the solicitor that he could not, or would not, procure the *cognovit*, replied that he would not be severe, and would proceed with his action.

The Court of Common Pleas said the enforcement of the undertaking was a matter of discretion, and that the plaintiff's election to go on with the action was virtually a waiver of his rights against the solicitor.

The question of waiver in the present instance cannot be determined by the authority of the case cited. If there were clear proof that the plaintiffs here had elected to arrest the *Borre*, and to release the solicitors from their undertaking, *Miller* v. *James* (*sup.*) would be an authority against them. In fact, what the plaintiff did was to arrest the ship with notice to the solicitors that they held them bound by their undertaking. What is to be determined is whether the arrest was so wholly inconsistent with any claim upon the undertaking that once arrest was made the undertaking must be treated as discharged. I think it was not. The ship was the property of the defendants. The undertaking created a personal obligation on the part of the solicitors. The security of the ship,

and the security of the undertaking, are not in their nature incompatible.

There was no doubt an implied term of the undertaking that if bail were given no arrest should be made, but the solicitors refused to give bail and invited an arrest. They could not properly do this, and to allow them now to profit by the state of things so brought about would be, in my opinion, substantially unjust.

Additional bail must be given forthwith to make up in all the value of the *Borre* as on the 22nd June 1920.

If the parties do not agree the amount will be determined in the registry.

Messrs. Thomas Cooper and Co. to pay the costs of the appeal.

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

Solicitors for the plaintiffs, *Inględew, Davis,* and *Sanders Brown.*

Monday, May 9, 1921.

(Before Sir HENRY DUKE, P.).

THE VIGILANT. (*a*)

Tug and tow—Towage contract—Rope cast off by tug during performance of contract—Damage to tow—Breach of towage contract—"Improper navigation or management" of the tug—Limitation of tug owners' liability—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503—*Merchant Shipping* (*Limitation of Shipowners and Others Liability*) *Act* 1900 (63 *&* 64 *Vict. c.* 32).

If a vessel which is being towed under a contract of towage is damaged by reason of the transfer of the towing rope from the engaged tug to another tug, the damage is caused by the improper navigation of the engaged tug, and not by a breach of the contract of towage. The owners of the engaged tug are therefore entitled to limit their liability in accordance with sect. 503 *of the Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

ACTION by the owners of the steam tug *Vigilant,* claiming to limit their liability in accordance with sect. 503 of the Merchant Shipping Act 1894.

The plaintiffs, who were the owners of a fleet of steam tugs, entered into a contract of towage with the owners of the steamship *Frey,* which involved towing the *Frey* from the Howden Dock in the Tyne to the Albert Edward Dock. The plaintiffs supplied their tug *Vigilant* to perform the towage. In the course of the performance of the contract of towage, when the *Frey* was in proximity to the island pier of the Albert Edward Dock, and under way in the sense that she was a moving vessel, subject to the action of the flow of the river, the *Vigilant* transferred her tow rope to another tug, the *Titan,* in order to proceed to the performance of some other contract of towage upon which the plaintiffs were engaged. The *Frey* came into collision with the island pier, sustaining damage. In a subsequent action by her owners to recover this damage, the present plaintiffs, the owners of the *Vigilant,* were held liable.

G. P. Langton, for the plaintiffs the owners of the *Vigilant.*—The damage was caused by the "improper navigation" of the *Vigilant,* and without the fault or privity of her owners, as required by the Merchant Shipping Act 1894. In any event the action of the *Vigilant* is covered by the much wider words "improper navigation or management" of the Merchant Shipping (Liability of Shipowners and Others) Act 1900, s. 1.

Dumas, for the defendants the owners of the *Frey.*—The damage did not arise from any act of navigation or management by those in charge of the *Vigilant,* but was solely caused by a failure to tow, in breach of the contract to do so. The plaintiffs are not entitled to limit their liability in respect of damage caused by a breach of contract:

Wahlberg v. *Young,* 4 Asp Mar. Law Cas. 27n.

Sir HENRY DUKE, P. (after stating the facts), said:—What is contended on the one hand, is that either under sect. 503 of the Merchant Shipping Act 1894 or under the combined effect of sect. 503 of that Act and sect. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 the plaintiffs are entitled to limit their liability on the ground that the damage in question was caused by reason of the "improper navigation" or by reason of the "improper navigation or management" of their ship *Vigilant,* they not being themselves in actual fault or privity to the negligent or improper navigation.

It is not disputed that for improper navigation of the tug in the act of towage, the tug owners, subject to the statutory restriction of their right to limit their liability, might limit their liability; for example if instead of letting go of the tow rope which held the *Frey,* the master of the *Vigilant* had slackened the tow rope, or if he had improperly gone astern on his engines, or had made any other negligent manœuvre in the act of towage. But it is said on behalf of the owners of the *Frey,* the negligence in this case was not negligence in the act of towing, but rather a breach of contract in failing to tow. The default which is relied upon is the transfer of the tow rope from the *Vigilant* to the *Titan,* and, that being so, it is said that there was no longer negligence in towing, but from the moment of the transfer there was a failure to tow, and so a mere breach of contract. Reliance is placed upon the principle enunciated in the case of *Wahlberg* v. *Young* (4 Asp. Mar. Law Cas. 27n) by Lord Esher (then Brett, J.) who declared (at p. 28): "A mere breach of the towage contract would not bring the case within sect. 54 of the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63)." Here it is said that there was a mere breach of the towage contract, and therefore the case does not fall within the sections of the Merchant Shipping Acts now relevant to the limitation of liability. Now it is to be observed that in the Court of Common Pleas in each of the judgments in the case of *Wahlberg* v. *Young* (*sup.*) Lord Coleridge, C.J. and Brett and Archibald, JJ. expressed themselves quite explicitly to the effect that the right to limitation of liability "applies equally whether the damage done be from a breach of contract or from a simple tort." Lord Coleridge stated that proposition in plain words; Lord Esher appears not to have dissented from the proposition; and I understand Archibald, J. to have concurred in the view of the Chief Justice.

It seems to me that what I have to determine here is whether there was something more than a mere breach of contract to tow. Failure to tow at all would have been a clear instance of such a

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

breach. Failure to complete the towage at a time when no act of towage was in process would have been, it seems to me, another mere breach of contract. When I say "No act of towage was in process," I mean when the *Frey* and the *Vigilant* were relatively in such positions that each of them could take charge of her own safety, irrespective of the navigation of the other involved in the contract of towage.

It seems to me that this case does not fall within either category which I have just mentioned. The findings upon which the judgment in the main action proceeded were that the tow rope of the *Frey* was transferred from the *Vigilant* to the *Titan* when the towage was proceeding, and the *Frey* was in motion; when the process of towage, which had brought her to the point at which she had arrived, still had its effect upon her, and when she herself had not control of her own safety which she would have had if the towage had either not been begun or had been interrupted when not in progress.

That being the case, it seems to me that the transfer of the tow rope from the *Vigilant* to the *Titan* at a time when the towage was in progress was negligent towage, or an act of negligence in the process of towage, and is so not within the class of acts as to which Lord Esher in his judgment declared that these acts were not within the provision of the Merchant Shipping Amendment Act 1862, which related to improper navigation.

The view of the matter I take, to put it shortly, is this, that, relatively to the *Frey*, the *Vigilant* was engaged in an act of navigation when she transferred the tow rope of the *Frey* to the *Titan*: that the performance of that act of navigation was improper, and that by reason of that the conduct of the plaintiffs which is here in question was improper navigation within the meaning of the Merchant Shipping Acts. My own impression of the extended provision of the Act of 1900, which extends the right to limit liability for "improper navigation or management of the ship" is that these words probably do not include the class of case here in question unless the larger and original words "improper navigation" do include it.

In my opinion, the larger words "improper navigation" do include what was done in this case. Therefore I hold that the plaintiffs are entitled to limit their liability. There will be a decree of limitation, as prayed, with the usual consequences as to costs—namely, that the plaintiffs pay the defendants their costs.

Decree of limitation pronounced as prayed.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *Wilkinson* and *Marshall*, of Newcastle.

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

April 14, 15 *and May* 27, 1921.

(Before Sir HENRY DUKE, P.).

THE TROMP. (*a*)

Bill of lading — "Shipped in good order and condition"—"Weight quality condition unknown"—Cargo damaged on shipment—Clean bill of lading — Estoppel — Shipper acting as agent of the consignee—Undertaking to indemnify the master.

The description "shipped in good order and condition" when it appears in a bill of lading refers to the outward condition and appearance of the goods. The subsequent description "weight quality condition unknown" refers to the internal condition of the goods not visible to the person who signs the bill. A bill of lading which contains both these expressions is not thereby contradictory in terms.

The plaintiffs agreed to purchase through A. and the B. agency in Sweden potatoes f.o.b. Gothenburg, payment to be made on signing clean bills of lading. A. chartered the Dutch sailing vessel Tromp *to carry some of the potatoes to Hull. The plaintiffs subsequently ratified the chartering of the* Tromp, *and the potatoes were loaded under the supervision of A., whom the plaintiffs authorised to act for them in certain matters connected with the stowage of the cargo. The bags of potatoes were brought to the ship in a wet condition, and the full number described in the bills of lading was not loaded. The master of the* Tromp *accordingly refused to sign clean bills of lading. On the undertaking of the B. agency, given with the knowledge and approval of A., to indemnify him against the liabilities which he might incur thereby, and acting upon the advice and with the approval of his owners' agents, he ultimately signed clean bills of lading which described the cargo as "shipped in good order and condition . . . weight quality condition unknown." Thereupon payment was made by the plaintiffs in Gothenburg in accordance with the terms of sale. On the arrival of the* Tromp *at Hull the whole of the cargo was found to be damaged. The plaintiffs accordingly arrested the* Tromp *in an action for damage to cargo and short delivery, contending that they were indorsees of the bills of lading without notice of the condition of the cargo, and that the defendants were estopped by the admissions contained in the bills from denying that the cargo was shipped in good order and condition. The defendants denied that the plaintiffs were indorsees without notice, saying that A. was the agent of the plaintiffs and that the property in the goods passed to the plaintiffs before shipment.*

Held, that A. was not the agent of the plaintiffs. The plaintiffs were therefore indorsees of the bills of lading without notice, and the property in the potatoes therefore passed to them on the signing of the bills. The defendants were therefore estopped from denying as against them that the potatoes were shipped in good order and condition. The description "shipped in good order and condition" applied to the external condition of the bags which was visible to the master, and was not in contradiction with the subsequent words "weight quality condition unknown." The defendants were liable for the injury to and loss of the potatoes.

ACTION *in rem* for damage to and short delivery of a cargo of potatoes laden on board the Dutch sailing vessel *Tromp*.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The plaintiffs were Messrs. Jefferson and Gosling, who were merchants at Hull. The defendants were the owners of the *Tromp*.

By their statement of claim the plaintiffs alleged that in May 1920 the Baltic and North Sea Traffic of Gothenburg shipped on board the *Tromp*, then at Gothenburg, 2923 bags of potatoes and that the master of the *Tromp* received the same to be carried from Gothenburg to Hull on the terms of bill of lading by which he acknowledged that the potatoes were shipped in good order and condition and agreed to deliver them in the like order at Hull. The *Tromp* arrived at Hull on the 3rd June 1920, when the potatoes were found to be wet, soft, pulpy, and greatly damaged. The plaintiffs arrested the *Tromp* and obtained bail.

The defendants by their defence alleged that by charter-party dated the 15th May 1920 the *Tromp* was chartered by one Appelgren, at Gothenburg, on behalf of the plaintiffs, on whose behalf the freight under the charter-party was paid. The Baltic and North Sea Traffic were the agents of the plaintiffs, and as such agents agreed to hold the master of the *Tromp* free from all responsibility which might arise from the master having signed the bill of lading, although the number of bags appeared from the mate's receipt to be less by seventy-four than the number stated in the bill of lading, and although the cargo was partly wet and was stowed in the ship by the shippers. The master signed at the request of the Baltic and North Sea Traffic and Appelgren. The charter-party provided that he was to do so. The potatoes were not shipped in good condition. The property in them did not pass to the plaintiffs through the bill of lading, but in accordance with a contract of purchase made about the 20th April 1920 by Appelgren acting on behalf of the plaintiffs. The defendants denied that there had been any breach of their duty as carriers. They further counterclaimed for damages for loss of charter-party by reason of the wrongful arrest of the *Tromp* by the plaintiffs at Hull on the 11th June 1920, but the counter-claim was abandoned at the trial.

The plaintiffs by their reply denied that Appelgren or the Baltic and North Sea Traffic ever acted as their agents and that the potatoes were their property when shipped.

Stephens, K.C. and *Clement Davies* for the plaintiffs.—The defendants, by presentation of a clean bill of lading, represented to the plaintiffs that the potatoes were shipped in good order and condition. This representation is not modified by the subsequent words "weight quality condition unknown," which refer to the internal condition of the goods. They are, therefore, estopped from denying the good condition of the potatoes on shipment. The following cases were cited:

Compania Naviera Vasconzaga v. *Churchill and Sim*, 94 L. T. Rep. 59; (1906) 1 K. B. 237; 10 Asp. Mar. Law Cas. 177;

Martineaus v. *Royal Mail Steam Packet Company*, 106 L. T. Rep. 638; 17 Com. Cas. 176; 12 Asp. Mar. Law Cas. 190;

Crossfield v. *Kyle Shipping Company*, 115 L. T. Rep. 285; (1916) 2 K. B. 885; 13 Asp. Mar. Law Cas. 190.

R. A. Wright, K.C. and *Bisschop* for the defendants.—The defendants are protected by the words "weight quality condition unknown." The appearance of the words "condition" in both expressions relieves the defendants from any warranty of condition. In the *Compania, &c.* v. *Churchill* (*sup.*) "condition" was opposed to "quality." The words "weight unknown" relieves them of responsibility for short delivery. The facts show that the plaintiffs shipped the potatoes through their agent Appelgren. There can thus be no estoppel. Appelgren was acquainted with the condition of the potatoes. Reliance was placed upon:

The Ida, 32 L. T. Rep. 541; 2 Asp. Mar. Law Cas. 551;

Craig v. *Delargy*, 6 R. 1269;

New Chinese Antimony Company v. *Ocean Steamship Company*, 117 L. T. Rep. 297; (1917) 2 K. B. 664; 14 Asp. Mar. Law Cas. 131.

Stephens, K.C. in reply. *Cur. adv. vult.*

Sir HENRY DUKE, P.—The plaintiffs are merchants at Hull and have brought this action against the defendants, the owners of the Dutch sailing vessel *Tromp*, to enforce a claim in respect of loss and damage alleged to have occurred in course of transit by sea from Gothenburg to Hull on board the *Tromp* of a cargo of potatoes. The plaintiffs sue as owners of the cargo and as indorsees of a bill of lading. The *Tromp* was arrested in the suit and in due course released on bail.

The resort of the plaintiffs to the jurisdiction of the court *in rem* is material to various questions which arose at the hearing. The plaintiffs found their action upon the acknowledgment in the bill of lading of shipment on board the *Tromp* of 2923 bags of potatoes in good order and condition, and the proved fact that a large part of the potatoes was delivered at Hull, as the statement of claim alleges, "wet, soft, pulpy, rotten and greatly damaged," and a part was not delivered. The defendants put in issue the alleged terms of the bill of lading. They allege also that the plaintiffs were the charterers of the *Tromp* when the bill of lading was issued, and had by their agents required its issue by the master with knowledge that 2923 bags were not shipped, and that the potatoes shipped were not in good condition, and under an indemnity against liability on the part of the defendants. They further allege that the plaintiffs were the owners before shipment and the shippers of the potatoes, and undertook the stowage of the same, and by their agent so stowed the potatoes that damage ensued upon the voyage. By way of counterclaim the defendants claim substantial damages for the arrest and detention of the vessel and consequent loss of charter. The counter-claim was not seriously maintained. Although the cause of action of the plaintiffs *in rem* depended upon estoppel as to the state of the potatoes when shipped, and the quality shipped, evidence was given by both parties as to the actual state of the cargo at shipment.

A large proportion of the bags and some part of their contents had become wet in course of inland transit in Sweden, and this wetness was the cause of the damaged condition in which cargo arrived. The state of the cargo was known at the time of shipment to the shippers, to the persons engaged in the delivery and stowage, to the master of the *Tromp*, and to the defendants' agents in Gothenburg, and all of these persons knew that the potatoes, by reason of the state of the bags, would inevitably arrive at Hull in a damaged

condition. They also all knew there was a shortage in quantity.

Assuming the relations of the parties to be governed by English law, and the plaintiffs to have been unaware of what was done in Gothenburg, various courses of action were no doubt open to them. The plaintiffs, however, in order to avail themselves of the power of arrest of the ship under the jurisdiction of the Court in Admiralty elected to proceed against the defendants *in rem* for alleged default of the defendants as shipowners in course of the carriage of goods by sea. Their success in the action must depend, therefore, upon their right to rely upon an estoppel and to hold the defendants accountable upon a suppositious state of facts. It would obviously be improper as against defendants, brought into the jurisdiction by the arrest of their property, to have regard to possible claims of the plaintiffs other than those in respect of which the action was brought.

The plaintiffs were and are importers and exporters of and dealers in fruit and vegetables. Oscar Theodor Appelgren was a commercial agent at Gothenburg who, before the events here in question, had sold fruit on commission in Sweden and done no other business on account of the plaintiffs.

The Baltic and North Sea Traffic was the name of a Swedish firm carrying on business at Gothenburg, *inter alia*, as forwarding and shipping agents. I shall call them the Baltic Agency. The potatoes in question were, before shipment, the property of a grower at Saternas, in South Sweden, and were offered for sale and sold on his behalf by one Per Carlander in Stockholm. Carlander supposed that he was selling to the plaintiffs.

In a letter to the Baltic Agency he described the whole parcel as "300,000 kilos potatoes which have been sold to Messrs. Jefferson and Gosling, Hull, by Saternas Eiendam, through Mr. Appelgren, for which parcel according to arrangement you are to pay and forward same to purchasers." Appelgren's authority in the transaction, and the capacity in which he, in fact, conducted it, were much in dispute in the case. The bargain he made with the grower's agent was for delivery f.o.b. at Saternas at a price of 6.50 kroner per 100 kilos payable in cash against bill of lading at Gothenburg after bill of lading had been signed by outward steamer.

Plaintiffs' purchase was at 100 kroner per 100 kilos f.o.b. at Gothenburg.

The matters of fact in dispute included these: When did the plaintiffs become owners of the potatoes? In what capacity and on whose behalf did Appelgren deal with the potatoes? What actual or implied authority had he as agent for the plaintiffs in and about the shipment and dispatch of the goods? Did he charter the defendants' vessel on behalf of the plaintiffs? Did he procure the bill of lading for the goods as plaintiffs' agent? Were the Baltic Agency plaintiffs' agents? And did they, as such agents, procure the bill of lading and agree to indemnify the defendants against claims arising from the condition of the cargo at shipment?

On the 10th April 1920 Appelgren, as the agent of an undisclosed principal, offered to the plaintiffs 300 tons of potatoes f.o.b. Gothenburg, in bags of 50 kilos, at a price inclusive of commission for payment at Gothenburg against inspection certificate and bill of lading.

After inspection of the potatoes by an agent of theirs, who was in Sweden, plaintiffs on the 20th April accepted Appelgren's offer of potatoes at 6.50 kroners per 50 kilos f.o.b., sacks and commission included. The commission to which the contract referred was, as the plaintiffs supposed, a commission payable to Appelgren. Appelgren directed them on the 22nd April that a credit for the price of the potatoes was to be opened in favour of the Baltic Agency at a bank in Gothenburg, and the plaintiffs accordingly, through their bankers, opened a credit with the Scandinaviska Kreditaktiebolegt "for an amount up to 39,000 kroner, to be paid against handing in a full set of bills of lading made out to order and invoice of 300 tons of potatoes, in sacks of 50 kilos each, at the price of 130 kroner per 1000 kilos, or *pro rata*." It was an implied term of the credit that payment should be made against clean bills of lading, and the plaintiffs supposed that the Baltic Agency were to receive payment as or on behalf of the vendor of the goods. While the plaintiffs' bargain for the potatoes was under negotiation, they telegraphed to Appelgren inquiring whether he could secure a small steamer to convey the potatoes to Hull. He secured space for 70 tons on board a Wilson liner, the *Novo*, at a rate of freight of 50 kroner per 1000 kilos payable on ship's arrival at Hull, and shipped 67 tons on that vessel. They pressed for dispatch of the remainder, and he telegraphed various statements as to possible mode of shipment. Then on the 15th May he chartered from the agents of the defendants the sailing vessel *Tromp*, and on the 17th May telegraphed to the plaintiffs: "Only shipping *Novo* 67 tons: remainder will be shipped Wednesday-Thursday by sailer *Tromp*." He further telegraphed: "Instruct bank to prepay freight for about 138 tons sailer *Tromp*, 60 crowns per ton." The defendants telegraphed expressing dissatisfaction, but upon being informed that the *Tromp* had been secured, and that the potatoes were alongside, they acquiesced in the situation.

At Appelgren's instance they opened a credit at Gothenburg for payment of freight at the specified rate against manifest and receipts. The credit was opened, as Appelgren suggested, in favour of the Baltic Agency.

Upon completing his arrangement for purchase of the potatoes, Appelgren agreed with the Baltic Agency for transport of the same by lighters from Saternas to Gothenburg, and delivery there on board ship. From evidence given by him and by Eric Douglas Franck, an official of the Baltic Agency, it was clear that they and he alike had full knowledge of his position in the business and of his actual relationship to the plaintiffs.

The potatoes were forwarded to Gothenburg in three parcels. The first parcel was shipped on board the *Novo* in sound condition and discharged sound at Hull. No question arises with regard to them. The cargo of the *Tromp* consisted of the other two parcels. Before and during the loading of the *Tromp* the plaintiffs sent to Appelgren telegraphic requests to do a variety of things on their behalf in relation to the shipment. They authorised him to secure tonnage for the potatoes and ratified his action in chartering the *Tromp*, directed him to insure, to inspect the potatoes as to condition, to see to the stowage and secure efficient ventilation, to direct the master as to the voyage, to promise him a gratuity for good dispatch

and to arrange for towage out of Gothenburg and into Hull. They directed him also to instruct the Baltic Agency to consign the *Tromp* to a firm at Hull, whom they named.

These various directions the plaintiffs apparently gave to Appelgren without any arrangement between them for his acting generally as their agent and in the expectation that he would be ready to carry out their instructions in order to earn his commission. Appelgren chartered the *Tromp* on the 18th May 1920 to proceed from Helsingborg to Gothenburg, and there load under deck a minimum cargo of 130 tons of potatoes in bags, with liberty to ship a full cargo; freight to be payable in advance on signing bills of lading; stevedores employed by captain to be approved by shippers; the master to sign bills of lading, at any rate, of freight, without prejudice to the charter-party, subject to adjustment in final payment of the freight. Berlind Bersen and Co., of Gothenburg, made the charter on behalf of the owners.

The loading of the *Tromp* extended over five days, the 21st May to 26th May. On the first day, after loading had gone on some time, the master called the attention of Appelgren and Franck to the wet condition of the bags and refused to be responsible for receiving the potatoes on board. Thereupon Appelgren stated that he was the buyer's agent and would take the responsibility. From that time the loading continued under his supervision, exercised personally, or by Franck. He also, through the Baltic Agency, employed workmen to expedite the work. The ship's log correctly records the master's view of the transaction in these words: "Cargo consisted of potatoes stored in bags which, however, were so wet that the captain protested against having them on board, whereupon the shippers continued the loading at their own responsibility."

The quantity of potatoes delivered at the ship's rail was 2923 bags. From time to time bags which were thought altogether too wet for stowing were put aside to dry. Ultimately 2849 bags were placed in the hold, and seventy-four were returned into lighters.

The facts as to the signature of the bills of lading were much discussed in the case. When the lighters arrived alongside the *Tromp* on the 29th May, 1920, the manager of the Baltic Agency and Appelgren sought to induce her master to sign bills of lading for the potatoes, although none was on board his vessel. For this purpose Appelgren signed a form of indemnity in the words following: "I hereby agree not to hold you responsible for any damage or loss incurred through your handing over to me clean signed bills of lading for the sailing vessel *Tromp* for 2923 sacks of potatoes from Gothenburg to Hull, although the said cargo has not yet been shipped." The master of the *Tromp* refused to sign bills of lading for cargo which was not on board. When the loading of the *Tromp* was complete the difficulty as to bills of lading became acute.

On the 26th May the master met the Baltic Agency's manager at their office. The Baltic Agency knew that payment of price and freight would only be made at the bank against bills of lading which did not disclose the condition of the cargo. The master knew also that payment of freight would only be made against such bills. His account of what took place at the interview was that when the Baltic Agency produced a clean bill of lading, he started to write his remarks upon it. They told him a clean bill of lading was necessary. Some conversation then took place as to his writing his remarks in the mate's receipt. Then, as he said, they "spoke of an indemnity." The master consulted Berlind Berson and Co., the local agents of his owners. They knew the Baltic Agency, and, as the master stated, "said it was all well," and filled in a form of indemnity to the following effect for signature by the representative of the Baltic Agency: "We hereby undertake to hold Captain Berner and (or) any other concerned free from all responsibility and (or) liability for compensation which may eventually arise owing to his having signed our bills of lading for 2923 bags of potatoes, 140,304 kilos per sailer *Tromp*, the 26th May 1920, although the mate's receipt states seventy-four bags less in dispute, cargo partly wet and stowed into the ship by the shippers. It is a special agreement that we immediately shall compensate Captain Berner for any deduction in the freight, and (or) compensation for liability which may be made in consequence of the above-mentioned remarks."

This undertaking was duly signed by the representative of the Baltic Agency, and thereupon the making out of the bills of lading proceeded.

The bill of lading in its printed form acknowledged shipment of "in good order and condition by the Baltic and North Sea Traffic of Gothenburg . . . 2923 bags of potatoes, 140,304 kilos . . . to be delivered in the like good order and condition at Hull . . . unto order or assigns, he and they paying freight for the same as per charter-party dated the 15th May 1920, all the terms and exceptions contained in which charter are herewith incorporated."

At the foot of the bill of lading and forming part of its printed contents were the words "quality, condition, and measure unknown." Before authorising the master to sign, the ship's agents added to these qualifying words the word "weight," thereby making the qualifying clause to read, "weight, quality, condition, and measure unknown." As soon as the master of the *Tromp* had signed the bills of lading, he and the representative of the Baltic Agency went together to the bank, where the purchase money of 2923 bags of potatoes, kr. 18239.32, and the amount of freight of the same kr. 3418.24, was paid them on behalf of the plaintiffs in exchange for the bills of lading and the receipted invoices for goods and freights.

The master of the *Tromp* admitted upon cross-examination that he knew the bill of lading was untrue as to the quantity and condition of the cargo, and that "it was not all right."

Appelgren was not present on the 26th May, but he knew and approved what was done by the Baltic Agency. They did what he and they had intended. On the following day he learned the exact details of their action.

He discussed with them the fact that the bill of lading acknowledged receipt of 74 bags which had not been shipped, and in respect of potatoes not shipped and wet bags shipped, and he arranged that they should deduct from the vendor's price the value of 350 bags. On the arrival of the *Tromp* at Hull, in answer to indignant messages from the plaintiffs as to the rotten condition of her cargo, he sent a variety of disingenuous statements, none of which revealed the actual state of affairs. The

Baltic Agency was in extreme pecuniary difficulties, but he got from them the amount of his expected profit on the business—5000 or 6000 kroner. They retained for their own use the amount of their account against Appelgren, and the balance of the sum received from the bank remained in their hands as a debt due to the grower of the potatoes, when shortly afterwards they became bankrupt.

The financial position of the Baltic Agency and of Appelgren, and the situation in point of domicile of the various parties concerned are sufficient to explain the election of the plaintiffs to proceed here under the jurisdiction *in rem* instead of pursuing elsewhere remedies against individuals.

The first matter for decision upon the facts is that of the extent of the estoppel which the bill of lading in question would create in favour of a holder for value, not affected with notice of the circumstances under which it was issued. Counsel for the plaintiffs relied to some extent upon the combined effect of the positive statement "shipped in good order and condition," and the negative statement, "weight, quality, and condition unknown," and suggested a liability on the part of the defendants by reason of the knowledge their agents, in fact, had of the weight of the cargo shipped, and the state of the potatoes at shipment.

To estop the defendants from denying that they knew the facts will not avail, however, to entitle the plaintiffs to judgment in an action where the quantity of the goods shipped and their order and condition at shipment are the first things to be proved. The defendants are not sued for a false pretence of their agents that they did not know anything to the contrary of the statements in the bill of lading. What the plaintiffs need is to estop the defendants from denying that the quantity of potatoes shipped was 2923 bags, and that the 2923 bags were shipped in good order. The bill of lading is to be examined to ascertain whether it makes in plain terms these statements of fact. In my opinion it does. The words "weight and measure unknown" do not qualify the acknowledgment that there were shipped 2923 bags. The words "quality, condition unknown" do not cover the whole area of the representation made by the words. "shipped in good order and condition." The representation made by the bill of lading, including the qualifying words, is that 2923 bags of potatoes were shipped in good order and that the weight, quality, condition and measure of the goods were unknown.

In *Compania Naveira Vascongada* v. *Churchill and Sim* (*sup.*) Channell, J. distinguished the meanings of "condition" and "quality" as those terms are applied to goods, and defined "condition" as referring usually to external appearance. The goods there under consideration consisted of sawn timber. "In good order" and "in good condition" may perhaps have the same meaning when they relate to deals or planks, because the external state of the goods is there apparent. All that appears to the eye upon a shipment of potatoes in bags is the state of the packages. The good order of the shipment and the condition and quality of the goods are, or at any rate may be, separate matters. The defendants, while they guarded themselves by the qualifying words in the bill of lading from making any representation as to the condition and quality of the potatoes shipped on the *Tromp* made a representation as to the state of the bags. Bags of potatoes in good order are not externally wet. The defendants are estopped from denying that the bags here in question were dry when shipped. The wetness of the bags, which was the main, if not the only, cause of the rotting of the potatoes in the ship's hold, must therefore be attributed to the treatment of the cargo by the defendants' servants after the shipment. As between the defendants and an indorsee of the bill of lading without notice this would give the cause of action relied on by the plaintiffs.

The answer made by the defendants to the plaintiffs' claim—assuming an average decision as to the meaning of the bill of lading—is that the plaintiffs are not in truth indorsees, or indorsees without notice; that they were themselves the charterers of the vessel and the shippers of the cargo; and that they, by their agents, not only knew the state of the potatoes, but knowingly stowed them in wet bags, and agreed to be responsible for any damage which might be thereby caused.

The plaintiffs no doubt ratified the action of Appelgren in chartering the *Tromp*. They used Appelgren as their agent for a variety of purposes in their efforts to secure careful shipment and careful handling of the goods. I do not find, however, that he bought or shipped the potatoes as their agent. They supposed him to be the seller's agent, paid by a commission for his services in selling goods which they bought f.o.b. at Gothenburg. Shipment was not undertaken by Appelgren on their behalf.

With regard to storage, the terms of the charter-party and the statements of Appelgren were relied upon by the defendants. Clause 4 of the charter-party is in these words: "Vessel to load under inspection as to stowage by the authorised inspector appointed by shippers free of charge to vessel for such inspection. Stevedore employed by captain to be approved by shippers." The plaintiffs did not in fact appoint or request Appelgren to exercise any authority for them under the charter-party. They did not represent him, or, as the phrase is, hold him out as a person who might act for them in this respect. I accept the evidence which shows him to have said to the master and crew of the *Tromp* that he was the plaintiffs' agent, but I am satisfied that the defendants' master and their agents at Gothenburg did not believe that Appelgren was authorised on behalf of the plaintiffs to ship or sanction the shipment on board the *Tromp* of potatoes in wet bags. The plaintiffs, in my judgment, are not deprived of any rights they may otherwise have under the bill of lading by any acts done by Appelgren as an agent or pretended agent of theirs.

There remains the question whether the plaintiffs were themselves the shippers of the cargo. The plaintiffs agreed to buy a cargo f.o.b., and to pay against bills of lading and receipted invoices. The defendants by their agents knew the truth of the matter, and that the plaintiffs were not the shippers. This was one of the reasons of their decision to give the bills of lading, which were given only upon receiving a guarantee from the Baltic Agency to protect them from liability for consequences of this improper act. With very full knowledge in relation to the nature of Appelgren's dealings with the plaintiffs' interests, the defendants by their agents corroborated by their bill of lading Appelgren's representation to the plaintiffs that the Baltic Agency was the shipper of the cargo. The plaintiffs did not know, and the defendants

ought not, as against them, to be heard to say that the fact was otherwise.

On the whole, I come to the conclusion that within the narrow ground of claim to which the plaintiffs are necessarily limited in this action, they are entitled to judgment, and there must be a reference to the registrar and merchants to assess damages. The plaintiffs will have the costs of their claim, and also of the defendants' counter-claim, which was not persisted in.

Solicitors: *Pritchard* and *Sons*, agents for *Andrew M. Jackson* and *Co.*, Hull; *A. W. J. Gross.*

PRIZE COURT.

Tuesday, July 13, 1920.

(Before Sir HENRY DUKE, P.)

THE DIRIGO. (*a*)

Security for costs of appeal—Charging order upon —Priorities—Payment out—Solicitors Act 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

Claimants having paid 500*l. into court as security for costs of their appeal to the Privy Council, and having then abandoned the appeal, applied for payment out thereof.*

The Procurator-General then applied for a charging order upon the said 500*l. on the ground that the security ordered in the proceedings before the Prize Court was inadequate and that the costs of those proceedings and of the abandoned appeal would fully absorb both securities. The claimants' solicitors contended that they had in any event a prior claim for their own costs under sect.* 28 *of the Solicitors Act* 1860.

Held, (1) *that the charging order should be granted as prayed*; (2) *that the solicitors had no prior claim upon the fund, as it had not been "recovered or preserved" by them.*

CROSS SUMMONSES adjourned into court.

The facts and contentions fully appear from his Lordship's judgment.

C. R. Dunlop, K.C. for the claimants.

Clement Davies for the Procurator-General.

Sir HENRY DUKE, P.—In this case there were cross summonses with regard to a sum of 500*l.* which had been paid into court by the claimants under an order of this court as security for the costs of the claimant's proposed appeal to the Privy Council against the judgment of this court.

The appeal has been abandoned, and thereupon the claimants solicitors issued a summons asking for payment out of court of the sum in court subject to the provisions of the costs of the Procurator-General in the abandoned appeal. Following upon that summons, the Procurator-General issued a summons asking for a charging order upon the sum of 500*l.*, subject to his own costs of the appeal, proceeding under the equitable jurisdiction of the court —jurisdiction about which there is, of course, now no question. That is illustrated in *Brereton* v. *Edwards* (60 L. T. Rep. 5; (1888) 21 Q. B. Div. 488) to which Mr. Clement Davies called my attention. The principle there laid down is that if the debtor is entitled to property which cannot be reached by fi. fa., or other process of execution at law, the judgment creditor is entitled *ex debito justitiæ* to an order charging such property with the amount of his judgment debt, and that charge is effective to secure the ultimate payment to him out of the property so charged. It has been said that the power to make that order is a discretionary power, but although the conclusion not to exercise it may arise in cases where the order will not be fruitful, and although the order will not be made contrary to general principles of justice, I take the law to be that a judgment creditor, who is aware of property of his debtor which is immune from legal process of excution, and which can be made the subject of a charging order, is entitled to have such a charging order. I take that to be the general position, subject to such qualifications as those I have referred to.

When the Procurator-General's application for a charging order had been supported before me, Mr. Dunlop, who appeared for the claimants, asked that his clients—the solicitors who were instructing him for the claimants—should be heard to maintain a claim to make the whole of the 500*l.* in the first instance available to secure their costs of the appeal to the Privy Council. The position with regard to the respective claims is this: that, assuming priority is due to the Procurator-General, his taxed costs of the proceedings in this court which remain unpaid will absorb the whole sum remaining after taxation of his Privy Council costs, and there will still be a balance in which the claimant will be indebted to him upon his costs in this court. So that the question is one of priority. The costs of the solicitors in connection with the proceedings in the Privy Council are not very great—they amount to some 50*l.* or 60*l.*—and the fund is obviously available in satisfaction of those costs in priority to the claim of the Procurator-General if the solicitors are properly entitled to have an order made in their favour.

It was because of the form in which the matter was raised at a late stage of the discussion of the question here that I thought it necessary to take time to consider what I ought to do. Owing to the manner in which the question arose there was not an opportunity of referring me to authorities, and I had not the authorities sufficiently clearly in my mind to have a definite view as to what I ought to do. Mr. Dunlop put it first on the ground of lien, and then he put it on the ground of the equitable jurisdiction of the court. Moreover, there is the general principle with regard to costs of solicitors which is often put into operation in decisions of the court. These are to this effect; that where a solicitor has been instrumental in bringing a fund into existence, or in preserving a fund, for a very long period of time it has been the practice of our courts—and not only the practice in equity, but I think it will be found in some decisions in the old common law courts—that the court will protect the interests of its officer who has been so instrumental. What Mr. Dunlop said to me was that although it might be true, as was urged against him, that there could be no lien here by reason that the fund was not in the possession of the solicitor, nevertheless there was an equitable claim upon the fund created or preserved by the exertions of the solicitor. The head of claim has been dealt with for a long time now under sect. 28 of the Solicitors Act of 1860, and the section has fortunately been expounded in numerous decisions. It provides that "In respect of

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

property recovered or preserved in a suit, matter, or proceedings, the court may declare the attorney or solicitor entitled to a charge upon and to a right of payment out of the property recovered or preserved through the instrumentality of any such attorney or solicitor for the taxed costs, charges, and expenses of or in reference to such suit, matter or proceeding." It is not necessary to refer to numerous decisions; but there are two cases in the Court of Appeal in one of which the solicitor's claim to charge was enforced, and in the other of which it failed—namely, *Bulley* v. *Bulley* (38 L. T. Rep. 401; 8 Ch. Div. 479), and *Greer* v. *Young* (49 L. T. Rep. 224; 24 Ch. Div. 545). In both of those cases the principle which is applicable was considered, and it was laid down broadly and generally that the right which is either recognised or created under the statute is in the nature of a salvage right, and that what entitles the solicitor to a charge is that the property or fund shall have been recovered or preserved by the instrumentality of the solicitor and have been so recovered or preserved "in the proceedings." It appears from the judgments of the Lords Justices in both these cases, and from other authorities, that, the right being in the nature of a salvage right, the solicitor may recover against the fund beyond the interest of his own client. Bowen, L.J. says in the second of the two cases—*Greer* v. *Young*—in interpreting the section: "The section is a very general one. It applies to every case in which a solicitor is employed. It authorises a charge not on the mere interest of the plaintiff, but on all property recovered in the action whatever, for the plaintiff only, or for him in connection with others. It appears clear to me that it is a salvage section. The solicitor is treated as a salvor who has recovered or preserved something in a time of danger by his work and labour." That brings the case to this position, that if I am satisfied on the facts that this fund is brought into being or is preserved by the activity of the solicitor he is entitled to have a charge upon it although there is a claim of his client's opponent which would have absorbed it.

I have to consider here whether this is in truth a fund such as is referred to—"a fund recovered or preserved" by the activity of the solicitor in the proceedings. I have come to the conclusion that it it is not. The fund was ordered to be brought into court as a condition precedent to the prosecution of an appeal at the instance of the Procurator-General. The Procurator-General was the first actor in the matter. The fund was brought into court because the court ordered it to be brought into court. It was not recovered by any activity of the solicitor. His duty was, under the circumstances which then existed, if he could, to defeat the application of the Procurator-General, and to induce the judge who made the order either to make no order, or to make a less order. Now, that is the state of things as to the origin of the fund. What has taken place since has been that the fund has been paid into court—no doubt paid into court by the solicitor, but not paid into court as the result of his exertions on behalf of the parties generally, or of his exertions on behalf of his own client, but paid into court in pursuance of a duty to pay it into court, in course of his professional duty as money entrusted to him by his client for that purpose.

If the fund had been in truth a fund which was recovered or preserved by the activity of the solicitor, and supervening upon that the Procurator-General brought this claim, I should have been glad to have recognised and enforced the claim on the part of the solicitor. But I come to the conclusion, regarding the facts from what I hope is a common-sense point of view, that the solicitor neither recovered nor preserved this fund, and that the equitable jurisdiction of the court does not apply in his favour.

I therefore dismiss the application of the solicitor for charge upon this fund for his costs, and I allow the claim of the Procurator-General for a charging order upon the fund for the balance of the costs of the Procurator-General in the suit in this court. The Procurator-General must have the costs of his application, but I make no order as to any other costs.

Solicitors: *Thomas Cooper* and *Co.*; *Treasury* Solicitor.

July 14 *and* 22, 1920.

(Before Sir HENRY DUKE, P.)

THE UNITED STATES (No. 2). (*a*)

Reprisals Order in Council of the 11*th March* 1915—*Terms of release of goods—Incidence of* (a) *insurance and* (b) *detention expenses.*

Goods seized on a neutral ship bound from Copenhagen to New York were decreed to be of enemy origin and to be enemy property, and ordered to be detained till peace or further order. The Attorney-General, on a claim by American claimants, now waived the rights of the Crown in respect of such decree, but claimed that orders for release should be subject to payment of insurance and detention expenses incurred by the marshal.

Held, that the seizure and detention being rightfully made in the course of a voyage begun after the publication of the Reprisals Order, and consequent upon shipment presumably made with knowledge thereof, the proper order was for restitution to claimants subject to payment of expenses of discharge, detention, or sale properly incurred, including costs of insurance.

CLAIMS by American citizens for release.

The facts and contentions are fully set out in his Lordship's judgment.

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

The United States, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 19; (1917) P. 30;
The Noordam (*No.* 2), 14 Asp. Mar. Law Cas. 481; 123 L. T. Rep. 477; (1920) A. C. 904;
The Cairnsmore, (1920) P. 290;
The Oscar II., 14 Asp. Mar. Law Cas. 447; (1920) P. 363;
The Stigstad, 14 Asp. Mar. Law Cas. 383; 120 L. T. Rep. 106; (1919) A. C. 279;
The Resolution, 1802, 4 C. Rob. 166 (n,);
The Narcissus, 1801, 4 C. Rob. 17;
The Catherine and Anna, 1801, 4 C. Rob. 39;
The Industrie, 1804, 5 C. Rob. 88;
The Peggy, 1804, 5 C. Rob. 90 (n.);
The Asia Grande, 1808, Edw. 45.

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), and *James Wylie* for the Procurator-General.

Raeburn, K.C. and *Wilfred Price* for the claimants.

Sir HENRY DUKE, P.—These are three claims by traders domiciled in the United States of America for the release of goods or their proceeds in the custody of the marshal after seizure at sea on board a Danish vessel by His Majesty's naval forces, under the Reprisals Order in Council of the 11th March 1915. A large number of similar claims are outstanding, and these cases have been selected for early disposal in order that the principles generally applicable to such claims may be determined.

Each of the seizures now in question was followed in due course by the issue of a writ in Prize framed under the Reprisals Order claiming—"an order for detention and/or sale of the goods seized being goods of enemy origin or being enemy property on board the steamship *United States* which sailed from a port other than a German port after the 1st March 1915, and for payment into court of the proceeds of sale of the said goods to be dealt with as the court may in the circumstances deem to be just (if such goods shall not before such order be requisitioned for the use of His Majesty)." In each case at various dates in 1917 the order sought by the writ was made and it was declared in each case that the goods were of enemy origin and were enemy property. The order was for detention until the conclusion of peace, with liberty to the Crown to apply for an order for sale and detention of the proceeds. The form of order was that settled by the President (Sir Samuel Evans) in the *United States* (American Bead Company and other claimants, *ubi sup.*). The claimants in all the various cases (these and others) submitted to an order in this form either without appearing or without objection at the hearing.

On the 3rd June last the court was moved on behalf of the present claimants and numerous others that the decrees or orders made in their several cases should be "varied so far as the goods are declared to be enemy property," and for liberty to enter appearance where no appearance had been entered, and to file evidence in support of their claims to ownership of such goods and to have their claims heard and determined by the court. After argument I allowed appearances to be entered and gave directions for delivery of pleadings and exchange of documents, in three selected cases, and for an early hearing, and reserved to the Crown whatever rights were created by the declarations of enemy ownership already made.

At the hearing of the cases now in question, evidence was produced that under the law applicable to mercantile transactions in time of peace—though not under the rules of international law which apply to the passing of property in goods forwarded by sea in time of war—the goods in question were at the time of seizure the property of the respective claimants. The Attorney-General, thereupon, waived the rights of the Crown in respect of the declarations of enemy ownership heretofore made by the court, and consented to orders for release, if the court were satisfied that the claimants were, according to municipal or mercantile law, owners at the time of seizure, but he claimed that any orders for release should be conditional upon payment by the claimants respectively of the necessary expenses of detention. He urged further that the expenses to be paid by the claimants ought to include premiums paid for the insurance of the goods.

The argument for the claimants as to the costs of bringing in, unloading, warehousing, and delivery was that these seizures were self-regarding acts of a belligerent power, not provoked by any previous action of the claimants, or warranted by any infraction of the ordinary rights of belligerents. The expense of such proceedings, it was said, ought not to fall upon neutrals, but ought rather to be borne by the belligerents.

As to insurance premiums, counsel for the claimants relied upon the usual practice in Prize under which in ordinary circumstances expenses which have been incurred for insurance of goods afterwards ordered to be released are not charged upon the goods.

Questions of some difficulty would have arisen if the Procurator-General had insisted upon the declarations of enemy ownership heretofore made in their full possible effect. It would have been necessary to consider, for example, the clauses of the Treaty of Versailles in relation to enemy property situate in the United Kingdom when peace was concluded. Under the circumstances, these matters need not be further examined. It is sufficient to say that the goods were rightly detained and are now to be released.

The question of expenses is to be determined upon consideration of the terms of the Order in Council and with due regard to the settled practice of the court. The claimants in their several statements of claim assert that the detention of their respective parcels of goods was wrongful. It is impossible that I should so hold. The validity of the Order in Council in point of international law has been definitely established in the highest tribunals, and its requirements must be observed in dealing with the present controversy.

The material provisions of the Order are that goods detained thereunder shall be restored at the appointed time upon such terms as this court may deem to be just, and that the practice of the court in its jurisdiction in Prize shall so far as applicable be allowed.

The power of the court as to the incidence of expenses incurred about the seizure, sale, detention, and restitution of goods which come into the custody of the Marshal after capture is complete, and under the Order in Council the power of the court is to be exercised as justice may in each case require. I think this has always been so in the ordinary jurisdiction in Prize. Any general principles which have been stated appear always to have been so applied in the exercise of the discretion of the court as to meet the justice of the particular cases as they arose. *The Resolution* (*ubi sup.*) supplies an instance in which captors' and claimants' expenses alike were borne by the Crown upon a requisition of goods seized as prize and afterwards ordered to be released. Reference to *The Narcissus* (*ubi sup.*), *The Catherine and Anna* (*ubi sup.*), *The Industrie* (*ubi sup.*), *The Peggy* (*ubi sup.*), and *The Asia Grande* (*ubi sup.*) furnish other illustrations of the complete authority of the court to determine the ultimate incidence of expenses incurred in relation to Prize.

Although the goods here in question were not claimed for condemnation, they are in some particulars similarly circumstanced to goods so claimed. They were rightfully seized unladen and detained, and if sold were rightfully sold. Their seizure and

detention, where it took place in course of any voyage which began after the publication of the Reprisals Order, was seizure and detention consequent upon shipment presumably made with knowledge of the order and of the measures directed by the Crown to be taken thereunder. Discharge in a British port of goods, within the prohibitions in the order, custody of the marshal, and sale by order of the court if necessity arose, were things which notoriously involve expense — expenses of unlading and warehousing in all cases and expenses of sale in some. On behalf of the Crown it was contended also that in the circumstances of the war, insurance was an expense which no prudent custodian of the merchandise of others would feel at liberty to omit. The question between the Crown and the claimants is whether these expenses ought to be borne by the goods and proceeds now to be released. Whether the matter is considered generally under the Order in Council, or in the light of the practice of the court in prize, the terms upon which it is just that the goods should be released are, in my view, terms of payment by the claimants of the expenses properly and necessarily incurred in the handling of their respective parcels.

As to insurance, it is the fact that under ordinary circumstances goods in the custody of the marshal under a claim of condemnation do not on release bear the expense of insurance, where these have not been incurred by order of the court or at the request of the claimant. This practice results from the relative positions of the captors and the claimant with regard to the property in the goods, and from the obligations properly belonging to the marshal. Goods held by the marshal for an owner who by his own act has subjected his property to detention seem to me, however, to be subject to other considerations. No captor has an interest in them. The marshal is charged with their safe keeping for the sole purpose of eventual restitution. He has incurred expenses of insurance, upon a system recognised in the registry and with the result, as I was reminded by the Attorney-General, that from time to time various claimants have received policy moneys for goods which, without any negligence, had been destroyed, and as to which they would otherwise have suffered a total loss. Insurance was a wise and almost indispensable precaution in these cases in the interest of the owners of the goods. It was in that interest only that insurance was effected. The facts differ widely from those under which the court has refused to charge upon goods seized as prize and afterwards ordered to be released, the cost of insurances effected by or on behalf of captors. In my opinion, it is just that the costs of the insurance here in question should be borne by the owners of the goods, and I direct that it shall be so borne.

Outside of the main question of expenses I was asked on behalf of the Procurator-General for some expression of opinion as to the conditions under which detained goods should ordinarily be released, and, in particular, as to proofs of ownership to be required and precautions proper to be taken to avoid claims by persons not now upon the scene. As to these matters, I do not think it is necessary to say more than that the Procurator-General is under no obligation to consent upon his own responsibility to the release of goods where the title of a claimant is not established to his reasonable satisfaction.

The order proper to be made in each of the three cases before the court is an order for restitution to the several claimants, upon payment in each case of the expenses properly incurred, including costs of insurance, the amount of such expenses in case of dispute to be determined in the registry.

Solicitors: *Thomas Cooper* and *Co.*; *Treasury Solicitor.*

Tuesday, July 27, 1920.

(Before Sir HENRY DUKE, P.)

IN THE MATTER OF THE BATTLE OF JUTLAND. (*a*)

Bounty—Battle of Jutland—Joint and common enterprise—Naval Prize Act 1864 (27 *& 28 Vict. c.* 25), *s.* 42—*Order in Council of the 2nd March* 1915.

By Order in Council No. 226 *of the 2nd March* 1915 *His Majesty made a declaration pursuant to sect.* 42 *of the Naval Prize Act* 1864 (27 *& 28 Vict. c.* 25) *of his "intention to grant prize bounty and that "such of the officers and crews" (of His Majesty's ships of war) "as are actually present at the taking or destroying of any armed ship" (of any of His Majesty's enemies) "shall be entitled to have distributed among them [as prize bounty a sum calculated at the rate of* 5*l. for each person on board the enemy's ship at the beginning of the engagement."*

In the Battle of Jutland on the 31*st May and the* 1*st June* 1916, *the British Grand Fleet, consisting of* 151 *ships, destroyed eleven enemy ships, having on board* 4537 *persons, but it was impossible to contend that any one British ship or squadron was responsible for the destruction of any one of the destroyed German ships.*

Decreed, counsel for the 151 *British ships agreeing, that the battle should be treated as a joint and common enterprise, and, the Procurator-General consenting, that the Battle of Jutland was the common engagement and enterprise of the* 151 *British ships, and that the prize bounty due under the regulations was* 22,685*l.*

MOTION for a declaration.

The facts of the application are set out in the headnote, and in an affidavit sworn by Viscount Jellicoe, the Commander-in-Chief of the Grand Fleet on the 31st May 1916, which, after setting out the names of the 151 ships and of the commanding officers, proceeded:

On the said date the British Battle Fleet was cruising in the North Sea accompanied by the 3rd Battle Cruiser Squadron, 1st and 2nd Cruiser Squadrons, 4th Light Cruiser Squadron, 4th, 11th, and 12th Flotillas. The 1st and 2nd Battle Cruiser Squadrons, the 1st, 2nd, and 3rd Light Cruiser Squadrons and destroyers from the 1st, 9th, 10th, and 13th Flotillas, supported by the 5th Battle Squadron, were in accordance with my directions scouting to the southward of the Battle Fleet. The Battle Cruiser Fleet was under the command of Earl Beatty (then Vice-Admiral Sir David Beatty), G.C.B., O.M., G.C.V.O., D.S.O., in the *Lion*.

At 2.20 p.m. reports were received by the Battle Cruiser Fleet which indicated the presence of the enemy and at 2.35 p.m. smoke was sighted to the eastwards. I was immediately informed of this and I proceeded (in the *Iron Duke*) with the Battle Fleet with its accompanying cruiser and destroyer force at full speed in a S.E. by S. direction to engage the

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

enemy. The Battle Cruiser Fleet on sighting the said smoke altered course to the E. and subsequently to N.E. and the 1st and 3rd Cruiser Squadrons spread to the E., forming a screen for the Battle Cruiser Squadrons and the 5th Battle Squadron.

At 3.30 p.m. line of battle was formed, the 2nd Battle Cruiser Squadron forming astern of the 1st Battle Cruiser Squadron with destroyers of the 13th and 9th Flotilla taking station ahead. A course was then set E.S.E. and the 2nd Light Cruiser Squadron coming up at high speed took station ahead of the battle cruisers. At 3.31 p.m. five enemy battle cruisers were sighted and the E.S.E. course steered caused the Battle Cruiser Fleet to converge slightly upon the enemy. At 3.48 p.m. the action commenced at a range of 18,500 yards. The 5th Battle Squadron, which had conformed to the movements of the Battle Cruiser Fleet, came into action at 4.8 p.m. at a range of 20,000 yards. The Battle Cruiser Fleet was then steering a course S.S.E. parallel to the enemy. At 4.1 p.m. *Nestor*, *Nomad*, *Nicator*, *Narborough*, *Pelican*, *Petard*, *Obdurate*, and *Nerissa* of the 13th Flotilla, *Moorsom* and *Morris* of the 10th Flotilla, and *Turbulent* and *Termagant* of the 8th Flotilla, moved out to attack the enemy with torpedoes and intercepted an enemy force of one light cruiser and fifteen destroyers. After a fierce engagement the British destroyers returned, having compelled the enemy force to retire on their battle cruisers with a loss of two destroyers sunk. *Nestor*, *Nomad*, *Nicator*, *Moorsom*, *Petard*, *Nerissa*, *Turbulent*, and *Termagant* pressed home the attack against the enemy battle cruisers.

From 4.1 p.m. to 4.43 p.m. the action raged fiercely, and at 4.18 p.m. one of the enemy vessels was seen to be in flames. At 4.38 p.m. the enemy battle fleet was reported ahead and was sighted in a S.E. direction at 4.42 p.m. The course of the British Battle Cruiser Fleet and 5th Battle Squadron was then altered 16 points to starboard and the said Fleet proceeded on a northerly course. The enemy cruisers shortly afterwards altering course the battle continued. Between 5 and 6 p.m. the battle continued on a northerly course at a range of about 14,000 yards, the enemy receiving severe punishment. At 5.35 p.m. the course steered was N.N.E., the enemy gradually hauling to the eastward. At this time the British Battle Fleet lay N. 16 W. from the Battle Cruiser Fleet and at 5.56 p.m. the leading battle ships of the British Battle Fleet were sighted by the Battle Cruiser Fleet. The battle cruisers then formed ahead of the Battle Fleet.

The Battle Fleet came into action at 6.17 p.m., and the enemy was engaged intermittently by the ships of the Grand Fleet till 8.20 p.m., at ranges between 9000 and 12,000 yards. During this time the British Battle Fleet made alterations of course from S.E. to S. and to S.W. and W., the enemy constantly turning away, being evidently anxious to avoid further action in view of the loss that he had sustained. At 7.20 p.m. the 4th Light Cruiser Squadron made an attack upon enemy destroyers, and at 8.18 p.m. they supported the 11th Flotilla in a similar attack. At 9 p.m. the enemy was entirely out of sight, but during the night attacks were made by the 4th, 11th, and 12th Flotillas upon the enemy, and at 10.30 p.m. the 2nd Light Cruiser Squadron in rear of the Battle Fleet was engaged in close action with an enemy's force of light cruisers.

At daylight on the 1st June 1916 the Grand Fleet, being then to the S. and W. of Horn Reef, turned to the N. to search for enemy vessels and remained in the vicinity of the battlefield near the line of approach to German ports until 10 a.m., and at 1.15 p.m. no sign of the enemy fleet being seen, the British Fleet returned to port.

During the said engagement the following enemy vessels were destroyed: *Lutzow*, *Pommern*, *Wiesbaden*, *Rostock*, *Elbing*, *Frauenlob*, *V.* 4, *V.* 27, *V.* 29, *V.* 48, *S.* 35. There were on board the said enemy vessels, at the beginning of the engagement 4537 persons in all distributed as follows:—

Ship.	Number on Board.
Lutzow	1450
Pommern	839
Wiesbaden	500
Rostock	480
Elbing	460
Frauenlob	350
Destroyers *V.* 4	85
V. 27	90
V. 29	90
V. 48	98
S. 35	95
Making a total of	4537

The destruction of the aforesaid German vessels was solely effected by the combined action of the ships of the Grand Fleet under my command . . . no other ship or vessel being present or assisting thereat.

Wilfrid Lewis for 120 of the ships.

Carpmael (*Langton* with him) for thirty-one of the ships.

Mockett (*J. W. Jardine* with him) for the Procurator-General.

Sir HENRY DUKE, P.—The circumstances of the naval action which is the subject of this motion, have been referred to by counsel, and the duty of the court is merely ministerial. It is to ascertain what amount of prize bounty is due in respect of the action, and what ships were engaged in it.

The admiration and gratitude of the nation have been properly expressed by those whose duty it is to express them. The gallant Admiral, whose affidavit has been read, and all who served under him, have received the thanks of His Majesty and of the Legislature. It is only necessary for me to say that I find and decree that the Battle of Jutland was the common engagement and enterprise of the 151 ships of the Grand Fleet, and that is a decree in which those who represent the whole of the Fleet concur. The prize bounty which is due under the regulations is 22,685*l.*

All I desire to add of my own motion is that the record of these proceedings will be one of the most cherished documents in the archives of this court.

Solicitors: *Woolley*, *Tyler*, and *Co.*; *Wilde*, *Moore*, and *Co.*; *Daniell* and *Glover*; *Botterell* and *Roche*; *The Treasury Solicitor*.

July 28, 29, *and* 30, 1920.

(Before Sir HENRY DUKE, P.).

THE TWEE AMBT. (*a*)

Prize—Neutral ship and cargo—Barratrous design of master to take ship to enemy port—Absence of overt act in prosecution of design—Absence of consent by crew—Absence of knowledge of owners of ship and cargo.

A Dutch vessel, the T. A., *having sailed under auspices of Netherlands Overseas Trust Company, from Dutch East Indies with cargo of coffee consigned to representatives in Amsterdam of the Dutch planters and owners, her master disclosed*

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law.

when ship in port of Freetown, Sierra Leone, that he intended criminally, without authorisation of owners, to take her to Stettin and had unsuccessfully invited the crew to assist.

Held, (1) *that, the crew having refused to assist, the master was not "in a position to control the destination" within the meaning of* The Louisiana (14 *Asp. Mar. Law Cas.* 233; 118 *L. T. Rep.* 274; (1918) *A. C.* 461); (2) *that no overt act having brought the* T. A. *into the prosecution of an unneutral undertaking, she was at Freetown still on her authorised voyage with Rotterdam as her destination in intention and in fact on the part of the only persons who had the power to carry out their intentions*; (3) *that ship and cargo should be released.*

ACTION for condemnation of ship and cargo.

The facts and contentions fully appear in his Lordship's judgment.

Sir *Gordon Hewart* (A.-G.), *Stuart Bevan*, K.C., and *Theobald Mathew* for the Procurator-General.

Hawke, K.C. and *Le Quesne* for the shipowners.

Inskip, K.C. and *Balloch* for the cargo owners.

Artemus Jones, K.C. and *Wilfred Lewis* for the Netherlands Overseas Trust Company.

The following cases were cited:

The Louisiana, 14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461;
The Alwina, 13 Asp. Mar. Law Cas. 311; 114 L. T. Rep. 707; (1916) P. 131; 118 L. T. Rep. 97; (1918) A. C. 444;
The Hakan, 13 Asp. Mar. Law Cas. 479; 117 L. T. Rep. 619; (1918) A. C. 148;
The Svithiod, 15 Asp. Mar. Law Cas. 9; 123 L. T. Rep. 148; (1920) A. C. 718;
The Kim, 15 Asp. Mar. Law Cas. 210; 125 L. T. Rep. 124; (1920) P. 319;
The Panaghia Rhomba, 1858, 12 Moo. P. C. 168.

Sir HENRY DUKE, P.—In this case the Crown claims the condemnation of the motor schooner *Twee Ambt*, and her cargo of coffee, on the ground that when she was captured in the port of Freetown in Sierra Leone she was on her way to the port of Stettin in Germany.

The ship is registered under the Dutch flag, and is owned by a company all of whose members are Dutch. The cargo is the produce of the Dutch colony of Java, grown upon a great number of estates in Java, and shipped on board the *Twee Ambt* under circumstances which can be very shortly stated.

In the years 1916 and 1917 there had been established by acts of His Majesty's Government, and with the concurrence to a considerable degree of neutral States and of neutral merchants, a system of control of the import of coffee into Holland, and the control had become continuously more stringent. Holland had been the entrepot through which supplies of coffee had passed in very large quantities into Germany when the German ports were closed, or practically closed, to direct overseas traffic by the action of His Majesty's Navy. For some time the legitimate activity of merchants in Holland in colonial produce from the colonies of their own country, and in colonial products of other countries, had been employed for the purpose of supplying to the German market, and to the German Government, the supplies of coffee which could not be directly obtained. Statistical evidence has been put before me which shows that during a considerable period of the war there was a great volume of trade in coffee proceeding from the Dutch ports and over the Dutch frontier. That had become progressively more restricted. There had been a limitation of the import of coffee into Holland, and there had been a limitation of the export of coffee from Holland. The Dutch Government had enacted, at the time which is material in this case, an absolute prohibition of export of coffee from Holland into Germany. Not only so, but the overseas trade with Holland by arrangements made between the Netherlands Overseas Trust and His Majesty's Government had been brought—as well as trade could be brought—into a neutral condition.

I have seen no case during the short period that I have sat in this court in which the Netherlands Overseas Trust has failed to discharge to the best of its ability the obligation it had undertaken towards His Majesty's Government for the maintenance of the neutral character of Holland's trade. It is material in this case that the Netherlands Overseas Trust had had no inconsiderable part in the authorisation, and in the organised control of, the adventure which is here in question, so far as it was a legitimate adventure. At the time in question, the import of coffee into Holland overseas had been reduced, so far as Java was concerned, to something like 30 per cent. of its normal volume, and the export from Holland of all coffee, as I have said, had been stopped by the Dutch Government. In these circumstances there was a condition almost of desperation among the planters of Java with regard to the coffee trade. Their produce could not come forward to the ports; there was a restriction upon forwarding; and there was another very serious factor in the business aspect of the matter—namely, that in the Javanese ports at the time in question it was almost impossible to obtain transport. The available transport of the mercantile marine world had been greatly reduced and produce lay—as appears from the correspondence in this case—awaiting transport for periods which tended to reduce and, in some cases, to destroy its value. That was broadly the state of things in Holland and in Java, and in the relations between the Dutch Government and the Dutch mercantile community, through the Netherlands Overseas Trust, and His Majesty's Government, at the time when the adventure here in question was undertaken in the summer of 1917.

The coffee trade of Java was carried on in a manner which it is desirable perhaps very shortly to state. The planters were, and apparently are, financed to a considerable extent by great mercantile firms in the home country—namely, Holland. Advances are made for the production of the crops. Those advances continue up to the time of the shipment of the crops, and in the normal course the Javanese planter is engaged in a joint enterprise, when his crops come to hand and are ready for shipment, with the great mercantile houses in Holland who finance, and in a considerable degree control, the trade of Java in coffee. Three of those houses are concerned in these present proceedings. I need not enumerate the very great body of planters who are concerned. They have put in their separate claims, but the litigation has been directed quite obviously by three large Amsterdam houses, and chiefly by the Koloniale Bank at Amsterdam, by reason of the

fact that the mercantile transactions of the planters were in the hands of those houses in Amsterdam.

That being the state of the case, in 1917 coffee was lying ready for shipment, and, to a limited amount, coffee could come forward for shipment. Shipping could not be found, but with great difficulty the Amsterdam houses made an arrangement—an arrangement initiated in the first instance by the Koloniale Bank—whereby the *Twee Ambt*, which had found her way to Java and was in some difficulties there, was made available for the transport of that limited quantity of coffee for which transport could be arranged. The Koloniale Bank, not having supplies of coffee in sight which would completely load the *Twee Ambt*, communicated with some of the other houses—two of the other houses in particular who are here concerned—and ultimately between them they found cargoes sufficient to load this vessel. Communications then took place between Java and Amsterdam, and the responsible people in Amsterdam, in the first instance, met the proposal to load the *Twee Ambt* by a statement that it would be either impossible or illegal to do so. There were further communications between the mercantile houses and the Netherlands Overseas Trust, and, after a delay, the enterprise of forwarding the cargo of Javanese coffee on board the *Twee Ambt* was accepted by the managers of the Netherlands Overseas Trust as a transaction for which they would become responsible. It is not immaterial to observe that one of the most prominent of the business men who were engaged in the concern—a gentleman who was called here before me, a banker of Amsterdam—was a very active member of the governing council of the Netherlands Overseas Trust. Arrangements were made for the transport of the cargo to Amsterdam, within the restrictions which had been established by His Majesty's Government, by the Dutch Government and by the Netherlands Overseas Trust. Having arrived at that stage, the persons in charge of the business got into communication with the naval authorities of this country; they notified the naval authorities of the intended voyage and the whole facts of the case, and they secured the sanction of the naval authorities for the voyage in question and had a route mapped out upon which they had to dispatch their ship, and upon which they did dispatch her. They were to make their voyage to Freetown, calling there for examination by the British authorities; to proceed from Freetown to the North Atlantic, round by the north coast of Scotland, coming down to the North Sea, and by that route making their way to Rotterdam. So far as the business people in this case are concerned—apart from two whom I will mention presently—that programme was not only mapped out, but it was entered on, and it was at all times intended honestly to be carried out. In that state of the case the vessel sailed on an authorised voyage with an authorised cargo of coffee for import into Holland. During that part of the voyage which brought the vessel to Freetown there were some very extraordinary happenings. The master was a young man of thirty, whose history perhaps illustrates the difficulty there was during the later periods of the war in obtaining trustworthy commanders for merchant ships in remote, and especially in tropical, countries. It seems to me that the master was probably as untrustworthy a master as the owners could well have obtained.

I dare say that he was the best man that those on the spot could get. But it is evident that he was a man entirely reckless, that he had not much self-respect, not much regard for his duty, and apparently not much regard for the interests of his owners; and he had very little conception of the manner in which a sensible shipmaster maintains his proper relations with his crew. I dare say it may be true that crews shipped, as the crew of this vessel was, are found not to be the best specimens of seamen. One of the witnesses said that crews shipped in the way in which this crew was shipped are always found drunk. Be that as it may, the master and the crew were frequently at variance long before the vessel got to Freetown. There were various causes for it—it is unnecessary to examine them—but there were violent personal differences between the master and the crew. While the undoubted conduct of the master must be given its true effect, absolute confidence cannot be reposed, it seems to me, in the statements of people who confess themselves his enemies and who had very serious grievances against him.

When the vessel had arrived at Freetown and was under the supervision of the naval authorities there, the master found his way ashore. He had not provided the crew with means of satisfying their favourite inclination—that for strong drink. Apparently they had had no advances, and that was one cause of difference between him and them. But he himself found his way ashore, and in drinking saloons in Freetown he was guilty of some extraordinary conduct. It was there that the master made known, in the course of conversation, and in the presence of various people, that he had been minded, and probably was then minded, to take the *Twee Ambt* to a German port. It was because of statements of the master—not of the crew, I think—that this matter originally came to be taken in hand by the naval authorities and the port authorities at Freetown. When the master had made his unguarded statements with relation to the war, and his views with regard to his ship and what he might do with her, the crew came to be examined, and the crew—which was, I think, in a semi-mutinous condition, and, at all events, was wholly at variance with the master and not under the ordinary control of the master—related to the British authorities at Freetown the happenings there had been in the course of the voyage so far as it had gone. It appeared—and I am satisfied that it was the case—that when the master was a few days out from the Javanese port he had seriously approached members of the crew to sound them as to whether they would engage with him in a barratrous enterprise of taking the vessel to Germany with her cargo. That, to my mind, is the serious element in this case. The crew—every man of them—refused to be parties to any such undertaking, and that, in my opinion, is a material fact. If this had been a case where the crew had entered into the design of the master, very different considerations would, according to my view of the facts, have arisen. The crew repelled the suggestions of the master, and they were at increasing variance with him until they arrived at Freetown, and at Freetown they disclosed all he had said to them.

It is alleged against the crew that they disclosed more than the master had said to them, but their evidence raised a case against him which, to my mind, is not satisfactorily displaced so far as he

is concerned, to the effect that he had conceived—and that he entertained—the design of taking this vessel, if he found his way to do so, to a German port. He was called at Freetown—he was examined here afterwards—and he made a variety of frivolous statements as to these allegations against him, which are as grave almost as could be made against a shipmaster. They were allegations that he had engaged in a scheme of barratrous conduct, which would not merely result in the dishonest expropriation of his owners' property, but conduct which, if it were carried to its intended issue, must have resulted in the forfeiture of their ship and of the forfeiture of the goods she was carrying. These allegations are not displaced by the owners' evidence. That was the situation, and that is my view of the facts at the time of the inquiry at Freetown, and I have to consider what results from that conclusion.

It is said for the Procurator-General that what is established is that the destination of this vessel while she was in the port of Freetown was the enemy port of Stettin, and I have to consider whether that is the fact. I am inclined at present—it is not necessary to examine the subject with minute care in view of my general conclusions—but I am inclined to take the view that if in fact the destination of this ship while she was at Freetown was Stettin, I ought to condemn this ship and cargo. I will not discuss this matter at length; but it is true that in a variety of decisions in Prize innocent owners of ships and cargoes have been involved, by reason of their confidence in the ship's master and the nature of his employment, in a liability to condemnation arising out of his acts. There are a variety of cases which may be referred to in this connection. I examined them quite recently in the group of cases known as *The Kim*, *The Alfred Nobel*, and *The Björnstjerne Björnson* (*ubi sup.*).

It is said by Mr. Bevan that once it is found that the master of a vessel has the intention to take his ship to an enemy destination in such a way as to subject it to condemnation, the vessel is subject to condemnation. Mr. Bevan read from *The Louisiana* (*ubi sup.*) this passage: "It is the intention of the person who is in a position to control the destination which is really material." I am bound by the decision of the Privy Council in *The Louisiana* to its full extent, and I should not for a moment shrink from applying it, but I have to consider what it means. It is one of many decisions relating to a variety of cases in which owners of ships and of cargoes may become liable, beyond their own intention, for conduct of their agent, the master. There are a great variety of cases—it is unnecessary to recapitulate them—but the most extreme case which is within my recollection is that in which the owners were held liable in the condemnation of their vessel by reason that the master against his will had been compelled to engage in the unneutral undertaking of carrying enemy forces and enemy papers. Cases of that kind, and cases such as those to which Mr. Bevan referred, *e.g.*, *The Panaghia Rhomba* (*ubi sup.*) in particular, where the ship and the cargo had been held liable to condemnation, notwithstanding absence of proof of knowledge on the part of the owners of ship or cargo, where it was found that the ship had been engaged in an actual breach of blockade, are those which I am asked to apply, together with what is said to be the principle stated in the passage to which I have referred from the judgment in *The Louisiana* (*ubi sup.*) to the facts of the present case. How does the matter really stand? I will examine what ground there is, apart from dicta in prize law, for condemning the owners of this ship and the cargo. The owners are a body of mercantile men—neutrals—who engaged, with the sanction of His Majesty's Government, in a neutral undertaking, the conditions of which, imposed by His Majesty's Government, they carried out with scrupulous regularity. That is the position of the owners, and I accept—it has hardly been challenged on the part of the Crown—the evidence presented by the shipowners and the cargo owners with regard to their conduct in this case, and their intentions. That is the position of the shipowners and the cargo owners. If I condemn the ship or the cargo, I must condemn them because of acts which the owners did not in fact authorise, and which were so far outside the authority of their agent, the master, that they would be, so far as they are established, criminal acts on his part.

It is quite true that in some Prize cases passages will be found in which it is said that although the act done was an act of barratry, nevertheless the ship and the cargo must pay the penalty. But in every case, so far as I am aware, the penalty was incurred only by the act done. I have to consider whether upon the broadest views of the authorities there was an act done here which subjects this vessel and her cargo to condemnation. What was done by the master was to conceive, and to take steps at sea—between Batavia, the Javanese port, and Freetown—to ascertain the views of members of his crew as to engaging in, a barratrous enterprise. That was what was done, accepting the evidence of the Crown at its full value. Now does that constitute such an act as renders it necessary in this court to condemn the ship and cargo? Of course they both stand on the same footing. In my judgment, it does not. The design of the master, however criminal it might have been, was never carried into practical effect. There is no overt act on the part of the ship which warrants my saying that this ship had been brought into the prosecution of an unneutral undertaking. She was on her authorised voyage, and she was subjected, in due course, to the control which the British authorities had provided for her. In my opinion there is no evidence which would warrant me in saying that at Freetown the master entertained the design at all costs of going to Stettin; I think it was in contemplation and was not a design definitely adopted; and I am satisfied, as a matter of fact, upon the proofs before me, that the master never could have carried the crew with him in any undertaking of that kind; and so, in point of fact, I say that whatever the criminal design or the criminal wishes of the master, and however unneutral the mind of the master, he never was in a position to carry his designs into execution, he never in fact began to carry them into execution, and he never could have carried them into execution.

Those, broadly, are the grounds on which, in my opinion, it would be wrong to say that this ship was in fact, when she was in the port of Freetown, destined for Stettin. I hold, therefore, that she was destined for Rotterdam, that Rotterdam was her destination in intention and also in fact on the part of the only persons who had the power to carry out their intentions, and I am satisfied that she would have duly arrived at Rotterdam.

propose, therefore, to decree the release of the ship and the cargo.

Solicitors: *Treasury Solicitor; Botterell* and *Roche; Albert M. Oppenheimer.*

July 26 and 28, 1921.

(Before Sir HENRY DUKE, P.)

THE NEW SWEDEN. (*a*)

Prize—Mails of a neutral State—Seizure—Transmission of mails by rail for examination—Damage by fire during transmission—Liability of captor—Duty to insure—Order in Council of the 11th March 1915.

Certain parcels of goods of enemy origin and enemy property were consigned per the Swedish parcels mails to the claimants who were domiciled in New York. The postal bags containing these packages were seized at the port of K. under the provisions of the Order in Council of the 11th March 1915. *Eventually the bags came into the hands of the post office authorities at K., who sent them by rail to the censor of parcel post in London, there being no facilities for the examination of the postal bags at K. On the railway journey some of the goods were destroyed or injured by fire. Those packages which were delivered in London were seized and in due course sold, the net proceeds being subsequently paid to the claimants. The claimants sought to recover from the Procurator-General the loss of that part of the consignment which had been affected by the fire, contending that the captors had failed to exercise due care in the control of the goods; in sending them to London they had caused a deviation in the voyage which avoided the existing insurances upon them, and they had failed to hand them over to the Marshal, as provided by the Order in Council of the 11th March* 1915, *by whom they would have been insured.*

Held, that the decision in The United States (No. 2) (*ante, p.* 344; (125 L. T. Rep. 446; (1920) P. 430) *does not imply in the duty of the captors to take reasonable care, an obligation to insure. The captors did not fail in their duty to take care of the goods in their custody when they forwarded the mail bags to London, as there were no facilities for examining mails at K. The Order in Council of the 11th March* 1915 *does not require that seized goods should be placed in the custody of the Marshal as soon as they are brought into port, nor at any particular time. In the present case, it could not have been done until after examination, whether the goods were subject to seizure or not. In so far as this Order in Council is concerned, it is doubtful whether any breach of duty on the part of public officers as between themselves and the Crown, concerning a matter of administrative instruction, will give a cause of action to foreign owners of goods.*

CLAIM to recover from the Procurator-General damages for loss and injury of goods whilst in the custody of captors. The facts and arguments of counsel sufficiently appear in the judgment.

Raeburn, K.C. and *Wilfrid Price* for the claimants.

Geoffrey Lawrence for the *Procurator-General.*

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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

The United States (*No.* 2), *ante*, p. 344: 125 L. T. Rep. 446; (1920) P. 430;
The Sudmark (*No.* 2), 118 L. T. Rep. 383; 14 Asp. Mar. Law Cas. 201; (1918) A. C. 475.

Sir HENRY DUKE, P.—This is the claim of a firm called Topken Company, having a commercial domicile in New York, to recover damages from the Procurator-General on behalf of the claimants in respect of destruction and damage by fire, which they suffered in relation to 113 packages, containing gloves of European, apparently German, manufacture, which had been seized in the parcels mail on board the Swedish vessel *New Sweden* on the way from Scandinavian ports to the United States. This raises some questions of principle quite novel in a good many circumstances. I heard the matter very ably argued, and, in order that I might avoid any hasty expressions of opinion, I desired to have an opportunity of carefully reading the Order in Council as to its administration with regard to the facts of this case.

The state of the case was this: On the 13th May 1916 the *New Sweden* called at Kirkwall in the course of her voyage by reason of the existence at that time of the Order in Council of the 11th March 1915 and the embargo or prohibition which His Majesty, as a belligerant of war, had found it necessary to put on commerce between Germany and neutral states, for reasons which did not appear in the hearing of this case, and which are immaterial here. It appeared to those who made the necessary examination, under the Order in Council, of the cargo from Sweden there was reason to believe that among the postal bags which were on board, it might be there were some which contained goods liable to detention under the Order in Council, and which had been forwarded in the Swedish post for the purpose of avoiding detention. The belief, in fact, proved well founded, for goods comprised in thirty or forty consignments, which were among the postal packages, have formed the subject of proceedings in this court by writ under the Order in Council. As to, I think, the whole of these consignments, and certainly with regard to the 113 packages of gloves which are here in question, there is a decree of the court made in an action relating to these consignments, which has not been the subject of any appeal, whereby it is declared that the packages in question, together with other consignments comprised in the writ, were of enemy origin and enemy property, and so they became subject to detention under the Order in Council until the end of the war. The decree went on to direct that the packages should remain in the custody of the court. The 157 postal bags, taken possession of by the authority of the Crown at Kirkwall on the 16th May, were corded and sealed. The seals of international mails were not broken by any authority, and the Surveyor of Customs, upon receiving these 157 postal bags from the naval authorities, handed them over, as he received them, to the authorities of His Majesty's post office, for delivery to the censor of parcels post in London. They were duly despatched, and it was in course of the despatch under the care of H.M. Postmaster-General that these Swedish mail bags met with an extraordinary accident, which has never been explained. While the train was on its way southward on the Highland Railway, a fire broke

out in the van in which these postal bags were, and destruction and damage to a considerable extent was done among the 113 parcels of goods which are the subject of the present application. The fire was extinguished, and on the 19th May the appointed surveyor of customs, Mr. Rogers, who had been nominated to supervise the examination of parcel goods of neutral mails sent to London for examination, taking account of facts revealed on examination of the packages here in question and numerous other packages, seized them as prize to the use of His Majesty. The schedule to Mr. Roger's affidavit represented the thirty-three consignments which were so seized in those of the mailbags which escaped destruction. Of the 157 forwarded, only sixty-two were discharged into the custody of the Customs in London, and the parcels in question were part of the contents of the sixty-two. The surveyor of customs in London who had been appointed to superintend the examination of the parcels, and, following the examination, to deal with matters of fact, on the 9th June, when the examination was complete, having seized these parcels, placed them in the custody of the Marshal of the court. The fire occurred when the packages were in the custody of the "captor," using the generic distinction "captor" as relating to all the persons acting under the authority of the Crown in the seizure, and detention of the goods, when he placed them in the custody of the Marshal. The claim, which is a claim for damages suffered by these goods, is made both under general prize law and under the terms of the Order in Council of the 11th March 1915.

It is necessary to consider what the position of the Procurator-General is in this case, he being sought to be made liable for damages. In the decision which governs the matter he must be held liable if there has been misconduct or some neglect on the part of persons who handled these goods on behalf of the Crown, either in the act of seizure or during the period of detention—he must answer in respect of all persons acting in the capacity of captor. So that a claim founded on prize law must be founded, as I think, on some allegation of misconduct or neglect of the captor. It was long ago decided that a captor, by virtue of his belligerent right of capture, is not an insurer. It was not contended otherwise by Mr. Raeburn for the claimant, but Mr. Raeburn could not resist the temptation to examine the possible effect upon prize law of a case which came to be decided in this court last year with regard to the liabilities which are imposed upon goods which are brought into prize by virtue of the operation of the Order in Council of March 1915. In the case of the *United States* (*No.* 2) (*sup.*), to which Mr. Raeburn referred, it was determined that the Marshal of the Court, who had received into his custody goods seized and detained under the Order in Council, must be reimbursed in respect of costs which he had incurred for insurance. He drew attention to the decision in that case as one which might affect the obligations of a captor, and which I think might affect the obligations of the Marshal. I have only to say that the decision in the case of the *United States* does not relate to general prize law at all, and does not purport in any way to modify the Order in Council of March 1915 and the well-established doctrine that the captor of the goods is not an insurer and is under no obligation to insure. It deals with expenditure which, in cases under the Order in Council, had been made by the Marshal, and decides that the expenditure was reasonably made. It may be at some future time the question may arise whether the Marshal is under an obligation to make expenditure which has been held to be reasonable in some cases. That question does not arise here. It is enough to exclude it in this case, to say that the facts in the question here occurred years before the decision in the case of the *United States*, *No.* 2 (*sup.*), but, if they had subsequently occurred, my own view is there is no enlargement of the obligation of the captor and there was no duty upon the Marshal to insure in this case. The obligation on the captor was to take care and reasonable care, of the goods. If he failed in that obligation, then, in general prize law he must answer the claim for damages.

What is said here is, that he sent these goods by rail transit to London after the goods were destined for sea transit. It is said by Mr. Raeburn that by this act they provided a deviation on the voyage which would avoid the existing insurance by the placing of the goods where they were never intended to be. I have to consider whether the "captor," using the expression collectively, was exercising a reasonable care of failing in his duty in that respect in the action taken with regard to these goods. They were lawfully captured, and they have been declared to be goods of enemy origin and enemy ownership within the meaning of the Order in Council. The captor must deal with them. The goods in question, 113 packages, were enclosed in the mails of a neutral state, and the mails for a neutral state have to be opened and examined to separate the goods subject to capture from the goods which I may describe comprehensively as innocent goods forming the contents of the mails. It was not suggested on the part of the claimant that otherwise was the case. It was not suggested that these goods could be examined as mails should be examined at Kirkwall. There were no facilities for examination on the ship or in the Kirkwall post office. There were goods of innocent consignors in the mails, which must be forwarded and which would be forwarded. It was almost conceded by the claimant that London was the proper place for such examination. In my judgment the familiar facts with regard to the examination of these parcel mails in London during the course of the war period, in which the Order in Council was in operation, and the facility with which packages were detained and packages not subject to detention were forwarded, upon the whole, are the best evidence that the course taken in this case of forwarding seized mails for delivery and examination under proper supervision at the General Post Office in London, was the proper course, if, indeed, it was not the only practicable course for all interests concerned. That being so, it seems to me that the allegation that there was any failure of duty, misconduct or neglect or breach of apparently reasonable care on the part of the captor in forwarding these mails in the ordinary course to be examined in London, wholly fails, and so far as prize law is concerned, apart from the Order in Council, this claim fails.

Under the Order in Council it was contended there had been a direct breach of duty in the failure on the part of the captor to deliver these packages forthwith upon their seizure into the custody of the

Marshal, and that automatically they would then have become insured. It is a fact that, if these goods were delivered into the custody of the Marshal at Kirkwall, they would have been insured.

I think what has to be ascertained is whether, the Order in Council providing in favour of the claimants that these goods should be at the first port reached after seizure delivered into the custody of the Marshal, there has been failure in this case. If the provision made in favour of a foreign consignor or owner has been disregarded, then such owner must have suffered damage by that disregard. In the quoted case of the *Sudmark, No.* 2 (*sup.*), it was pointed out on behalf of the Procurator-General that the decision of the Privy Council was to the effect that directions given as matters of administration by the Crown to its servants are not directions for the benefit of owners of captured goods as against the captors. In so far as this decision and the regulations contained in the Order in Council as to the modes of dealing with captured goods are concerned, it does not seem to me that any breach of duty on the part of public officers as between themselves and the Crown, concerning a matter of administrative instruction, will give a cause of action to foreign owners of goods. I think a distinction must be made in that respect, but the first and main question is to ascertain what does the Order in Council in fact provide as to the time of delivery into the custody of the Marshal. Art. 1 of the Order in Council deals with vessels sailing for foreign ports. The language is somewhat different from that which refers to vessels or goods which are the subject of the subsequent clause. The clause says that the goods on board any vessel which has "sailed from her port of departure after the 1st March 1915" shall not be allowed "to proceed to any German port," but "must be discharged in a British port and placed in the custody of the Marshal of the Prize Court." That is not the same direction precisely as is given as to the goods now in question, which ismet with in 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. . . . Such goods shall be placed in the custody of the Marshal of the Prize Court." I see nothing to hold that this was not complied with sufficiently, there being no provision for forthwith or peremptory handing over. The goods, subject to the embargo provided in art. 4, are goods of enemy origin or enemy property. The goods seized in this case were the Swedish parcels mail. It could not be said of the mails collectively or of the contents of any particular packet which constituted the mail, that they were seized as being of enemy origin or property. The fact was, that until examination was made, no ground for seizure to be operative under the Order in Council could have effect. The goods to be seized were goods of enemy origin or property. Among these were the goods of the present claimant. They had been so disposed under the protection of the neutral mails that they could not be individually seized by themselves at Kirkwall. They must be subject to examination, and I think that upon a reasonable construction of art. 4 there was no obligation to put the goods in question into the custody of the Marshal until they had been ascertained to be subject to seizure. I have already come to the conclusion that that could not be ascertained until they had been examined by the British postal authorites, and the censor of the mails, who was responsible for their delivery to the Marshal in due time.

In my judgment, both on the express directions of art. 4 and upon the reasonableness under art. 1, the captor, speaking collectively, acted within his right in prize law and under the Order in Council in postponing delivery of the goods until they could be delivered after ascertainment as to specific conclusions that they answered the description set forth. Looking at the facts both as to prize law and the Order in Council, I come to the conclusion that this demand for damages fails and must be dismissed with costs.

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

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

House of Lords.

May 3 *and* 5, 1921.

(Before Lords FINLAY, DUNEDIN, SUMNER, PARMOOR and WRENBURY.

ATTORNEY-GENERAL *v.* ARD COASTERS LIMITED; LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LIMITED *v.* MARINE UNDERWRITERS OF STEAMSHIP RICHARD DE LARRINAGA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—War risk—Collision between merchant ship and warship—No navigation lights—"Consequences of hostilities or warlike operations."

Two merchant vessels, while navigating at night without lights, in accordance with Admiralty orders, were sunk in collisions, the one by a patrolling destroyer and the other by an armoured cruiser on her way to take up the duty of escorting a convoy. The question in each case was whether the loss was due to a "war" risk, which in the case of the A. was a risk undertaken by the Admiralty, who had requisitioned the ship; and in the case of the L. was a risk accepted by the appellant insurance company.

Both merchant ships were insured against ordinary marine risks, and also by their policies against "consequences of hostilities and warlike operations."

Bailhache, J. decided that both the destroyer and the cruiser were engaged in "warlike operations," and therefore that the ships were not lost by ordinary marine risks but as the consequence of warlike operations, and that the war risk underwriters were liable. The Court of Appeal affirmed that decision.

Held, that the orders appealed from were right, and both appeals must be dismissed on the grounds stated by Bailhache, J. and endorsed by the Court of Appeal.

Decision of the Court of Appeal, in the first case reported 36 *T. L. Rep.* 555, *and in the second case reported* 15 *Asp. Mar. Law Cas.* 46; 123 *L. T. Rep.* 485; (1920) 3 *K. B.* 65, *affirmed.*

APPEAL from two decisions of the Court of Appeal affirming decisions of Bailhache, J.

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

The *Ard Coasters'* case is reported in 36 T. L. Rep. 555, and that of the *Richard Larrinaga* in 14 Asp. Mar. Law Cas. 572; 15 Asp. Mar. Law Cas. 46; 123 L. T. Rep. 485; (1920) 3 K. B. 65.

In the *Ard Coasters'* case, their steamship, the *Ardgantock*, was requisitioned by the Government under the terms of the charter-party known as T. 99. By clause 19 the Admiralty took the war risks which would be excluded by the f.c. and s. clause of an ordinary marine policy, including "all consequences of hostilities or warlike operations," but (clause 18) the Admiralty were not liable for sea risks. The *Ardgantock* was lost owing to a collision off the east coast in the dark with a British destroyer which was patrolling for submarines. Both vessels were sailing without lights in accordance with Admiralty instructions. The vessels were proceeding in opposite courses, and if their original position had been maintained, they would have passed well clear of each other, but the destroyer having come to the end of her beat, turned on a starboard helm and, being unable to see the respondents' vessel until the last moment, struck her on the port side. No negligence was proved on the part of either ship. By a petition of right the respondents claimed to be entitled to 70,000*l.*, the agreed value of their ship.

Bailhache, J. found that the patrolling of the North Sea by the destroyer was a warlike operation, which was rendered dangerous by the absence of navigating lights, and that the collision was due to this warlike operation and gave judgment for the amount claimed. His judgment was affirmed by the Court of Appeal.

In the *Richard Larrinaga* case the ship, a merchant vessel, was sailing in convoy from the United States to England. At the same time one of His Majesty's warships was on a voyage to pick up a convoy. Both ships were sailing without lights. The night was very dark. The two ships sighted one another at close quarters and a collision occurred in which both ships were damaged. No negligence was proved on the part of either ship. The *Richard Larrinaga* was insured under a marine risks' policy which contained the usual f.c. and s. clause and a war risks' policy which covered "all consequences of hostilities or warlike operations by or against the King's enemies."

Bailhache, J. held that the warship was at the time of the collision engaged in a warlike operation and that loss consequently fell on the war risks' underwriters. The Court of Appeal affirmed that decision.

In the first appeal:

Sir *Ernest Pollock* (S.-G.), *Raeburn*, K.C., and *R. H. Balloch* for the appellants.

Leslie Scott, K.C., *A. T. Miller*, K.C. and *Le Quesne* for the respondents were not called on.

In the second appeal:

Raeburn, K.C. and *S. L. Porter* for the appellants.

R. A. Wright, K.C., *A. T. Miller*, K.C. and *Le Quesne* for the respondents were not called on.

The House dismissed both appeals.

Lord FINLAY.—These two appeals have been heard together by your Lordships, but I shall deal with the two cases separately, and I take first the *Ard Coasters'* case, which we heard argued on a previous occasion.

In that case there was a petition of right against the Crown based on obligations undertaken by the Admiralty in the form of charter-party, which is very familiar, now known as T. 99. The facts out of which the question arises are very simple indeed.

His Majesty's warship *Tartar* was engaged patrolling between the Tees and Whitby for the purpose of looking out for submarines or anything in the shape of an enemy. The *Tartar* ranged about and proceeded a certain distance and then turned and proceeded in the opposite direction, roaming over the beat of sea she was directed to patrol. She had been proceeding at the time just before the turning which lead to the collision in a southerly direction. The *Ardgantock* was a merchantman which was proceeding in the same part of the sea in a northerly direction on a course such that, if both courses had been prolonged, they would have been parallel, and had no alteration taken place the two vessels would have passed each other safely port to port. They were navigating both vessels with lights out. It was a dark night, and the *Tartar*, when she got to the point whereabouts in the ordinary course she would turn round and go in the opposite direction, proceeded to starboard, and after she did that she was within such a short distance of the *Ardgantock* that there was no time to prevent the collision which ensued. She had not been able to see the *Ardgantock*, the night being dark and visibility not being good, and the lights being out. The result was that the *Tartar* struck the *Ardgantock* on the port side at about right angles.

In these circumstances the question arose as to the effect of clauses 18 and 19 in the charter-party T. 99 under which the Admiralty had requisitioned the ship. Clause 18, which deals with sea risks is as follows:

"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 sea or tempest or any other cause arising as a sea risk."

Clause 19, which deals with war risks, provides: "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 rest of clause 19 I need not read. There can be no doubt whatever, in my opinion, that, when patrolling in this way the *Tartar* was engaged in warlike operations. In the course of that warlike operation—in the ordinary course—when she got to the end of her tether in the one direction proceeded to turn round, and she happened to turn under her starboard helm in the direction of the *Ardgantock*, which she could not see owing to the darkness and the absence of lights, and the collision took place. It appears to me that the loss was the direct consequence of the patrolling, and the turning which took place was part of that operation. Bailhache, J. is reported as saying this: "The negligence point therefore fails, and it remains to consider whether this collision was a consequence of hostilities or of warlike operations. Now I have said what the *Tartar* was doing. She was a destroyer and she was patrolling the seas in search of submarines. In

doing that she was patrolling the seas without lights. The *Ardgantock*, in pursuance of Admiralty instructions, was also sailing without lights. I have already held in an earlier case that under those circumstances where there is a collision between two merchant vessels, neither of which is engaged in warlike operations, the mere fact of their both sailing without lights in pursuance of Admiralty directions to that effect and colliding does not make the collision a war risk, but it retains its character of a marine risk. But in this case there was a warlike operation. The *Tartar* was patrolling the seas. That, of itself, was a warlike operation. She was patrolling the seas without lights, which made the warlike operations dangerous. The collision was due to the fact that the *Tartar* was patrolling the seas, that is to say, it was due to a warlike operation which was being conducted on the part of the Admiralty. It seems to me, therefore, to follow that the collision which was due to that is a consequence of hostilities or warlike operations."

In the Court of Appeal, Atkin, L.J. puts the matter very clearly indeed. I may be permitted to quote one passage from his judgment. "To my mind the *Tartar* was clearly engaged upon a warlike operation. She was patrolling the seas in search of submarines, and indeed, for the purposes of this argument counsel for the Crown accepted the findings of the learned judge, and accepted and argued the case on the assumption that the *Tartar* was engaged in a warlike operation. Now it appears to me that as part of her warlike operation it was her duty to alter her course from time to time, under circumstances where she could not effectively see where she was going; in other words, she had to turn in the dark. Turning in the dark she ran into the suppliants' vessel, the *Ardgantock*, and that vessel was, without negligence on her part, navigating without lights in such a position that the *Tartar* executing her warlike operations, without negligence must run into her. The injury to the *Ardgantock* was proximately caused by the impact of the war vessel moving in the course of warlike operations. The injury was directly due to the warlike operation of the *Tartar*, just as it would have been, in my view, if the *Tartar* had been herself injured by running into an unlighted wreck or other peril of the same kind. The *Tartar* would have avoided the peril if she had received timely warning by lights, or otherwise, of the presence of the *Ardgantock*, but that she had in the course of her warlike operations to proceed without such warning and to expose herself and others to risk of injury is one of the risks of the warlike operation. In my view the injury of the *Ardgantock* was proximately caused by the warlike operation of the *Tartar*."

I entirely agree with that view of the case, and I desire to say one word about the case of the *British Steamship Company* v. *The King* (*The St. Oswald*) (14 Asp. Mar. Law Cas. 121, 270; 118 T. L. Rep. 640; (1918) 2 K. B. 879) and the admission which was supposed to have been made on behalf of the Crown in that case, that the absence of lights made the adventure a warlike operation. I think there must have been some misunderstanding there, and that any admission which was made must be read with reference to the particular circumstances of the case. It cannot be that the mere fact that two merchantmen at sea proceeding on their peaceful errand as merchantmen become engaged in a military operation because for the purpose of escaping submarines or the enemy they are sailing with their lights out. They are sailing with their lights out on a peaceful errand, and in the hope of evading the attention of enemy warships. For these reasons, my Lords, it seems to me that in this case the decision of the courts below was right and the appeal should be dismissed.

THE SECOND CASE.

In the case of the *Liverpool and London War Risks Insurance Association, Limited* v. *Marine Underwriters of the Steamship Richard de Larrinaga*, the question arises in a contest between two sets of insurers, the marine underwriters on the one hand who insure against sea risks and the War Risks Association who insure against war risks. We have been supplied with a copy of the policies issued by both these bodies. Taking the War Risks Associations' policy the second clause is this: "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 the consequences of hostilities or warlike operations by or against the King's enemies, whether before or after the declaration of war." Now, the War Risks Association say that this case does not fall within the terms of that clause. The facts giving rise to the question are extremely simple. The *Richard de Larrinaga* was going in an easterly direction in convoy not very far from the coast of the United States on the Atlantic side. His Majesty's ship *Devonshire* was proceeding from Halifax in Nova Scotia to Hampton Roads in Virginia for the purpose of picking up a convoy there, and the *Richard de Larrinaga* was run into by the *Devonshire*. There was a collision between the two vessels, and the damage took place which is the subject of the arbitration which has finally, on a case stated by the arbitrator, come before your Lordships. The award was stated in the form of a special case. The first paragraph states that the claim in the arbitration arose out of a collision between the steamship *Richard de Larrinaga* and his Majesty's ship *Devonshire* in the Atlantic on the 23rd July 1917. The second paragraph states: "At the time in question the *Richard de Larrinaga* was sailing in convoy at a speed of about six or seven knots an hour. In obedience to Admiralty orders she was exhibiting no lights. The night was very dark. The *Devonshire* was on a voyage to pick up a convoy of merchant vessels; she was making a speed of about twelve knots an hour and was exhibiting no lights. The two ships sighted one another at close quarters, and very shortly afterwards the collision occurred. A good look-out was being kept on each." Then the next paragraph in the case states that the question has been referred to Mr. Butler Aspinall, and the fourth paragraph states that by an interim award he had found that it was not established that either ship was to blame for the collision. The fifth paragraph states that the Marine Underwriters and the War Risks Association came before him afterwards for the determination of the question whether the collision arose from a marine or a war peril, and the sixth paragraph quotes the clause which I have already read from the policy itself.

Bailhache, J. in dealing with this matter, says this: "I do not think myself that very much is to be got out of the *St. Oswald* case (*sup.*). The *St. Oswald* case (*sup.*) proceeded, as the Court of Appeal pointed out in the *British India Company* v. *Green; The Matiana* (14 Asp. Mar. Law Cas.

513; 15 Asp. Mar. Law Cas. 58; 121 L. T. Rep. 559; (1919) 2 K. B. 670), upon admissions made by the Crown, which really, when once those admissions are made, seem to make the result in that case inevitable." As I have said in the *Ard Coasters* case, I think there is some misconception about that.—"Leaving that case out of account, so far as the authorities go I really think these propositions are established, 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 she collides with another ship, there the collision is due to a consequence of hostilities. The same is the case 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, that is a consequence of hostilities or warlike operations. The question which remains, and which is not absolutely covered by authority, is as to what was the position in such a case as this; where one of His Majesty's ships is sailing at night without lights, not at the moment actively engaged in actual warlike operations, such as patrolling and on the look-out for submarines or the actual convoying of ships, but she is proceeding to her station for the purpose of taking up her duties there as a convoying ship. Atkin, L.J. in the *Petersham* case, *British Steamship Company* v. *The King* (14 Asp. Mar. Law Cas. 404, 507; 15 Asp. Mar. Law Cas. 58; 121 L. T. Rep. 553; (1919) 2 K. B. 670), said this: '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.'" Bailhache, J. goes on: "I think myself 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."

In the Court of Appeal Bankes, L.J. expressed an opinion to the same effect: "I cannot myself draw any distinction, as I say, in principle between the facts of the *Ard Coasters* case and the present case. Mr. Raeburn has said, 'Oh, but the *Devonshire* was proceeding on a peaceful voyage with a view to later taking up a warlike operation.' I do not agree with that argument. I think a vessel proceeding to her station in order to take up a warlike operation is in fact at the time she is so proceeding engaged on a warlike operation." I entirely agree with the opinion expressed by both these learned judges. Part of a warlike operation consists in getting to the proper point for striking at the enemy if actual hostilities of that kind are the object of the expedition, or in proceeding to the point where the duty of undertaking the charge of a convoy is to take effect. Protecting convoys is a form of warlike operation; it is an operation in the course of war necessary to be performed by war vessels for the purpose of protecting the merchantmen. I cannot separate the proceeding under orders to the spot where the duty is to be discharged from the actual discharge of the duty itself; both form part of the warlike operation. It is just as much a part of a warlike operation to get your ships or your troops to the spot where a thing is to be done as it is to do it when you get to the spot. It is said, "Oh, there may be great difficulties in saying where the progress to the place of operation begins." Well, nice questions might arise in some cases, but it seems to me perfectly plain that when a war vessel is actually at sea, and is there because she is under orders to go to a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in that warlike operation because she is doing that which is necessary to get to the spot where the actual thing is to be done. For these reasons, it appears to me that the decisions of the courts below were right and ought to be affirmed.

Lord DUNEDIN.—I concur. In the *Ard Coasters* case I think the judgment may be put in a form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The *Tartar* was engaged in patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation.

In the other case I think it is necessary first to see exactly what has been already decided in the *Matiana* case (*British India Company* v. *Green* (*sup.*). I think the *Matiana* case was a clear decision to the effect that the escorting ship of a convoy is engaged in a warlike operation—the escorted ship is not. Here if the *Devonshire* had been the escorting ship, then the result in view of the *Matiana* case and the last case would be clear; the collision would be a consequence of a warlike operation. The *Devonshire* was not actually the escorting ship, and she was not actually convoying, but she was on a voyage to pick up a convoy; her commission to convoys covered her proceeding to the place where she was to pick up the convoy, and accordingly I think it comes within the decision in the *Matiana* case that she was engaged in warlike operations.

Lord SUMNER.—I agree. I think both the *Ardgantock* and the *Richard de Larrinaga* were lost in what were warlike operations and as the direct consequence of them. The *Tartar* was on patrol and so all her manœuvres in the course of that duty were warlike operations. One of these manœuvres was to starboard her helm just before this collision and she was irrevocably committed to it before she could see the *Ardgantock*. In continuing it she found the *Ardgantock* across her bows before anything could be done, and as part of the continuance of that warlike operation the *Ardgantock* was cut down. The absence of lights was only one of the conditions, not the direct cause of what happened. This case is distinguishable from those of the *Petersham* (*sup.*) and *Matiana* (*sup.*). The case of the *Richard de Larrinaga* is another illustration of the same position. His Majesty's ship *Devonshire* was proceeding on her duty of going to pick up a convoy through waters where convoying and navigation without lights were both necessary. There was a possible risk of the sudden appearance of enemy craft, and in the area of war the *Devonshire* would be found, if occasion arose, to take appropriate warlike action. We do not know the details, but I think we must take it that she ran into the *Richard de Larrinaga* because she was steaming on the particular course which she actually took as part of that warlike operation. It cannot at any rate be said that this cruise of the *Devonshire* was not a warlike operation. There may be action taken and effects produced by men-of-war in time of war which are not warlike operations, and no doubt operations in war and operations of war are not necessarily the same thing; but no exact definition of these terms is needed for this case, and I think this task had better

be left to those of your Lordships who may be sitting in the next war.

Lord PARMOOR.—I agree, and I desire to add nothing in the *Ard Coasters* case.

In the case of the *Richard de Larrinaga*, although concurring, as I do fully, in the opinions already delivered, I desire to add a few words. The cases referred to show that a warship may be engaged in a warlike operation though no attack upon or by the enemy is taking place or immediately impending. In this case a commissioned ship of war was at the time of the collision under orders to pick up a convoy of merchant ships and was on her way at sea to carry out these orders in accordance with her duty. Under these conditions she appears to me to be a ship engaged in a warlike operation. I should be prepared to endorse the view of Bailhache, J., founded on an opinion expressed by Atkin, L.J., in these words, "Indeed I think myself, agreeing, with respect, with what Atkin, L.J. says there, that almost any movement in war time at sea of one of his Majesty's ships is a warlike operation." It is not necessary to say that some exceptional conditions might not arise, but no such conditions are present in this case. The rest of the case appears to me to be covered by your Lordships' decision in the *Ard Coasters* case.

Lord WRENBURY.—There are two cases before the House. The principles applicable to each have, I think, been largely determined, or at any rate indicated, in the opinions expressed by your Lordships in the *Petersham* case, *Britain Steamship Company* v. *The King* (*sup.*). I take it that this is certainly decided—that an ordinary marine risk does not become a war risk because some regulation operative during and by reason of war renders the risk more serious. The question is whether the loss was occasioned by a new risk arising by reason of warlike operations. The first case with which your Lordships have to deal is this. The *Tartar* was engaged in a warlike operation. She was performing the duty of patrolling a certain area of the sea, going from north to south, then turning and going from south to north, and so on, from time to time. She was doing this in discharge of her duty as a vessel of war in order to deal with the possibility that there were submarines in the district with which it would have been her duty to engage if she had found them. While employed on that duty, having finished her beat in one direction, she was turning for the purpose of proceeding in the reverse direction.

The operation of turning was a necessary part of the warlike operation of patrolling that part of the sea. There were no lights, the night was dark, and in turning she fouled the course of the *Ardgantock*, which was proceeding along the coast, and a collision occurred. It is plain, I think, that the course of the *Tartar*, whether she was proceeding directly down the coast or whether she was turning for the purpose of going in the reverse direction, was equally a course taken in discharge of her duty as a ship conducting a warlike operation. If the two ships had met end on, and without anything to attach blame to either vessel and a collision occurred there can be no question, I think, about it. If a warship engaged in performing a particular duty of war, in the course of performing that duty without blame attaching to either vessel, comes into collision with another vessel in ignorance of her proximity because for precautionary reasons neither vessel is carrying lights, the collision results in consequence of her operation of patrolling and the loss is a loss in consequence of warlike operations. There can be no difference by reason of the fact that the ships did not meet end on, but that the *Tartar*, in discharge of her duty, was turning at the moment when the collision occurred. The Solicitor-General's argument, I think, if I seek to summarise it, really comes to this, that no doubt the *Tartar* was engaged in a warlike operation, but that the moment when she should turn, the direction in which she should turn and the place where she should turn were matters in her discretion; that she was not compelled by her duty as a ship of war to turn when she did or where she did or as she did. That is an argument which does not commend itself to me. It was her duty to turn somewhere, and, if in the ordinary course of her turning the result was a loss it appears to me that it was in consequence of her warlike operation. I do not think it is enough to say that the ship was a warship and was proceeding under orders given by naval authority. If, for instance, her orders were to go into dock to have her bottom cleaned or her boilers overhauled, and she was simply proceeding there, that might be one case. If, on the other hand, her orders were to go as fast as she could to a particular place to take part in an action which was proceeding or immediately expected, that is another case, and I should say that certainly she was on a war errand and engaged in a warlike operation. I do not think that the matter is to be tried by the fact that she is firing her guns or using her ram at the moment or anything of that kind. The question is: What is the duty she is performing at the moment? The particular facts in the second case that we have here to deal with are these. The vessel in question was under orders to go to a particular place to pick up a convoy of merchantmen. When she was conveying them certainly she would have been engaged in a warlike operation. I think that operation began when she took up the duty of going to the place where she was going to act. She was, I think, engaged in a warlike operation at the time the collision occurred. For these reasons I think the second appeal fails.

Solicitors for the appellant in the first appeal, *Treasury Solicitor.*

Solicitors for the respondents, *Charles Lightbound* and *Co.*

Solicitors for the appellants in the second appeal, *Thomas Cooper* and *Co.*, for *Hill, Dickenson* and *Co.*, Liverpool.

Solicitors for the respondents, *Charles Lightbound* and *Co.*

May 5, 6, *and July* 18, 1921.

(Before Lords FINLAY, DUNEDIN, SUMNER, PARMOOR, and WRENBURY.)

FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Time charter-party — Construction — Payment monthly in advance—Extension of charter beyond stipulated period — Frustration of adventure — Effect on payment of hire.

The appellants chartered from the respondents a steamer for four calendar months under a charter-party, which provided that the charterers should pay as hire a fixed sum per month, and pro rata, *for any fractional part of a month until re-delivery of the steamer to owners as therein stipulated, payment of hire to be made monthly in advance. Provision was also made for re-delivery of the steamer at a United Kingdom coal port. Should the steamer be on a voyage at the expiration of the period fixed by the charter, the charterers were to have the use of the steamer at the rate and on the conditions therein stipulated to enable them to complete the voyage, provided always that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter. In the event of a breakdown of machinery or other accident preventing the working of the vessel for more than twenty-four hours, the charter-party provided for the cesser of hire until she was again in an effective state to resume her services; but should the vessel be driven into port or to anchorage by stress of weather, and in certain other events the time so lost and expenses incurred were to be for the charterer's account, and in the event of the vessel being lost, the hire paid in advance or not earned was to be returned to the charterers, who were to have a lien on the steamer for all moneys paid in advance and not earned.*

The period fixed by the charter-party expired on the 10*th Aug.* 1919. *In the previous July the charterers had loaded the steamer at Antwerp with a cargo of coal for Toulon, intending that she should return to Great Britain with a cargo of mineral, but on the* 14*th July the Shipping Controller notified that after completion of her discharge at Toulon the steamer was required to go to Australia. The steamer proceeded to Toulon, but the discharge of her cargo was not completed until the* 16*th Aug., on which day the owners took delivery of their steamer at Toulon without prejudice to their rights, and under the requisition she was sent to Australia.*

The charterers claimed that they were only entitled to pay a fractional portion of a month's hire, namely, from the 10*th to the* 16*th Aug., when the steamer was delivered, and the question was referred to arbitration.*

Held, (1) *that the provision for payment in advance applied to the case of an extension of the charter-party beyond the stipulated period, and that, on the* 10*th Aug. a full month's hire was payable by the charterers; and* (2) (*Lord Finlay and Lord Wrenbury dissenting on this point*) *that there having been no re-delivery as prescribed by the charter, the charterers were not entitled to a* pro rata *adjustment by reason of the frustration of the adventure.*

Tonnelier *v.* Smith (8 Asp. Mar. Law Cas. 327; 77 *L. T. Rep.* 277) *explained and applied.*

Elliott *v.* Crutchley (90 *L. T. Rep.* 497; (1904) 1 *K. B.* 565) *applied.*

Dicta of Pickford, L.J. in Lloyd Royal Belge Société Anonyme *v.* Stathatos (34 *Times L. Rep.* 70) *considered.*

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

APPEAL from a decision of the Court of Appeal, affirming a judgment of Bailhache, J. upon a case stated by an arbitrator.

The question in the case was as to the amount due from the French Marine to the respondent company in respect of the hire of the steamship *Ardoyne* under a charter-party dated the 13th March 1919. Bailhache, J. and the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) held, on the authority of *Tonnelier* v. *Smith* (77 L. T. Rep. 277), that no part of the hire was returnable.

The charterers appealed.

Leck, K.C. and *G. P. Langton* for the appellants.

R. A. Wright, K.C. and *Jowitt* for the respondents.

After consideration, their Lordships, by a majority (Lord Finlay and Lord Wrenbury dissenting), dismissed the appeal.

Lord FINLAY.—The question in this case is as to the amount due from the French Marine to the respondent company in respect of the hire of the steamship *Ardoyne* under a charter-party dated the 13th March 1919.

The dispute was referred to arbitration, and the arbitrator made his award in the form of a special case, raising three questions, of which the third alone is now material:

3. Whether the French Marine were bound on the 10th Aug. 1919 to pay a full month's hire of the said steamer, or whether they were bound to pay only a fractional part of a month's hire for the period from the 10th Aug. 1919 until the steamer was re-delivered to the chartered owners.

The arbitrator awarded as follows:

That the French Marine are not and were not on the 10th Aug. 1919 liable to pay a whole month's hire on that date, but are and were only liable to pay to the chartered owners a fractional part of a month's hire from the 10th Aug. 1919 up to the date when the steamer was re-delivered to the chartered owners. . . . But this award is subject to the opinion of the court on the following special case, which is stated at the request of the parties.

The special case incorporated the charter-party. The charter-party was between the respondent company as owners of the steamship *Ardoyne* and the appellants, the French Marine, charterers. Clause 1 states that the owners agreed to let, and the charters to hire, the steamer for the term of four calendar months from the time when the steamer was placed at the disposal of the charterers. The following are the other clauses material to the present question:

5. That the said charterers shall pay as hire for the said steamer 25*s.* per ton deadweight, say 9250*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 re-delivery to owners as herein stipulated.

That the payment of the hire shall be made as follows: In London, in cash, without discount, monthly in advance to Ernest Bigland and Co. Limited.

In default of such payment or payments, as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the

charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers under this charter.

7. That the steamer (unless lost) shall be re-delivered on the expiration of this charter-party, in same good order as when delivered to the charterers (fair wear and tear excepted) at an ice-free port in charterers' option in a United Kingdom coal port. Charterers giving disponents of steamer seven days' notice of expected date of re-delivery between the hours of 6 a.m. and 6 p.m., but the day of re-delivery shall not be a Sunday or legal holiday, always unless owners agree to take re-delivery earlier.

The charterers to give the owners not less than ten days' written notice at which port and on about which day the steamer will be re-delivered.

Should the steamer be on a voyage at the expiration of the period fixed by this charter, the charterers are to have the use of the steamer at the rate and on the conditions herein stipulated to enable them to complete the voyage, provided always that the said voyage was reasonably calculated to be completed about the time fixed for the termination of the charter.

Money in dispute to be deposited in the joint names of the parties to this charter-party with approved bankers at the place of payment of the hire until the dispute has been settled by the arbitrators.

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; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account.

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.

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.

31. Should steamer be in a position to give re-delivery under this charter within ten days before the expiration of the stipulated charter period of four months, disponents agree to accept re-delivery then. If the steamer should be in a position to give re-delivery at an earlier date than ten days before the expiration of the stipulated charter period, charterers have the right to arrange for the steamer to perform a voyage reasonably calculated to be completed within ten days after the expiration of the charter period.

The special case then proceeds to make a statement of the facts, which may be summarised as follows:

The steamer was placed at the disposal of the charterers on the 10th April 1919. In consequence of a letter from the British Shipping Controller of 16th June 1919 the charterers caused the *Ardoyne* to be loaded at Antwerp with a cargo of coal for Toulon with the intention that she should return to Great Britain with a cargo of mineral. After the vessel was so loaded there was correspondence between the British Ministry of Shipping and the charterers by letters of the 9th, 10th, and 14th July 1919, all of which are set out in the case. What ensued is stated in pars. 5 and 6 of the case:

5. On the 14th July 1919 the Shipping Controller issued his licence in respect of the *Ardoyne* for a voyage from Antwerp to Toulon with a cargo of coal, and endorsed the licence with the following words: "Thence Australia to load for Royal Commission on Wheat Supplies."

6. The *Ardoyne* accordingly proceeded from Antwerp to Toulon and delivered her cargo of coal at the latter place, and the French Marine gave notice to the chartered owners that on completion of the discharge of her cargo at Toulon the *Ardoyne* would be re-delivered to the chartered owners as they were prevented by the action of the Shipping Controller from bringing the ship back to the United Kingdom with a cargo of ore as had been intended. The chartered owners disputed this view, but in order to save waste of tonange and without prejudice and reserving their rights, took delivery of their steamer at Toulon from the French Marine on the 16th Aug. 1919. The steamer then proceeded on her Australian voyage pursuant to the directions of the Shipping Controller.

In the 10th par. of the case the arbitrator says:

I am of opinion and, so far as questions of fact are involved, find as follows:—

(*a*) That the commercial adventure contemplated in the charter-party of the 13th March 1919 was frustrated as from the 16th Aug. 1919 by the direction of the Shipping Controller that the said steamer should proceed to Australia to carry from there a cargo of wheat for account of the Royal Commission on Wheat Supplies.

(*d*) That the French Marine were therfore justified in re-delivering the steamer to the chartered owners at Toulon on completion of the discharge of the coal cargo.

(*e*) That the French Marine are not and were not on the 10th Aug. 1919, liable to pay a full month's hire of the steamer on that date, but are and were only liable to pay a fractional proportion of a month's hire from the 10th Aug. to the 16th Aug., when the steamer was re-delivered as aforesaid.

The question for the opinion of the Court is stated as being whether his opinion expressed in par. 10 so far as it involves questions of law is right.

It is obvious that the arbitrator's finding means that the owners of the vessel are entitled, in respect of the period from the 10th Aug. onwards only, to hire from the days from the 10th to the 16th Aug., and I shall deal with the case on this footing. The question cannot be read as relating only to a provisional payment on the 10th Aug. subject to liability to account. The real question is as to the rights of the parties with regard to the final payment.

The answer to the question raised by the case must depend upon the construction to be put upon the charty-party.

The term of the charter-party is four calendar months (clause 1). The hire (clause 5) is 9,250*l.* per month and *pro rata* for any fractional part of a month until her redelivery to owners as stipulated. The payment is to be in London in cash, payable monthly in advance, and in default of such payment the owners may withdraw the steamer.

The first question that arises is whether the provisions of clause 5 for payment of the monthly hire in advance apply in cases of an extension of the charter-party beyond the four months certain. That this was a very debatable point is shown by the fact that while Lord Esher and

Rigby, L.J. answered this question in the affirmative, two judges of wide commercial experience (A. L. Smith, L.J. and Mathew, L.J.) answered it in the negative (*Tonnelier* v. *Smith*, 8 Asp. Mar. Law Cas. 327; 77 L. T. Rep. 277). Whatever view I might have been disposed to take upon this point, if it were a new one, I think we ought to follow the decision of the majority of the Court of Appeal given in that case nearly a quarter of a century ago. It has no doubt been acted upon since then, and, apart from the fact that it was given by a court of very high authority, I do not think it would be right to depart from the practice as settled by that case, as innumerable charter-parties must have been entered into on the view that that decision was good law.

For these reasons I think we ought to hold, as the Court of Appeal held in 1897, that the whole of the monthly hire was payable in advance on the 10th Aug., but it appears to me clear, upon the charter-party and on authority, that any such payment is provisional merely, and if, at the end of the period, it is found that less hire has been earned, the owner must account for the excess to the charterer. This was so held in express terms by the Court of Appeal in the case which I have just referred to (*Tonnelier* v. *Smith*), and it was on this basis that the Court of Appeal arrived at the conclusion that the monthly hire was payable in advance under such an extension.

Apart from authority, how does this question stand upon the terms of the charter-party?

The hire was for a calendar month 925*l.* and for any fractional part of a month *pro rata*. If the use under the charter-party is only for a portion of a month, the hire is according to the number of days computed *pro rata* on the basis of 925*l.* for the whole month. Whenever there is a broken month the hire is less in proportion. It would be extraordinary if when during any month the hire earned under the charter-party is, say, 2000*l.*, being *pro rata*, the owner should be entitled to retain the whole month's hire, 925*l.*, which has been paid in advance. There might be a bargain to this effect, but very clear words would be necessary to compel such a construction. If it appears when the month in question ends that the user has been for a week only, surely the reasonable view is that the owners must pay back three-fourths of the whole month's hire which they received in advance.

Payment in advance is highly expedient, for in many cases if the money be not paid in advance it may be very difficult to enforce payment by the charterer, who may belong to a foreign country and not be amenable to English law. The payment in advance is really intended to secure the owner. The right of the charterer to repayment of the amount paid in advance in excess of what is earned does not rest merely upon special provisions in the charter-party as to particular cases. It rests upon the provision of clause 5 that if there has been less than a month's use the payment is to be in proportion only. Certain special cases are particulraly dealt with in the charter-party, but the enumeration is not exhaustive; wherever there has been a provisional payment in advance for a month if it be found that less has been earned during the month the recipient must account for the excess.

One of the commonest cases in which the vessel is used for a fraction of a fresh month after the expiration of the period of the charter-party would be when from some accidental cause she does not reach the home port for redelivery to the owner till some time, say, a week after the time fixed in the charter-party has expired. A whole month's hire is paid in advance when the month begins, but the owner can keep only what represents a week's hire. The right to the return on this case is not expressly given in the charter-party, but it follows from the terms of clause 5.

A second case receives special treatment. If a vessel is on a voyage at the expiration of the period fixed by the charter-party the charterers are to have the use of the steamer to complete the voyage on the chartered terms, which include payment *pro rata*, provided the voyage was reasonably calculated to be completed by the time of the termination of the charter (clause 7, 3rd sentence). It is obvious that this is intended to provide for voyages other than the mere voyage home for redelivery, which requires no special provision.

A third case is that dealt with by clause 12. If there is loss of time from deficiency of men or owner's stores, breakdown of machinery or accident preventing the working of the steamer and lasting for more than twenty-four hours, the hire ceases till she is in an efficient state to resume her services. A corresponding amount would have to be accounted for when the amount of hire up to the end of the month is settled. The right is obvious, though there is no express provision for it. On the other hand, the concluding part of clause 12 provides that in case of loss of time owing to the vessel's being driven into port or having to anchor by reason of bad weather or detention by bars in shallow water, &c., the time lost is to be for the charterers' account.

A fourth case is dealt with in the charter-party, that of the steamer's being lost or missing, and it is provided that the hire is to cease from the time she was last seen or spoken to. This is the case dealt with by clause 18, and it is only here that the words are added, "and hire paid in advance and not earned shall be returned to the charterers." We were informed during the argument that this form of charter-party has grown gradually and has been altered from time to time. We do not know how these words came to be inserted here and here only, but it cannot be seriously contended that this is the only case in which the owner is to account for hire which he received in advance but has not earned. I think that this sufficiently appears from the scope of the clauses to which I have already referred.

Further, the terms of clause 21 show that the charterers have, under the charter-party, this right to a return of moneys paid in advance and not earned. I have endeavoured to show that clause 5 and other clauses preceding this clause 21 conferred this right in all cases. Clause 21 recognises the existence of this right and gives a special remedy for its enforcement by providing that the Charterers "are to have a lien on the steamer for all moneys paid in advance and not earned."

A good deal of confusion had been introduced into this case by the argument put forward for the respondents that it is a case of "frustration," and that it is to be governed by rules laid down in some cases where there has been "frustration of the adventure" owing to some unexpected event. The truth is that this is simply a case

in which the action of the British Government in requisitioning the vessel prevented the owner from being able to give to the charterers after the 16th Aug. the use of the vessel. The case need not be encumbered by the discussion of rules which have been laid down for cases in which some supervening event so profoundly modifies the circumstances affecting a contract as to justify its being treated as at an end. All that has happened here is that as the British Government took the vessel out of the hands of the owner he could not go on giving the charterers the use of it. As he could not give the use of the vessel after the 16th Aug. the freight ceased to be payable. After the 16th Aug. no freight could be earned by him with the *Ardoyne* from the French Marine for the reason that the vessel was employed by orders of the British Government in earning freight for the owner, by carrying wheat from Australia at remuneration given by the British Government. That remuneration may be adequate or inadequate. With that we are not concerned. What is certain is that this employment of the vessel prevented the owner from giving the use of the vessel under the charter-party to the French Marine for more than a fractional period of the month. The freight ceased with the cesser of the use of the ship.

I have endeavoured to show that upon the construction of the charter-party the payment of the month's hire, 925*l.*, on the 10th Aug. was purely provisional and subject to account at the end of the user during the month ending the 10th Sept. This very point was decided in the case of *Tonnelier* v. *Smith* (*sup.*). In that case the charter-party provided that the charterer should pay for the hire of the vessel at the rate of 700*l.* per calendar month from the time she came on hire and at the same rate for any part of a month, hire to continue until her redelivery to the owners unless lost, payment of the said hire to be made in cash in London monthly in advance. The term of the charter-party was for the time required for performing a round voyage out and home with an option to continue the charter for a further period of one second round trip. This option was exercised, and the vessel arrived at Middlesbrough, her final port of destination on the second round voyage, on the 13th Jan. A fresh month of hire was begun on the 19th Jan., and the shipowner demanded payment on that date of 700*l.*, a whole month's hire. The charterers tendered a sum representing hire up to the 28th Jan., by which time he reckoned the vessel would be discharged and ready for delivery. Mathew, J. held that the charterers' contention was right. "The charterer," he said, "must calculate what the sum is likely to be, and pay it to the owners; if too little the charterer is liable for the balance." The case went to the Court of Appeal. A. L. Smith, L.J. agreed with Mathew, J., but the majority of the court, Lord Esher, M.R. and Rigby, L.J., were of the contrary opinion, and held that the shipowners were entitled to have full payment of a month's freight made on the 19th Jan. They give as a reason that the payment was provisional only and subject to adjustment according to the time actually taken. Rigby, L.J. in delivering the judgment of Lord Esher and himself, after referring to the terms of the charter-party (which are very similar to those of the charter-party in the present case), went on to say as follows: "The last provision that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid—a right which would effectually secure prompt repayment of those amounts. The special provision for repayment in case of loss is intended to fix readily the actual amount to be repaid, and cannot be construed, regard being had to the lien on ship given to the charterer in respect of all unearned payments, as limiting repayments to the sole case of loss. The provisions in favour of the owners, first, for advance payment of freight, and, secondly, for lien on cargo and subfreights, were plainly intended to relieve the owners as far as possible from the necessity of having to bring a personal action against the charterer, and may have the more importance when, as here, the charterer is a foreigner and might have to be sued, if at all, in his own country. 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. The ship might be disabled or even lost just after the date fixed for the monthly payment, and then only a day's freight might be earned. Even when it appears probable that only a day's freight will be earned some circumstance—as, for instance, a strike—may intervene to delay the date of discharge and delivery up, and in the result a whole month's freight may, after all, be earned. The greater or less degree of probability of the happening of the events which will determine how much freight is to be earned is nowhere referred to in the contract, and can scarcely afford a rule for construing it."

The whole of this last passage from the judgment of the Court of Appeal is exactly in point upon the construction of the charter-party in the present case. The judgment of the Court of Appeal proceeds on the ground that the payments in advance are provisional only and not final, and that the charterer would be entitled to postpone delivery of the ship until the unearned payments were repaid, and that the special provision for repayment in case of loss cannot be considered, regard being had to the lien on the ship given to the charterer in respect of all unearned payments, as limiting repayments to the sole case of loss.

I have given my reasons for thinking that this conclusion is correct, and that it is so appears to me to follow not merely from the provisions specially referred to by Rigby, L.J., but from the whole frame of the charter-party under which, when the hire is for a fractional part of a month, the payment is to be proportionately reduced. It would require a very strong case to justify us in departing from the practice sanctioned by the decision of the Court of Appeal in 1897.

I desire to add a few words as to one suggestion which was thrown out in argument—namely, that there had been no delivery of the ship as stipulated in the charter-party, so that the right to hire would run on after the requisition. It is true that payment of hire was by the terms of clause 1 to go on until re-delivery of the ship to the owners, as stipulated in the charter-party. The requisi-

tioning of the *Ardoyne* by the British Government, however, would obviously, on possession being taken under the requisition on behalf of the British Government, amount to a determination of the possession of the charterers and a transfer of possession to the British Government on the terms of their requisition and under any liability to the owners which the requisition entailed. The owners themselves took delivery of the steamer at Toulon, but without prejudice, and reserving their rights, and the vessel proceeded from Toulon on her voyage to Australia under the orders of the Shipping Controller on behalf of the British Government. It seems to follow that with this delivery the hire under the charter-party must have stopped running.

I have already referred to the use that has been made of the phrase "frustration" with reference to the cesser of the user of the *Ardoyne* as an argument for leaving the owner in possession of the whole 9250*l*. It was said that when an adventure is "frustrated" things must remain as they are, that the money remains with the man who has it, that the contract is gone, and therefore that there is no right to have any part of the month's hire returned. The distinction between the present case and such "frustration" as was deemed to have occurred in the group of cases called the "Coronation Cases" is obvious. In those cases the payments had been made not provisionally but absolutely, and the person who had received the money was held entitled to keep it after the "frustration." In the present case the payment was provisional and subject to adjustment according to the time during which the hire might last. "Frustration" cannot convert a provisional payment into an absolute one. If it did it would not leave the parties in *statu quo* but would make a most material alteration in the position of the person who had paid the money. The very act of requisition relied on as a "frustration" put an end to the hiring, as the ship was taken from the charterer and handed over to the British Government. The requisition made it impossible that the hiring under the charter-party should continue beyond the 16th Aug., and it follows that the charterers are liable only for six days in August.

In my opinion the French Marine were bound to pay a full month's hire of the steamer on the 10th Aug. 1919, but this payment would have been provisional only, and in the events which happened they are only liable to pay a fractional proportion of a month's hire—namely, from the 10th Aug. to 16th Aug., when the steamer was re-delivered under the circumstances I have stated.

In my opinion the appellants substantially succeed, and should have their costs on this appeal and in the courts below.

Lord DUNEDIN.—Strictly speaking, the question put by the umpire is limited to the determination of whether the appellants were liable on the 10th Aug. to pay a month's hire in advance. *Tonnelier* v. *Smith* (8 Asp. Mar. Law Cas. 327; 77 L. T. Rep. 277) decided in a case for all practical purposes the same as the present as regards the phraseology of the charter that the payment must be made. I agree with your Lordships that, though not technically binding, the case of *Tonnelier* has ruled practice so long that it ought not to be disturbed unless we thought it was clearly wrong. I cannot say that. Further, I think it is unavailing to distinguish *Tonnelier's* case from the present on the ground of the provision in clause 7 that money in dispute should be deposited in a bank. On the 10th Aug. there was no reason to hold that any money was in dispute, and further, the clause has ample justification in regard to disputes as to coals and other matters of the same sort.

The case, however, has not been confined within these strict limits. Assuming that the full month's hire ought to have been paid in advance on the 10th Aug., yet upon the doctrine which is conveniently expressed by the brocard of the civil law, *frustra petis quod mox es restiturus*, if it can be shown that the appellants would have been entitled to get repayment of that portion of the month's hire which corresponded to the period after the 16th Aug. when the ship was taken away from them by the action of the Government, then it would be useless to give judgment to the respondents for more than the sum corresponding to the period from the 10th to the 16th. And it is on these lines that the courts below have proceeded, though they have held that inasmuch as no such right would have accrued to the appellants, judgment ought to be given for the full amount.

I do not shrink from saying that I have found this question one of extreme difficulty, as to which my opinion has repeatedly wavered. It has been rendered all the more difficult by the very slight assistance which is to be derived from the opinions of the learned judges below. I do not say this by way of criticism; it is rather a piece of evil fortune.

As to the first point, they were bound by the judgment of *Tonnelier*, and so far there is no more to be said.

As to the second point, it is not mentioned in two of the judgments, but I assume that the learned judges proceeded on the ground explicitly stated by Scrutton, L.J., namely, that they were bound by *Lloyd's Royal Belge* v. *Stathatos* (33 Times L. Rep. 390; 34 Times L. Rep. 70). They were so bound, and that prevented them doing what they would otherwise have done—arguing the case on its merits. Then, when I consider *Stathatos*, I am scarcely better satisfied. There is, indeed, a carefully argued judgment by Atkin, J., but when I turn to the Court of Appeal the judgment is put on a ground which is either ill reported, as has been said by Lord Finlay, or is, I think, clearly erroneous. That ground is that you could only recover under the contract, and that as the contract is no longer existent owing to what is termed frustration, there is no basis on which you can reach re-payment. It is useless to cite the numerous cases which have recently arisen and have been decided, several of them in this House, as to what happens when the performance of a contract according to its terms is rendered impossible by a *vis major*. It is nowhere laid down that the contract is non-existent. There is no liability in respect of non-performance in the future; but accrued rights remain untouched and enforceable. There is no better *reductio ad absurdum* of the other proposition than is to be found in the present case. If the contract is non-existent for all purposes of recovering money under it, then, inasmuch as the appellants here did not *de facto* pay anything on the 10th Aug., the respondents can get nothing from them now and no question of repayment arises.

The question must therefore, in my opinion, be thus approached: On the 10th Aug. the respondents were bound to pay a month's hire; on the 16th Aug. the further performance of the contract became impossible. Was there or was there not an accrued right on the appellants' part to get repayment of such portion of the hire paid on the 10th Aug. as did not, as we conveniently term it in Scotland by a word which is wanting in English, "effeir" to the period from the 10th to the 16th Aug. The sheet anchor of the appellants' argument is the expression used by Rigby, L.J. and the Master of the Rolls in *Tonnelier's* case, that the payment in advance is "provisional"; coupled with the admission which had to be given by the respondents' counsel that had there been a delivery at a coal port in the United Kingdom in the ordinary course on the 16th that sum would have been recoverable. I confess I was much moved by that argument, but on further consideration it appeared to me that the word "provisional" might be too hard pressed. I do not think that by terming the payment "provisional" the learned judges meant to say that the payment in advance was not really a payment, but only a deposit, leaving the question of payment over. The payment in advance is truly payment, but it can only be a payment of what the contract says is earned. Now, the payment earned by the contract is freight for use till re-delivery of the ship in terms of the contract; on delivery, freight ceases, consequently the money paid in advance in so far as it does not represent freight earned, became mere money had and received, and, as such, recoverable. This was the result in *Tonnelier's* case.

Now, in the present case there was no re-delivery in terms of the contract, and consequently freight in terms of the contract never ceased. In each and every case that was thought of there is a substantive provision for the ceasing of freight. There is the case of re-delivery (clause 5), there is temporary inefficiency (clause 12), there is loss of the steamer (clause 18). The addendum to clause 18, that hire not earned shall be returned, neither helps nor hinders the argument, for the right to get return is conceded when there is re-delivery, and I take it would have to be conceded when there was a partial operation of clause 12. The case that has happened was not thought of, and consequently there is no provision for the cessation of hire in that event. No doubt, the inability to re-deliver is due to no fault of the appellants; that, however, has no effect one way or the other on accrued rights. The "Coronation" cases here come to be in point.

The situation, therefore, stands thus: The payment in advance has accrued and has been made good. A right to stop the hire after re-delivery or during such temporary inefficiency, or after loss, has not accrued, for none of these events has happened; and no right has accrued in respect of an event which was not mentioned.

I proceed entirely on the words of the contract. The general consideration that hire is *prima facie* the consideration for use does not move me; the same might be said of bill of lading freight when payment stipulated for and made in advance cannot be recovered though the goods are never delivered owing to loss at sea.

For these reasons, I think that the appeal falls to be dismissed, and I move accordingly.

Lord SUMNER.—In strictness, the umpire's question, which has now to be answered, is concluded by *Tonnelier* v. *Smith* (8 Asp. Mar. Law Cas. 327; 77 L. T. Rep. 277). He states his opinion to be "that the French Marine are not, and were not on the 10th Aug. 1919, liable to pay a full month's hire of the steamer on that date, but are and were only liable to pay a fractional proportion of month's hire from the 10th Aug. to the 16th Aug.," and leaves it to the decision of the court to say whether this was right in law or not. Further, in reciting the issues raised between the parties and the submission made by the charterers, he confines himself to the words "were not on the 10th Aug.," omitting any reference to present liability. Now *Tonnelier* v. *Smith* decided that, if payment was not made, the remedy by lien was exercisable by the shipowner on the day on which payment of a month's hire was due in advance; that is to say, that the full month's hire was then due and payable. So far that decision would conclude the matter. The first question, therefore, is whether *Tonnelier* v. *Smith* is either distinguishable or wrong; but the courts below have allowed the case stated to be treated loosely, so as to raise the further question, whether by reason of events happening after the 10th Aug. and involving what the umpire calls "frustration" of the commercial adventure, only the sum to be paid can be reduced to an amount representing the time from the 10th Aug. to the 16th Aug., and this accordingly forms the second question.

Tonnelier v. *Smith* (*sup.*) has so long been acted upon in the time-chartering business and has been followed in such a multitude of settlements of ships' accounts, that, unless it is manifestly wrong, it ought not to be overruled. Personally, I think the issue in that case was rightly decided, but some sentences in the majority judgment—incautious perhaps and wanting in clearness—have been, as it seems to me, much misunderstood. In that case the ship had reached the port of redelivery, and there it was that a dispute arose in view of the high probablility that the discharge would not occupy a month. The case of "frustration" of the further performance of the adventure was not before the minds of the Court of Appeal at all. To read the words "the payments in advance were to be provisional only and not final" as deciding, that in all events whatever, in the event of frustration as well as in that which was the origin of the actual dispute, a repayment could be claimed, if the use of the ship was not enjoyed for a full month, is, in my view, to disregard both the reasoning of the judgment and the occasion on which it was delivered. The charter contained express words applicable to the particular case and the Court of Appeal construed them. They were "at and after the same rate for any part of a month, hire to continue till her redelivery." They were held to be an express provision for a payment in advance, which was not final. True it was that in terms repayment was only stipulated for in that charter once, in another clause and in another event—namely, loss of the ship, but to give the charterer the security of a lien on a ship, which was lost, would be meaningless. Other cases of repayments to the charterer were evidently contemplated, and the case before the court, covered by the words above quoted, was one of them. The difficulty of reading this lien as

meaning that the charterer can refuse redelivery of the ship and yet not be under a continuing liability for further hire is obvious, and lien on the ship in the strict sense he had none. In the present case also the ship never was out of the possession of the owners, whether chartered or actual. There may have been no demise to the chartered owners; there certainly was none to the charterers. The ship sailed for Australia in the same unchanged possession as that in which she arrived at Toulon. I reserve any opinion as to the meaning and effect of this so-called lien, but the use made of it by the Court of Appeal in *Tonnelier's* case is simple enough. The judgment goes on to dismiss the charterer's contention, that in the event which had happened all he had to pay was hire estimated *pro rata*, on the ground that the charter contained no provision for any estimate, clearly showing that the court held the rights of the parties to depend on the actual provisions of the contract. If the court had meant that in a time-charter all advance payments of hire are provisional or conditional, they need not have dwelt on the lien clause or have explained the object of the loss clause. To say that, apart from the circumstances of that dispute, the court then held that any such payment is provisional merely, and that, if at the end of the period a less amount of hire proves to have been earned, the owner must account for the excess to the charterer, to my mind imputes to Esher, M.R. and Rigby, L.J. a proposition equally irrelevant and wrong, for it means that they did not consider the rule *Expressum facit cessare tacitum* applicable to a time-charter. Payment means payment. Without some provision, expressed or necessarily to be implied from the expressions used, there is no right to repayment except such as the law gives. Here there was no total failure of consideration but a partial failure only, for which in law no *pro rata* repayment could be claimed. The right to repayment, in the events which happened, has to be found in the charter, and the fact that, in one form of words or another, the charter provides for repayment in certain named events is good ground for saying that in other events repayment is not provided for. This, in my view, is all that Rigby, L.J. said or was warranted in saying, and it fails to carry the appellants home.

It was ingeniously agrued that *Tonnelier* v. *Smith* (*sup.*) might be distinguished from the present case, because this charter contains a provision that money in dispute is to be deposited in joint names, but I think there is no substance in the point. If a dispute arises, it must go to arbitration, and the party from whom a payment is claimed must, so to speak, pay it into court. This is the most that can be made of the clause; perhaps it means no more than this, that, if there is a sum received from strangers by one party, to which both lay claim, it is to be deposited *in medio* to abide an award. In no case can it mean that if one party disputes his liability to pay money to the other, he can deposit the money in joint names and so discharge himself from an actual obligation to pay according to the contract. The clause refers to security and procedure only, not to liability.

It will not be disputed that the charter and the charter alone must be the source from which any right to a repayment or reduction of hire is to be derived. The umpire has found as a fact, that on the 16th Aug. further performance on either side was frustrated. The term may not be the best, and it has been doubted—though not in the most recent cases—whether "frustration" applies to a time-charter, when the chartered period has not expired and the ship has not been lost. The result, however, is plain. From the 16th Aug. both parties were released from further performance, but both remained bound to perform such things as they had become bound to before that date. What provision, then, does the charter contain?

There can be no doubt that on the 10th Aug. the full sum of 9250*l.* was due and payable in advance, and it was not paid. The words applicable are these: "The payment of the hire shall be made . . . monthly in advance" and "the" hire (not merely hire) is 9250*l.* per calendar month and *pro rata* for any fractional part of a month, payable "as hire . . . until her redelivery to owners as herein stipulated," that is, at a United Kingdom coal port. No one could then tell for certain the date of re-delivery. A strike of dock labourers at Toulon might cause such delay as to make another month's hire fall due on the 10th Sept. On the other hand, the ship might be re-delivered at almost any time after fourteen days, or might break down or be lost within the month. The charter provides for these three cases, but for the case of frustration, which happened, it makes no provision at all. The words "*pro rata* for any fractional part of a month" refer only to a period of time terminating with re-delivery as stipulated and not to any other period. The period from the 10th to the 16th did not terminate with re-delivery as stipulated. A portion of a month terminating with the loss of the ship and a period the currency of which is suspended by a breakdown and renewed on further readiness for service, are expressly provided for elsewhere and otherwise. It is true that on the 10th Aug. such rights as these provisions involve were rights which the charterers were entitled to enjoy, but they were entitled to enjoy them only in the events upon which the charter makes them contingent. If the ship occupied only a fractional part of thirty days in reaching her port of re-delivery and in being tendered to the chartered owners there, if she lost time from any breakdown within clause 12, if she was lost or missing, then, but not till then, the terms of clauses 5, 12, or 18, as the case might be, would become applicable. In fact, on the 16th Aug. further performance of this charter on either side became impracticable, because the ship was requisitioned, and the charter was silent about the consequences. The legal rights thereupon arising are those stated by Collins, M.R. in *Elliot* v. *Crutchley* (90 L. T. Rep. 497; (1904) 1 K. B. 565, at p. 568) "in the absence of any special provision made by the parties with reference to the contingency of further performance of the contract becoming impossible, moneys paid in accordance with the terms of the contract must remain where they are when that contingency occurs; the party who has paid them, and by the contract was bound to pay them, cannot recover them back, but, as regards future liabilities, the contract is at an end." I cannot see why these words should be less applicable to a case where the contingency has occurred during and not before

the commencement or performance of the contract, or what distinction can be drawn between the obligatory directions of the Shipping Controller, for which unexpected event this pre-war form of charter made no provision, and the unexpected cancellation of the Coronation Procession.

It is no doubt true that the object of payment in advance is to secure the chartered owner in dealing with a foreigner, but that is no measure of the meaning of the stipulation which requires it. I daresay that in some events to require payment in advance is stringent, but the debtor takes his chance and in most cases covers himself by insurance. This obligation cannot be measured by such considerations, nor is any special perspicuity necessary to the expression of it. In the case of prepaid bill of lading freight and of chartered freight for a voyage paid in advance, the risk is run every day and the law is clear; the loss of ship and cargo next day leaves the money prepaid in the receiver's hands. The reason is because payment is to be "in advance"; it is not also stipulated to be "on account." The money is not deposited, it is paid. Here the charterers got six days' service, at any rate, for their money, and when, on the 16th Aug., the further service was frustrated, the chartered owners reserved all their rights and the ship's service ended at Toulon. This was the charterer's misfortune; it was not the chartered owners' fault. The parties had made no provision for the event, and, if a court were to make compensation to the charterers at the chartered owners' expense by taking a mere proportion of a month's hire, several important stipulations would be overlooked and injustice would be done. Under this charter the charterer has to pay hire from the date when the steamer is placed at his disposal till he re-delivers her at the stipulated port of re-delivery in same good order as when delivered to him, and not on a Sunday or legal holiday. The length of this period cannot be fixed exactly in advance, and, therefore, all time charters have to be made with a certain elasticity in the charterer's interest. In this case the period was four months plus any further time needed to complete a voyage current on the expiry of the four months. It is a fallacy to suppose that this results in a hiring consisting of separate and disparate periods, to which different considerations apply. The period of hiring is one and continuous, though it is longer or shorter according as the ship is or is not on a voyage at the expiration of the four months, and, in fact, this last part of the hiring is expressed like the other to be "on the conditions herein stipulated." In this way the owners not merely get hire for the ship's use but, under clause 3, they are freed from a large part of the costs of bringing her back to a convenient port of re-delivery, such as coals, port charges, pilotages, tug-assistance, &c. The relevance of this is that, if there were a simple refund of hire paid in advance, proportionate to the number of days during which the ship was not at the charterer's disposal because she had been requisitioned and the charter "frustrated," the owner would be returning too much, for he would be getting no compensation for the loss of the advantage of having her brought home in large part at the charterer's expense, although he himself was in no default under the charter.

I would venture to ask this question: If clause 5 provides generally for a readjustment of a provisional advance by repayment of hire not earned, or if the hire, which is to be paid in advance under clause 5, means only hire for an efficient vessel placed at the charterers' disposal and does not extend to hire for a vessel not placed at their disposal, why are the clauses as to breakdown and loss of the ship required at all? The former is otiose; the latter should have been confined to the words prescribing the date for presumption of the loss. I agree that, if at the date of prepayment the charterers had a general right to have their advance payment readjusted in all events, for any fractional part of the month during which the ship might not prove to be at their disposal from any cause, the subsequent frustration would not defeat that right, but I fail to see how such a meaning can be extracted from the words of the charter. The charterers were relieved from having to bring the ship back to England to a coal port of their selection; they had no more hire to pay, no more bunkers to provide, but that is all. The word "hire" does not mean a payment commensurate with user; indeed, it is expressly provided that hire is not recoverable, when the opportunity for using the ship fails because, though efficient *per se*, she is weather bound and so of no use to anybody. Where a fractional payment constitutes hire, the charter says so; when advance payments are to be repaid, it says so; when it makes no provision in terms, none can be supplied by your Lordships. Where is there any provision for repayments in the event of frustration? The shipowner was thereby excused from earning his hire; why is he, nevertheless, required to repay it? The judgments of four learned judges of great experience in these matters have been given in favour of the respondents. After a careful re-examination of the matter I believe them to be in accordance with the current of authority in these matters for many years, and to be right.

Lord Parmoor.—This is an appeal from the order of the Court of Appeal of the 17th June 1920, affirming an order of Bailhache, J. to the effect that a full month's hire was payable to the respondents under the terms of a time charter-party, dated the 13th March 1919, between the respondents as owners of the steamship *Ardoyne*, and the appellant as charterers. The order of Bailhache, J. was made on an award, in the form of a special case, in an arbitration under the terms of the charter-party. The owners and the charterers submitted certain points of law to the umpire, but the only question now left in dispute is, whether the umpire was right in awarding that the French Marine were not on the 10th Aug. liable to pay a whole month's hire, but were only liable to pay a fractional part thereof. It is not disputed that the commercial adventure, contemplated in the charter-party, was frustrated as from the 16th Aug. 1919, by the direction of the Shipping Controller, that the steamer should proceed to Australia, to carry from there a cargo of wheat for account of the Royal Commission on Wheat Supplies.

The charter-party in question is a time charter party. The charterers, under clause 5, undertake to pay hire monthly in advance, in cash, in London, without discount until re-delivery of the ship to the owners. Re-delivery under the terms of the charter was made impossible after the frustration of the commercial adventure by the direction of the Shipping Controller. The provision "*pro rata* for any fractional part of a month" is a provision

applicable when the ship has been re-delivered at such time, or under such conditions, that an adjustment of the amount of hire is necessitated under the terms of the charter-party. In this sense the amount paid in advance is a provisional payment, and if this is the meaning of the decision in *Tonnelier* v. *Smith* (8 Asp. Mar. Law Cas. 327; 77 L. T. Rep. 277) I am in agreement with the Court of Appeal in that case. It is necessary, therefore, further to consider whether at the date of the frustration of the contract any right of *pro rata* adjustment had accrued. It had not, I think, accrued either under the re-delivery clause, the breakdown clause, or the loss of steamer clause. The ship was on voyage at the expiration of the period fixed by the charter, but under clause 7 the charterers are to have her use at the rate, and on the conditions therein stipulated to enable them to complete the voyage; that is to say, on the payment of the monthly hire in advance, subject to any provisions in the charter for *pro rata* adjustment. The provision in clause 7, as to the deposit of money in dispute, has no application to the matters in dispute in the arbitration, and I cannot find that either party placed any reliance on this provision. There is no suggestion of a breakdown under clause 12, or of the loss of the steamer under clause 18. Under the terms of the charter there has been no re-delivery of the ship within the terms of the charter-party, such re-delivery being rendered impossible by the direction of the Shipping Controller, which frustrated the commercial adventure.

When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded *ab initio*, but the parties are released from further performance. Thus any payment previously made and any legal right previously accrued according to the terms of the agreement will not be disturbed, but the courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into. It has been pointed out that this principle may not in all cases provide an equitable settlement, but that there is no preferable alternative: (*Civil Service Co-operative Society* v. *General Steam Navigation Company*, 9 Asp. Mar. Law Cas. 477; 89 L. T. Rep. 429; (1903) 2 K. B. 756) and *Chandler* v. *Webster* (90 L. T. Rep. 217; (1904) 1 K. B. 493), *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (34 Times L. Rep. 70). It follows that the money paid in advance for the full month cannot be recovered back in respect to the part of the month after the frustration unless the right to a *pro rata* adjustment had previously accrued. In my opinion no such right had accrued under the terms of the charter-party. The simple fact is that the parties at the time of the making the contract did not contemplate the contingency of a commercial frustration consequent on the order of a Food Controller, due to the outbreak of an European war, and made no provision to meet any such contingency.

The appeal should be dismissed.

Lord WRENBURY.—When the Ministry of Shipping intervened, there resulted two consequences—first, both parties were discharged from further performance of the contract, for further performance had been rendered impossible; and secondly, the charterer's obligation to pay hire until re-delivery of the vessel at a United Kingdom coal port was at an end because such re-delivery had been rendered impossible. Having stated these two consequences, I have stated all the consequences resulting from the frustration of the contract. Existing rights remained undisturbed. The contract was not torn up. It was not dead—it was partially paralysed. Some of the contractual terms retained, others had lost, their living force.

In *Lloyd Royal Belge* v. *Stathatos* (34 Times L. Rep. 70) hire had been paid in advance and the contract was frustrated by the detention of the ship by the British Government. Pickford, L.J. is there reported to have said that as a result of the intervention of the Government "the contract was at an end." And upon the question of the charterer's right to recover the hire paid in advance he is reported to have said that "the implication arising from" clause 21 in the charter "could only arise while the contract remained in existence. When the charter was put an end to, that implication did not arise. They could only recover the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision under which the money could be recovered." I doubt whether Pickford, L.J. can be correctly reported. The report being only in the Times Law Reports will not have been revised by the judge, and I doubt whether he can have said that which is attributed to him and have laid down so general a proposition as is contained in the words I have quoted. If he is correctly reported I must say with all respect that I do not agree with that general proposition. As regards rights existing at the time of frustration the contract is, in my judgment, not impaired.

To ascertain those existing rights I have to read and construe the contract. That which remains is, in my judgment, merely a question of construction.

The questions to be determined are, first, whether on the 10th or the 16th Aug. the shipowner was entitled to sue the charterer for a full month's hire (what was at that time the existing right of the shipowner in this respect?); and, secondly, if he was so entitled whether the charterer could, in an appropriate state of facts, recover a proportion of the amount.

Hire is, *primâ facie*, a payment made for user This *primâ facie* meaning may be displaced by provisions in the contract. The charterer may have agreed to pay for the expectation of user; or he may have agreed to pay, whether he has user or not. I find that in this contract there are provisions that the charterer is not to pay if, in certain circumstances, he has not the user: (*see* art. 12). This, at first sight, seems to imply that, except in the defined circumstances, he is to pay, whether he has the user or not. The events, however, in which he is not to pay are confined to cases in which the ship is not in a condition efficient for user. If she is efficient, but time is lost by other causes, he is to pay. From these provisions arises an implication that hire in this contract means payment to be made for an efficient steamer whether the charterer has the actual user or not, but not an implication that it includes payment to be made for a steamer whose user has by frustration been made impossible. It does not follow, therefore, that in this contract the *primâ facie* meaning of hire, namely, payment for user, is displaced.

Upon this question, art. 18 is again instructive. If the steamer is lost, hire is not payable, after the date of the loss, and "hire paid in advance and not earned" is to be returned. Here is a plain indication that hire is not earned unless there be user or the opportunity of user.

Further, as regards the hire itself, I look to see whether the hire is necessarily so much a month (neither more or less), whether the use be for a month or less than a month, or whether the contract contemplates fractional sums for periods less than a month. The answer is that it does contemplate fractional amounts in some events at any rate. Under art. 5, the hire during the four months ending on the 10th Aug. is so much a month in advance, for any further period the hire is a fractional part to be calculated to the date of re-delivery. For my purpose it is not material for the moment to inquire whether the particular case in which a fractional payment is to be due is this case or not. The point is that a fractional and not an entire payment is under some circumstances "hire" under this contract. A similar observation arises upon art. 7. In the circumstances there contemplated the hire is to be "at the rate" stipulated by the contract—*i.e.*, at the rate of so much a month, and, as the period of time for which the calculation at that rate is to be made may be uncertain, provision is made for deposit in joint names until that question has been settled.

Lastly, by art. 21, the charterer is to have a lien on the steamer for all moneys "paid in advance and not earned." Upon this the following passage in *Tonnelier* v. *Smith* (8 Asp. Mar. Law Cas. 327; 77 L. T. Rep. 277) is relevant: "The last provision that the charterer was to have a lien on the ship for all moneys paid in advance and not earned makes it plain if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the incurred payments were repaid."

With this I agree. And again, upon the question of construction it is not material that re-delivery of the ship is not now possible.

These being the provisions of the contract, the conclusion at which I arrive upon the question of construction is that hire here means payment due for an efficient vessel which the owner places at the disposal of the charterer whether from outside causes the charterer is able to make use of the efficient vessel or not, but does not extend to payment to be made for a vessel which the owner does not (because he cannot) place at the disposal of the charterer; that during the time when the owner does not place an efficient vessel at the disposal of the charterer the hire is "not earned"; that the provision of art. 21 that the charterer shall have a lien on the ship for moneys "paid in advance and not earned" (however difficult this may be to apply practically having regard to the provision as to hire continuing to accrue until re-delivery) shows that if the sum paid in advance turns out to be too large the charterer will have a right to recover.

Payment was not made on the 10th Aug. in advance—the question is whether the charterers are now liable to pay a full month's hire or a fractional part. It is not, I think, material to inquire whether the obligation was, and is, to pay a full month with a right of recovery of a proportionate part or to pay a fractional part. In either case the charterers, I think, are right in saying that the owners cannot demand and retain a full month's payment when the vessel was taken from the charterer during the currency of a month.

For these reasons I think that this appeal should be allowed.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

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

Judicial Committee of the Privy Council.

May 27, 30, *and June* 17, 1921.

(Present: Lords HALDANE, ATKINSON, and PHILLIMORE.)

AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY LIMITED *v.* HUNT. (*a*)

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Bill of lading—Clause requiring claims to be made within seven days—Refrigerating apparatus—Obligation to maintain imposed by statute on shipowner — Whether "weakened, lessened, or avoided" by the bill of lading—Fiji Ordinance No. XIV. of 1906, *s.* 4.

The Fiji Ordinance, No. XIV. of 1906, *relating to the sea carriage of goods (which is in substance identical with the Sea Carriage of Goods Act* 1904 *of Australia) enacts by sect.* 4 *that where any bill of lading or document contains any clause whereby the obligation of a ship-owner* (inter alia) *to make and keep the ship's refrigerating chambers fit for the carriage and preservation of the goods should in any way be weakened, lessened, or avoided, that clause shall be illegal and void. By sect.* 5 *the parties to a bill of lading are to be deemed to have intended to contract according to the laws in force at the place of shipment, and by sect.* 7 (1) *a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects.*

The respondent shipped at Fiji bananas on board a vessel belonging to the appellants. The bill of lading provided that no claim for loss or damage should be enforceable unless made within seven days from the date at which the cargo was or should have been landed. The refrigerating chambers were defective and the fruit was damaged on the voyage. The shipper sued to recover the loss so caused him, contending that the shipowners were liable in that the ship was unseaworthy, but he failed to claim within seven days.

Held, that as the clause in the bill of lading weakened or lessened the ship-owners' obligation, it was void under sect. 4 *of the Ordinance, and consequently the shipper was not barred by his delay in claiming from recovering damages.*

Judgment of the Supreme Court of Fiji affirmed.

APPEAL from a judgment of the Supreme Court of Fiji dated the 21st Oct. 1919.

The action was brought by the respondent against appellants claiming damages for negligence and breach of duty in the carriage of bananas shipped in the appellants' steamship, *Levuka,* from Fiji for delivery in New South Wales. The only question to be decided by their Lordships was

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

whether by the terms of the two bills of lading under which the fruit was carried the appellants were freed from liability. The facts and the material terms of the bills of lading, each of which contained the same conditions and of Fiji Ordinance XIV. of 1906 (the Sea-Carriage of Goods Ordinance) are set out in the judgment of their Lordships. The negligence alleged consisted in the defective condition of the refrigerating chambers of the vessel as found by Sir C. S. Dawson, C.J., who tried the action. That finding of fact could not be challenged, but he held that the conditions in the bills of lading did not apply, since the action was in respect of an implied and not an express warranty, and he accordingly entered judgment against the appellants for 547*l.* 14*s.*

R. T. Wright, K.C. and *Simey* for the appellants.

Leslie Scott, K.C. and *T. Mathew* for the respondents were not heard.

The judgment of their Lordships was delivered by

Lord HALDANE.—This is an appeal of the defendants in an action from a judgment of the Supreme Court of Fiji. The claim in that action was for damage suffered by a consignment of bananas shipped by the respondent on a vessel belonging to the appellants. It was adjudged that the respondent should recover 547*l.* 14*s.* and costs.

The respondent is a planter residing and carrying on business in Fiji. The appellants are shipowners. No question now arises as to the fact of damage or the amount, or of such damage having been due to the unseaworthiness of the appellants' vessel, the *Levuka*, on which the bananas were shipped in Fiji for delivery in New South Wales. The unseaworthiness consisted in the defective condition of the refrigerating chambers of the vessel, as established. But a question which remains is whether, by the terms of the two bills of lading, under which the fruit was carried, the appellants are freed from liability.

Before considering the terms of the bills of lading, their Lordships think it important to refer to the provisions of the Fiji Ordinance of 1906 relating to the sea carriage of goods. This Ordinance follows in substance the analogy of the well-known Harter Act of the United States, as well as that of the Sea Carriage of Goods Act 1904, of the Australian Commonwealth. The Ordinance enacts (sect. 4) that:

> Where any bill of lading or document contains any clause, covenant or agreement whereby (*a*) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability from loss or damage to goods arising from the harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or arising from negligence, fault or failure in the proper loading, stowage, custody, care or delivery of goods received by them, or any of them, to be carried in or by the ship; or (*b*) any obligations of the owner or charterer of any ship to exercise due diligence and to properly man, equip and supply the ship, to keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation, are in any wise weakened, lessened or avoided; or (*c*) the obligation of the masters, officers, agents or servants of any ship to carefully handle and stow goods and to care for, preserve and properly deliver them, are in any way lessened, weakened or avoided, that clause, covenant or agreement, shall be illegal null and void and of no effect.

By sect. 5 the parties to any bill of lading are to be deemed to have intended to contract according to the laws in force at the place of shipment. By sect. 7 (1):

> In every bill of lading with respect to goods a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects, and properly manned, equipped and supplied.

The bills of lading provided that the goods were received for shipment subject to the terms, conditions and exceptions indorsed on the back which were to form part of the contract. Along with these was a provision that the appellants received the goods to be forwarded subject to any statutory exemptions and limitations, and on the terms contained in the document, but that such terms were to be construed as qualified by the provisions of the Sea Carriage of Goods Act 1904, already mentioned, which, as their Lordships have observed, is substantially the same in its provisions as the Fiji Ordinance of 1906. Among the terms indorsed were the exemption of the appellants from liability for loss or damage due to accidents arising from defects in the fittings or appurtenances of the ship. There was also a clause (No. 17) under which any claim for loss or damage to goods was to be restricted to the wholesale cash value at the port of discharge and must be made in writing within seven days from the date at which the cargo was or should have been landed. Otherwise such claim was not to be enforceable.

Reading the terms of the Ordinance, which are controlling, into those of the bills of lading, it is obvious that if the latter conflict with the former the former must prevail. This being so, the first question which arises is whether there was imported into the bills of lading an obligation on the owners that the ship should be seaworthy, and in particular that the refrigerating chambers should be in adequate condition for the transport of the bananas. It is clear that this question must be answered in the affirmative, and that if the bills of lading contained any stipulation inconsistent with such a provision, the stipulation was inoperative.

The second question is whether the bills of lading actually contained any such inconsistent stipulation. What happened was that when the ship arrived at Sydney and Melbourne, her ports of destination in Australia, the fruit turned out to have been damaged on the voyage by the imperfect condition of the insulating chambers. But the respondent did not give notice of his claim within seven days of the arrival of the *Levuka* at the ports of discharge, and if the condition as to the necessity for that in clause 17 of the bills of lading was operative, that fact would have exonerated the appellants from liability. The point is, therefore, whether the terms of the ordinance have rendered the condition as to notice inoperative. Their Lordships think that this question must be answered in the affirmative. Reliance was placed for the appellants on decisions in the courts of the United States, such as those in the cases of *The Persiana* in 1911 (185 Fed. Rep. 396), *The Westminster* (127 Fed. Rep. 680), and *The St. Hubert* (107 Fed. Rep. 727), to which their Lordships would have attached much importance had the question been in reality analogous to that which arises in the appeal before them. But there the provision in the bills of lading was merely that the owner was not to be held liable for any damage to goods, notice of

which was not given before the removal of the goods. This was held not to be inconsistent with the provisions of the Harter Act. In the case of such provision it may be that it can be treated as not affecting the substantial right which that Act gives, but as restricted to the character of the evidence by which it is to be established, and therefore as confined to procedure and as not extending to interference with substantive title. In the present case the conditions contained in clause 17 are that the claim is not only to be restricted, but that it must be made in writing and within seven days from the date of landing of the cargo. Their Lordships are of opinion that such conditions affect the substance of the right conferred by the Fiji Ordinance, which is to treat as void any condition by which the absolute right to recover for damage due to failure to keep the refrigerating chambers in good condition was "in any wise weakened, lessened, or avoided." On this question the judgment of Horridge, J. in *Hordern* v. *Commonwealth and Dominion Line Limited* (14 Asp. Mar. Law Cas. 51; 116 L. T. Rep. 501; (1917) 2 K. B. 420) is instructive.

As they have already said, their Lordships also think that the same provision in the ordinance rendered it impossible for the appellants to say that no warranty as to seaworthiness was implied. But it has been contended that it was open to them to stipulate validly that they should not be liable for damage arising from defects in the fittings of the ship, if the stipulation was restricted to a warranty that was merely implied. Their Lordships might have called upon the respondent for an argument upon this point, but in the view which they take on the earlier question, which goes to the root of this appeal, they are of opinion that it is unnecessary to pronounce upon it.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondent, *Murray, Hutchins,* and *Co.*

House of Lords.

June 24 and July 26, 1921.

(Before Lords BUCKMASTER, SUMNER, PARMOOR WRENBURY and CARSON.)

Re AN ARBITRATION BETWEEN C. T. COGSTAD AND CO. AND H. NEWSUM, SONS, AND CO. LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Arbitration—Practice—Appeal—Case stated by arbitrator—Arbitrator desiring case may go back in certain events—Consultative jurisdiction of court—Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 7 *and* 19.

An award stated by an arbitrator for the opinion of the High Court is not a final award stated in accordance with sect. 7 *of the Arbitration Act* 1889, *if on the face of the award it is apparent that in the exercise of the duties originally undertaken by him the arbitrator desires that in a certain event further opportunity should be afforded for the final exercise of his authority. Such an award is an award stated for the consultative opinion of the court under sect.* 19 *of the Act.*

An umpire in stating a special case after stating certain findings of fact and conclusions of law proceeded, "*The question for the opinion of the court is whether upon the true construction of the charter-party and the facts as stated by me the decisions at which I have arrived are correct in point of law. If they be correct, my award is to stand, but if incorrect in any particular, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the court.*"

Held, (Lord Parmoor and Lord Carson dissenting) that the award was not final and no appeal lay from the decision of the judge at the hearing of the award.

Decision of the Court of Appeal (15 *Asp. Mar. Law Cas.* 134; 124 *L. T. Rep.* 204; (1921) 1 *K. B.* 87) *affirmed.*

APPEAL from an order of the majority of the Court of Appeal (Bankes, and Warrington, L.JJ. (Scrutton, L.J. *dissentiente*) (reported 15 Asp. Mar. Law Cas. 134: 124 L. T. Rep. 204; (1921) 1 K. B. 87) refusing to hear an appeal against a judgment of Bailhache, J. (15 Asp. Mar. Law Cas. 19) given on the hearing of an award stated in the form of a special case.

By the order it was adjudged as a preliminary point that no appeal lay from the judgment for the reason that such award was not stated in the form of a special case under sect. 7 of the Arbitration Act 1889, but was a special case stated under sect. 19 of that Act.

By a submission contained in a charter-party disputes were referred to two arbitrators and, if they could not agree, to an umpire. The umpire by his award, which was stated in the form of a special case, set out the facts and decided that the appellants, the ship-owners, were responsible to the respondents, the charterers, for breach of a charter-party and assessed damages for the breach, and he concluded as follows: "The question for the opinion of the court is whether upon the true construction of the charter-party and the facts stated by me the decisions at which I have arrived are correct in law. If they be correct, my award is to stand, but if they be incorrect in any particulars, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the Court."

Bailhache, J. upheld the award.

Upon appeal to the Court of Appeal, a preliminary objection was taken on behalf of the charterers that no appeal lay from the judgment of Bailhache, J. because the special case stated by the umpire was not a final award stated for the opinion of the court under sect. 7 of the Arbitration Act 1889, but was a case stated for the opinion of the court under sect. 19. The Court of Appeal (Scrutton, L.J. *dissentiente*) decided that the objection prevailed as the case, from the language used, must be taken to have been stated under sect. 19, and the jurisdiction of the court under that section being consultative only, they had no power to entertain the appeal.

The Arbitration Act 1889 provides that:

Sect. 7. The arbitrator or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power (*a*) to administer oaths to or take the affirmations of the parties and witnesses appearing; and (*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and (*c*) to correct in an award any clerical error arising from any accidental slip or omission.

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

Sect. 19. Any referee, arbitrator or umpire may, at any stage in the proceedings under a 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.

Neilson, K. C. and *Jowitt* for the appellants.

Mackinnon, K.C. and *Le Quesne* for the respondents.

The following cases were referred to :

Re Knight and Tabernacle Building Society, 67 L.T. Rep. 403 ; (1892) 2 Q. B. 613 ;

Re Kirkleatham Local Board and Stockton Water Board, 67 L. T. Rep. 811 ; (1893) 1 Q. B. 375 ;

Re Holland Steamship Company and Bristol Steam Navigation Company, 93 L. T. Rep. 769 ;

Shubrook v. *Tufull*, 46 L. T. Rep. 749 ; 9 Q. B. Div. 621 ;

Bozson v. *Altrincham Urban District Council* (1903) 1 K. B. 547 ; 1 L. T. Rep. 639 ;

Salaman v. *Warner*, (1891) 1 Q. B. 734 ;

Re Herbert Reeves and Co., 85 L. T. Rep. 495 ; (1902) 1 Ch. 29.

Lord BUCKMASTER.—By charter-party dated the 8th April 1916, and made between the appellants, as the owners of the steamship *Lord* on the one part, and the respondents as charterers of the vessel on the other, the said steamship was chartered for a term of six months from the date of delivery. The charter-party contained provisions that the captain should prosecute his voyage with due dispatch and exempted the owner from liability for damage from various causes therein specified, including negligence default or error of judgment of the masters. There was also the usual provision that, in case of dispute, the matter should be referred to the arbitration in London of two arbitrators and their umpires.

On the 26th Sept. 1916, the vessel, after loading, left Liverpool on a voyage to Archangel in accordance with the instructions given by the respondents. The voyage was never completed owing to the fact that the master, in anticipation of danger due to German submarines, delayed the ship, and, on the 2nd Nov. the monthly freight due on the 19th Oct. being unpaid, the appellants withdrew the vessel from the service of the respondents.

Disputes consequently arose between the parties, the appellants claiming for hire, war insurance and other expenses, and the respondents for loss incurred by withdrawal and delay. These disputes were referred to arbitration in accordance with the provisions of the charter-party. The arbitration was duly held, and, on the 21st Nov. 1919, an award was issued in the form of a special case. The whole question on this appeal is whether this award was a complete and final exercise of the power of the arbitrator, or whether it was partial and interlocutory, reserving powers which had not been exercised and which, in certain events, the arbitrator would be compelled to exercise in order to put a final conclusion to the dispute. The important difference of these two views is due to the provisions of the Arbitration Act. This provides, by sect. 7, that the arbitrator should have the power to state a final award in the form of a special case ; but, by sect. 19, power is also given to state a special case on any question at law at any stage of the proceedings. If the special case be stated under sect. 7 it can be appealed from the judge who determines it to the Court of Appeal ; but, in the latter case, the decision of the judge before whom the matter is first heard cannot be challenged. It is under this latter head that the respondents say that the present case falls. Consequently they contend the decision of Bailhache, J. (reported 15 Asp. Mar. Law Cas. 19), before whom the matter was first heard, is complete, and the Court of Appeal had no jurisdiction to entertain this matter.

The Court of Appeal has taken this view, Scrutton, L.J. dissenting, and it is from this decision that this appeal has been brought.

The whole difficulty is due to the ambiguous form of the award issued. It is stated upon its face to be an award and, after a general recital, contains the statement that the arbitrator had been requested to make an award in the form of a special case, and it concludes with a final assessment of costs. All this is properly referable to the idea that the award is a final statement under sect. 7 ; but clause 21 modifies the effect of this language and gives rise to the difficulty. That clause finds its place in the award after the full examination of the facts.

He states that the voyage was abandoned on the 31st Oct. and that the owners were justified in withdrawing the steamer for non-payment of the hire, but that they committed a breach of clause 9, which provides that the captain should prosecute his voyage with the utmost dispatch. On these views he assessed the damage due to the owners and to the charterers respectively, leaving a balance in favour of the owners of a sum of 1849*l.* 0*s.* 9*d.* He then concludes in these words : " (21) The question for the opinion of the court is whether upon the true construction of the charter-party and the facts as stated by me the decisions at which I have arrived are correct in point of law. If they be correct, my award is to stand, but if incorrect in any particulars, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the court."

The appellants contend that the qualified form of this clause is merely nothing but an expression of the arbitrator's wish that, if the court thinks he has been wrong in a point of law, it should exercise the power under sect. 10 to remit the award for the purpose of re-determining the amount of damage ; they suggest that, in fact, this would only require a small and simple sum in arithmetic ; and they finally point out that the final clause which awards the cost of arbitration shows that the matter was complete.

I find myself unable to accept this view. The only way in which it is possible to ascertain what was the real effect of this award is to construe its language. Unless it can be found that, according to its terms, the powers of the arbitrator were so exercised that, in any event, his duties under the arbitration were ended, and that he reserved to himself no further power in any event, then the award cannot be regarded as final.

The prefatory language of question 21 is strongly relied upon by the appellants ; but there was no need for any such statement at all if the award was intended to be complete. If the matter reserved was nothing but a mere calculation of figures already ascertained and which could not upon any interpretation of the law be altered, it would then have been a simple matter for the arbitrator to have stated that in the event of his conclusion as to the construction of the charter-party being held to be erroneous, he had assessed

the final figures in the manner suggested, or he might have left the matter entirely alone, leaving the court, if it were necessary, to send it back for re-adjudication; or the parties themselves could, on that hypothesis, have settled the figures without further reference.

The fact that he had expressly desired that the matter should be referred back to him for re-assessment of the damages is to my mind inconsistent with the view that his power to decide the amount of the damage, which was not in terms assessed, had been fully and effectually discharged.

In the case of the *Holland Steamship Company and others* (95 L. T. Rep. 769), the circumstances were the same as in the present, excepting that the award stated that if the opinions given by the arbitrator were wrong, "the matter is to be remitted" to give effect to the true construction of the contract. I agree with Bankes, L.J. and Warrington, L.J. in thinking that the difference in language between that award and the present is immaterial, and I agree also with both those learned judges that the principle upon which that case proceeded was correct.

The case of *Shubrook* v. *Tufnell* (46 L. T. Rep. 749; 9 Q. B. Div. 621) is a case which arose on a discussion as to whether or not an appeal from a decision upon a special case the matter should take its place on the final or interlocutory list; but the Master of the Rolls, in deciding that it ought to appear in the final list, made a statement, upon which Scrutton, L.J. places considerable reliance in arriving at his conclusion. In that case Sir George Jessel said, referring to the case of *Collins* v. *Paddington Vestry* (5 Q. B. Div. 368) that "that case only held that where the decision of the court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory. Here, if we differ from the court below, final judgment has to be entered for the defendant, and there is an end of the action."

He appears to assume that if an award is made in such a form that in one event a decision will make it final that constitutes a final award.

I am unable to agree with this view. It does not appear to me that an arbitrator has exhausted the duties he has undertaken if he makes an award that is final in one event alone and leaves open and undetermined what may happen in any other event, and desires that on the happening of that event the matter shall be sent back to him for completion. It makes no difference how much or how little of his original power as arbitrator is retained, if in fact from the award itself it can be seen that, in the exercise of the duties originally undertaken by him the arbitrator desires, in certain circumstances, that further opportunity should be afforded for the final exercise of that authority the award cannot be regarded as final.

I think the judgment of the Court of Appeal is correct and that this appeal should be dismissed with costs.

Lord Sumner.—It is from the award itself and from the language in which the umpire has expressed it, that we have to gather what he meant or more exactly what he did. The question is this: When he executed this award did he end his umpirage by making a final award, imperfect in form it may be but exhaustive of his functions, or did he merely submit to the court a question of law on the footing of such findings as he had already arrived at, the answer to which would decide whether he must continue to exercise his arbitral functions, in accordance with a right to do so which by the award he reserved to himself?

Substantially all turns on par. 21. The prefatory words "having been requested to make my award in the form of a special case for the opinion of the court, do hereby make my award accordingly," agree somewhat better with a final than with a consultative award, for they are quite suitable to the former while the latter, though not wrongly so expressed, would more naturally not be called "my award." I do not, however, think the words are sufficiently significant to modify the effect of par. 21, which in terms states what the relation of the umpire to the court is and what question he submits to it.

The material words of par. 21 are "if they"—that is "the decisions at which I have arrived"—"are correct, my award is to stand, but, if incorrect in any particulars, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the court." The best way for the appellants of reading these words is that adopted by Scrutton, L.J., namely, that the umpire therein requests the court to exercise its powers of sending the case back to him, if, in its discretion, it thinks fit to do so, but this is open to the comment that, if that was what was meant it should have been more clearly stated, or better still, have been left to the court and not stated at all. I think the natural meaning of the words is this: "On the question whether the shipowners are excused from liability for their captain's default, I hold in law that they are not, and have included in my award certain damages against them accordingly. I may be wrong in so holding, but have not hitherto thought it necessary to make up an alternative computation of the damages. I wish to be told if I am right or wrong. If I am wrong, I wish to have the opportunity of completing my award by finding what in that event I should have to decide, though, if I have been right, it does not arise for decision." This accords with the words "for re-assessment of the damages," for the effect of reversing the umpire's decision upon this question of law would be more than a mere rectification of the arithmetic disclosed on the face of the award. The amounts dealt with by the umpire are not so stated in the award as to dispense with "readjustments" by some one, who knows more of the matter than the award itself tells the court.

This construction seems plain but, if the words were ambiguous, I think that the result would be the same for, it should be presumed that the umpire meant to do, and so worded his award as to do, his duty, which was to decide all questions submitted directly or indirectly for his decision. This he would only do, if he consulted the court on the point of law, reserving the final award on the fact in the alternative till he had received a direction.

I think the appeal fails.

Lord Parmoor.—I agree with the opinion expressed by Scrutton, L.J. in the Court of Appeal, and think that the appeal should be allowed. There is a right of appeal, unless the case stated by the umpire comes under sect. 19 of the Arbitration Act of 1889. The determination of the appeal depends upon the construction of the document of the 21st Nov. 1919, signed by the umpire.

The document is designated an award, and the umpire recites that he has been requested to make his award in the form of a special case for the opinion of the court, and that he thereby so makes his award accordingly. It was argued that this recital was consistent with the statement of a special case, either under sect. 7 or under sect. 19 of the Arbitration Act 1889. I cannot agree with this contention. The power given to an umpire under sect. 7 is to make an award in the form of a special case for the opinion of the court. This is in accord with the language of the recital. Under sect. 19 there is no award. The umpire may at any stage of the proceedings under a reference state, or be ordered to 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. This distinction is fundamental. The purpose of a case stated under sect. 19 is to enable the umpire to obtain guidance during the pendency of the reference in order to assist him in arriving at his decision. Although a case may be stated under this section at any stage of the proceedings, it cannot be stated after an award has been made. The language used by Bowen, L.J. in *Re Knight and the Tabernacle Permanent Building Society* (67 L. T. Rep. 403; (1892) 2 Q. B. 613), has been accepted in all subsequent cases: "The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact." I think that the umpire in the present case did divest himself of his complete authority over the subject-matter of the arbitration and that his intention to do so is clear on the construction of the document.

It is not necessary to go through the document in detail, but, *inter alia*, the umpire found that the owners of the ship had committed a breach of clause 9 of the charter-party and assessed the damages for the breach at 4586*l.* 11*s.* 4*d.* He further found that, subject to the opinion of the court of law, there was nothing due by the owners to the charterers, but that there was due by the charterers to the owners the sum of 1849*l.* 0*s.* 9*d.* in full settlement of all accounts. In respect of a claim made by the charterers for cash advanced by the captain, he disallowed the amount as the charterers had not produced satisfactory proof of such advance. These are decisions made by the umpire under the terms of the reference, and in respect of them he has discharged his duty as the judge of law and fact. Clause 21 is as follows: "The question for the opinion of the court is whether upon the true construction of the charter-party, and the facts as stated by me, the decisions at which I have arrived are correct in point of law. If they be correct my award is to stand, but if incorrect in any particulars I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the court." There can be no doubt as to the effect of this clause. In one alternative the award stands as the final judgment of the umpire, in the other alternative a desire is expressed that the award be referred back to the umpire for re-assessment of the damages due in accordance with the decision of the court. It was argued that it was not the intention of an umpire to state a case under sect. 7 because he had not dealt with one or more alternative assessments, which only become material if a decision at which he has arrived is not correct in point of law. I think that this contention cannot be maintained. I do not doubt the importance of the form in which a question or questions are submitted for the opinion of the court, but it is only one of the contentions relevant to the construction of the document as a whole, and is not in itself a conclusive test. The umpire asks whether the decisions at which he has arrived are correct in point of law. If the court agree in this view the umpire has once and for all divested himself of his authority over the subject-matter of the arbitration. I do not desire to place my decision on any meticulous analysis of the language used, and think the result would be the same, whether the umpire had expressed his desire that the award should be referred to him in a certain contingency, or had used the language which was used in *Holland Steamship Company* v. *Bristol Navigation Company* (*sup.*). If an umpire intending to state a case under sect. 7 states it in such a form as not to enable the court to give a final decision on all the matters in issue, there is ample power under sect. 10 of the Arbitration Act 1889 to remit the matters referred, or any of them, to the reconsideration of the umpire. It would not be necessary to make such a remission if the court agree that the decisions at which the umpire has arrived are correct in point of law. As a matter of convenience and economy, it may often happen that a long inquiry into alternatives will be avoided, if, on one point, the decision of an umpire is upheld. I can see no reason why this form of procedure should not be adopted. One of the difficulties in arbitration practice, before the Act of 1889 consisted in the want of an alternative procedure to the revocation of a submission. This alternative is supplied by sect. 10.

The last paragraph in the document is an award of the costs of the arbitration. This, again, is an important matter on which the arbitrator has divested himself of his authority. To award the costs of the arbitration is a necessary factor for finality, in an award stated as a special case under sect. 7 of the Arbitration Act 1889, but is not consistent with the statement of a special case under sect. 19, which is only a step in procedure during the pendency of the reference. In such a case the costs are in the discretion of the arbitrator or umpire and would naturally not be dealt with by him until he made his award. Subject, therefore to the authorities, to which I propose to call attention, the document of the 21st Nov., signed by the umpire, denotes, in my opinion, the intention of the umpire to state his award in the form of a special case, and negatives the suggestion that the umpire intended merely to ask the opinion of the court in a case stated under sect. 19.

The case of *Shubrook* v. *Tufnell* (46 L. T. Rep. 749; 9 Q. B. Div. 621) raised the question whether a case stated for the opinion of the court, which, in the alternative, was to be referred back to the arbitrator, and in which an order had been made for reference back to the arbitrator, was appealable. No doubt this case was before the Arbitration Act 1889 and therefore the effect of sect. 19 of that Act could not be considered, but it is an authority to show that under conditions similar to those in the present case, an appeal would lie, unless it is held that the arbitrator intended to proceed under sect. 19. The decision was that of Sir George Jessel, M.R. and Lindley, L.J. concurred. The judgment says:

"If we differ from the court below, final judgment has to be entered for the defendant, and there is an end of the action." It makes no difference that under later procedure an award can be enforced by an order without the necessity of bringing an action. That case was further considered in *Bozson* v. *Altrincham Urban District Council* (1903, 1 K. B. 547), when the question arose whether an appeal from an order made in an action was an appeal from a final order. The case of *Salaman* v. *Warner* (1891, 1 Q. B. 734) was quoted to maintain the proposition that an order is not a final order unless it is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Reference was also made to *Re Herbert Reeves and Co.* (85 L. T. Rep. 495; (1902) 1 Ch. 29). The earlier decision of the Court of Appeal in *Shubrook* v. *Tufnell* (*sup.*), which was not cited in *Salaman* v. *Warner* (*sup.*), and which appeared to be in conflict with it, was also called to the attention of the court. In his judgment, Lord Halsbury said that he preferred the earlier decision of *Shubrook* v. *Tufnell* (*sup.*), and thought that the order appealed from was a final order. In the same case Lord Alverstone, C.J. takes as the real test whether the judgment or order, as made, finally disposes of the rights of parties. Applying this test to the present case, Bailhache, J. found that the award was correct, and the appeal is against a decision which, as made, does finally dispose of the rights of the parties. The conclusion from these cases is that where one alternative may finally dispose of the rights of the parties, the fact that there are other alternatives, which may require further consideration, is not in itself a sufficient ground on which to found the conclusion that the arbitrator did not intend to make an award in the form of a special case, but only to ask the opinion of the court for his guidance on the point of law. The case relied on by the respondents is the *Holland Steamship Company's* case, in which the Master of the Rolls (Lord Collins) and Farwell, L.J. held that, as the umpire had said the case was to go back if either or both points had been wrongly decided, the case was under sect. 19. Scrutton, L.J. who was umpire in this case, retained the opinion that his decision was a final decision, "as it was stated to be, and certainly intended to be, and not an interlocutory one," and that he did not intend to retain any seisin or conduct of the case. In the present case I agree with Scrutton, L.J. that the umpire does not retain any control or conduct of the arbitration after the issue of the document of the 21st Nov. 1919. Any further reference to him would not arise from the terms of the submission, but only in the event of the court's exercising its powers under sect. 10 of the Arbitration Act 1889. Bankes, L.J. thinks that arbitrators would be well advised, when stating a special case, to state, on the face of the case, under which section it intended to be stated. I do not question the advantage of adopting this course of procedure. The umpire, in stating the special case under appeal, has, in my opinion, clearly expressed on the face of the case, that it is intended to be stated under sect. 7 of the Arbitration Act 1889. It is on this ground that I think the appeal should be allowed.

Lord WRENBURY:—The alternatives are two. The one is that this is a final award—that the authority of the umpire is at an end, that he has bid farewell to the arbitration and is no longer umpire—although by an order under sect. 10 he could be recalled to the office which otherwise he has vacated. The other is that this is a consultative award—that he has retained his hold over the matters submitted to his arbitration—that his authority is not over—and that he awaits the opinion of this court before he resumes and concludes his duties. To determine which is the true view recourse must be had to the language of the award itself. The question turns, I think, upon the language of art. 21, not forgetting any other article in the document which may throw light upon the true meaning of art. 21.

As I read art. 21 the umpire is here saying—I ask the opinion of the court upon a definite question of law. If the answer is A. then my award is to stand (implying that in some other state of circumstances it is not to stand). But if it is B. my award is not to stand for I have by my award assessed the damages, and if the answer is B. that assessment is not to stand. I shall have to assess the damages anew. If he reserves the power to assess the damages anew he can only assess them anew under the authority which is in him as umpire, and his office as umpire must be a continuing office.

It is argued that the words "I desire that the award may be "referred back to me" import not that he is retaining his hold upon his office, but that he is requesting the court to make an order under sect. 10 reviving his office. I do not so read them. I think the language of the article means "In event A. I have, in event B. I have not assessed the damages" (which was the fact) "and in event B. I must go on and assess them."

Art. 22 has given me some concern. The umpire there assesses the costs of the arbitration and directs their payment as to two-thirds by the owners and one-third by the charterers. It may be that his apportionment was based upon the damages as he had assessed them in case A., and it would not be unlikely that if the relevant case should turn out to be B. he would desire to reconsider that. But it is not obvious or necessary that he should desire to retain the power to alter the apportionment which he had thought proper to make. I cannot, from the fact that he was committing himself finally as to costs, infer that he was concluding his office as regards the assessment of the damages in case B.

I think that this was not a final award under sect. 7, but an award under sect. 19, and that there is no appeal.

It results that, in my judgment, this appeal should be dismissed with costs.

Lord CARSON.—I agree with the judgment of Scrutton, L.J. in the Court of Appeal, and with the reasons upon which he has based it. The question is whether the award has been stated in the form of a special case for the opinion of the court under sect. 7 of the Arbitration Act, or whether the arbitrator has found it necessary under sect. 19 in the course of the proceeding under the reference to consult the court for his guidance before making a final award. Upon reading the award I am of opinion that the arbitrator intended to make and did make a final award—that he has decided all the questions which have been submitted to him or have arisen in the course of the reference, and finally that he has dealt with the costs of the arbitration which he could only do in

the event of a final adjudication upon the case submitted to him.

It is true that in clause 20 the award is expressed to be made subject to the opinion of the court upon any point of law, and that in clause 21 the arbitrator states that the question for the opinion of the courts is whether upon the true construction of the charter-party and the facts as stated by him the decisions at which he has arrived are correct in point of law.

As the court before whom the case stated came agreed with the arbitrator in his construction of the charter-party and the decisions at which the arbitrator had arrived, it became unnecessary to remit the award for any further consideration.

It was argued before this House that as the arbitrator had not decided the liability of the parties in the event of a different view being taken by the court and had stated in clause 21 that if his decision was not correct in any particular he "desired" that the award might be referred back to him for re-assessment of the damages due in accordance with the decision of the court, the award could not be considered a final one. I agree with Scrutton, L.J. that where the arbitrator expresses his final opinion in the form of a special case, he need not and in many cases he could not be expected to work out all the possible results which might follow from the various views that the court might take, and indeed I think it was with a view to meeting such a difficulty that sect. 10 of the Arbitration Act was enacted. The expression of his desire that under circumstances the award might be referred back to him does not in my opinion prevent the award from being a final one as it is merely referring to the power given by sect. 10 of the statute to the court before whom the special case would come for decision. I am therefore of opinion that this appeal should be allowed.

Solicitors for the appellants, *Botterell* and *Roche*.
Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

June 21, 23, *and July* 28, 1921.

(Before Lords BUCKMASTER, SUMNER, PARMOOR, WRENBURY, and CARSON).

OWNERS OF THE STEAMSHIP CELIA *v.* OWNERS OF THE STEAMSHIP VOLTURNO; THE VOLTURNO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Damage—Loss agreed in foreign currency—Rate of Exchange—Date of conversion.

Held (*Lord Carson dissenting*), *that in an action of negligence causing collision and damage to a ship and consequent loss of the use of the ship during detention for repairs, the damages must be assessed with reference to the actual period of detention. And if those damages are agreed in a foreign currency the tribunal must convert them into English currency at the rate of exchange ruling at the time the detention occurred.*

Order of Court of Appeal affirming a judgment of Hill, J. (*reported* ante, *p.* 288; 125 *L. T. Rep.* 191; (1920) *P.* 447), *affirmed.*

Decision in Di Ferdinando *v.* Simon and Co. (124 *L. T. Rep.* 117; (1920) 3 *K. B.* 409), *applied.*

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

APPEAL by the plaintiffs, the owners of the steamship *Celia* from an order dismissing their appeal with costs from a decree of Hill, J. on a motion in objection to the registrar's report in an action of damage by collision (reported *ante*, p. 288; 125 L. T. Rep. 191; (1920) P. 447).

The collision took place in the Mediterranean Sea between the steamship *Celia* and the steamship *Volturno*, an Italian ship, on the 17th Dec. 1917. Both vessels were equally to blame for the collision and both were damaged. The cross claims for damages were referred to the registrar for assessment, but were subsequently agreed and no reference was held. Subsequently a difference arose as to the date at which the rate of exchange allowed to the owners of the *Volturno* for loss by detention during repairs, should be taken, and that point was submitted to the registrar. The registrar reported that in his opinion the time at which the rate of exchange should be calculated was the "date of payment." At that time (since 1920) the rate of exchange was over 66 lire to the £ sterling. At the dates when the two periods of detention for temporary and permanent repairs were incurred the rate of exchange was only 39.9 and 41.3 lire respectively.

The owners of the *Volturno* gave notice of objection to the report of the registrar and submitted that they had at the dates when the losses by detention were respectively suffered an accrued right to recover from the owners of the *Celia* a sum of British sterling determined by the rates of exchange prevailing at the time, together with interest until payment and that the subsequent fluctuations of exchange could not increase or diminish the amount so recoverable.

Hill, J. following the decision of the Court of Appeal in *Di Ferdinando* v. *Simon Smits and Co. Ltd.* (124 L. T. Rep. 117; (1920) 3 K. B. 409), held that the respondents claim for detention must be assessed with reference to the rate of exchange prevailing at the actual period of detention. He therefore, allowed the appeal with costs.

The Court of Appeal (Lord Sterndale, M.R., and Atkin and Younger, L.JJ.) refrained from giving any opinion on the merits dealing with the matter merely by adopting the view of Hill, J. that the case was covered by the decision of the other branch of the Court of Appeal, (Bankes, Warrington and Scrutton, L.JJ.) in *Di Ferdinando's* case.

Raeburn, K.C. and *G. P. Langton* for the appellants.

Sir *John Simon*, K.C., *Bateson*, K.C., and *Balloch* for the respondents.

The following cases were referred to in the course of the case:

Scott v. *Bevan*, 1831, 2 B. & Ad. 78;
Barry v. *Van den Hurk*, 123 L. T. Rep. 719; (1920) 2 K. B. 709;
Lebearepin v. *Crispin*, 124 L. T. Rep. 124; (1920) 2 K. B. 714;
Di Ferdinando v. *Simon*, 124 L. T. Rep. 117; (1920) 2 K. B. 704; (1920) 3 K. B. 409;
Kirsch and Co. v. *Allen, Harding and Co.*, 122 L. T. Rep. 159; 123 L. T. Rep. 105;
Manners v. *Pearson and Son*, 78 L. T. Rep. 432; (1898) 1 Ch. 581;
Marburg v. *Marburg*, 1866, 26 Maryland, 8;
Joyner v. *Weeks*, 65 L. T. Rep. 16; (1891) 2 Q. B. 31;
Bertram v. *Duhamed*, 1838, 2 Moo. P.C. 212;

Cash v. *Kennion*, 1805, 11 Ves. 314;
Pilkington v. *Commissioners for Claims on France*, 1821, 2 Knapp, 7;
Delegal v. *Taylor*, 1831, 7 Bing. 460.

After consideration their Lordships dismissed the appeal, Lord Carson dissenting.

Lord BUCKMASTER.—On the 17th Dec. 1917, a collision occurred in the Mediterranean between the steamship *Celia*, which belongs to the appellants, and the Italian steamship *Volturno*, which is the property of the respondents.

The dispute as to liability for the collision was determined in this country in an action before Hill, J. who decided, on the 22nd July 1919, that both vessels were to blame and referred the question of damages to the registrar. The cross claims for damages were agreed between the parties. The claim of the owners of the *Volturno* included one for loss due to the fact that the vessel was under hire to the Italian Ministry of Marine at all material dates, and that in consequence of her detention for the necessary repairs from the 25th to 30th Dec. 1917 at Gibraltar, and the 24th Jan. to the 18th Feb. 1918 at Newport, deductions for her hire were made amounting in all to 304,418 lire. That the *Volturno* is entitled to damages under this head is admitted. But the question is, at what date ought the rate of exchange to be fixed, in order that those damages which were originally assessed in lire should be converted into sterling. The registrar held that the date at which the damage was assessed was the correct date, but Hill, J. decided that the time when the actual loss for each detention was incurred was the correct period, and this view has been confirmed by the Court of Appeal.

It is suggested that special considerations may apply in regard to the particular circumstances in which this matter arises for determination, but I cannot see that any of these circumstances take this case out of the general rule and it is the nature of that general rule which your Lordships are asked to consider and determine. There are only two possible dates put forward as the dates upon which the conversion can be made. The one is the date when the actual loss was incurred and the other the date when the judgment assessing it was delivered. The suggestion that it might be the date of the writ was incapable of being supported and has not been argued. For the purpose of determining which of these two periods is correct it is essential to examine what it is that the judgment effects.

It is argued on behalf of the appellants that it should be considered as divided into two parts, the one declaratory of liability determined in lire and fixed at the date when the damage was incurred and the other as a matter of mere machinery converting the lire into sterling at the date of the judgment.

That, to my mind, is not the true function and purpose of the judgment. A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong.

With regard to an ordinary claim for breach of contract this is plain. Assuming that the breach complained of was the non-delivery of goods according to contract, the measure of damage is the loss sustained at the time of the breach measured by the difference between the contract price and the market price of the goods at that date.

As was stated by Wright, J. in the case of *Joyner* v. *Weeks* (65 L. T. Rep. 16; (1891) 2 Q. B. 31, at p. 33): "Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is, in fact, no worse off than he would have been if the contract had been performed."

And as an instance of this proposition, he gives the alteration of market values. By the same process of reasoning a person who has committed a breach cannot have his liability increased by such a cause.

Similar considerations apply to an action for tort. In cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then existing circumstances, and subsequent changes would not affect the result. If these damages be assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account.

There is little authority upon the actual question until recent times, a circumstance due, no doubt, to the fact that fluctuations of currency did not formerly occur with the violent oscillations by which they have been marked in recent years.

One of the earliest authorities is the case of *Scott* v. *Bevan* (2 B. & Ad. 78).

In that case judgment had been recovered in Jamaica for the sum of 1554*l.* 16*s.* 8*d.*, current money of the Island of Jamaica, and proceedings were taken here upon the judgment, the only question being whether the judgment should be converted into English currency, 100*l.* sterling being the equivalent of 140*l.* currency of Jamaica, or whether it should be taken at par, and it was decided that it ought to be estimated at the rate of exchange at the time of the judgment in Jamaica. The real question raised here does not appear to have been considered by the court, a significant fact when it is remembered that Lord Tenterden was the presiding judge.

In the case of *Bertram* v. *Duhamel* (2 Moo. P. C. 212), the point was not elaborately argued, and the quotation in the judgment at p. 217 is from the opinion of Lord Eldon in *Cash* v. *Kennion* (11 Ves., 314), but this is not sufficiently explicit to afford real assistance.

The next case is of greater importance. It is *Manners* v. *Pearson* (78 L. T. Rep. 432 (1898) 1 Ch. 581). In that case an action was brought claiming an account of moneys due under a contract which provided for payment in Mexican dollars. Judgment in the action, declaring the plaintiff to be entitled to an account, was delivered on the 4th Nov. 1897, and the defendant in fact delivered an account on the 13th Nov. of the same year, showing that a balance was due to the plaintiff in Mexican dollars on the 31st Oct. 1896. The question that arose was the date at which conversion from Mexican dollars into English sterling should take place. The plaintiff at first suggested that each sum of money should be converted into sterling at the date when it was shown to be due in the account, but he appears to have been willing to accept the 31st Oct. 1896,

the date when the balance of the amount was shown to be due, while the defendants contended that the proper date was the 13th Nov. 1897, when the account was delivered.

It is at least remarkable that the actual date of the judgment was not suggested as the critical moment. The court held (Vaughan Williams, L.J. dissenting) that the right date was the 13th Nov. 1897. The foundation of the judgment depends entirely upon the fact that the claim was a claim for account, and it appears to proceed upon the principle that the account was the real cause of action. Lindley, L.J. says: "To substitute English for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiffs can prove that the defendants committed, which is a totally different matter." Rigby, L.J. says, that "plaintiff's argument proceeds upon an entire misapprehension of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account and not for the several items to be included in it"; and he then says that the account "was not delivered until the 13th Nov. 1897, and even if accepted on that date, could not have formed a basis of an order at an earlier period." This judgment clearly does not proceed upon the view that the date of the judgment is the correct date for conversion, but rather upon the ground that the judgment is a judgment for something which is found due on taking the account, and that it is at the date when the account has been taken or delivered that the true liability is disclosed. In other words the balance of the account is treated as the foundation of the claim for judgment, and it is at that date that the conversion is to be made.

I am not prepared in the absence of argument to accept this view as correct, but it is not essential to determine it in the present case. It is sufficient to say that the judgment certainly did not proceed upon the ground for which the appellants now contend. Vaughan Williams, L.J. on the other hand, states in clear language the principle which the respondents say is correct. He says, "It seems plain that this mode of computing the value of foreign currency in English sterling and thus converting the one currency into the other is based upon damage for the breach of contract to deliver the commodity bargained for at the appointed time and place; and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment," and he adds, "I see no reason why different rules should be applied in the case where the form of action is, as in this case, an action for an account." He thought, therefore, that conversion should take place in respect of each item as it was shown to be due, but as the plaintiff was willing to accept the 31st Oct. 1896 he also accepted that date as correct.

With the principle as he enunciates it I am in entire agreement, and I do not think that there is any expression in the judgment of the other learned Lords Justices to show that they disagreed. Their judgment depended, as I have shown, on their view as to the proper application of this principle to the circumstances of the action. The final authorities upon this matter are fortunately far from ambiguous. Roche, J. in *Kirsch and Co.* v. *Allan, Harding, and Co.* (122 L. T. Rep. 159) decided that the rate of exchange should be taken as at date of payment. It is a little difficult to ascertain what is exactly meant by that phrase; but it is not necessary to examine it further; for, in a later decision of *Di Ferdinando* v. *Simon and Co.* (124 L. T. Rep. 117: (1920) 2 K. B. 704), which was an action for breach of contract to carry goods from London to Italy and for conversion, the learned judge held that the proper measure of damage was the value of the goods at the date when they should have arrived in Italy. He found the value in Italian lire and converted the sum into English currency at the rate of exchange on that date. This judgment was upheld by the Court of Appeal (*sup.*). Bailhache, J. in *Barry* v. *Van den Hurk* (123 L. T. Rep. 719; (1920) 2 K. B. 709), also fixed the date for conversion as the date when the damages were properly measured, and MacCardie, J. in *Lebeaupin* v. *Crispin*, decided the same thing (124 L. T. Rep. 124); (1920) 2 K. B. 714).

There is consequently a very formidable body of opinion in recent decisions against the appellants' contention, and the only authority to which they can refer in their support is an American decision in the case of *Marburg* v. *Marburg*, decided in 1866. It is reported in 26 Maryland 8. There does not appear to have been any consideration of the question in the Supreme Court of the United States, and their Lordships are deprived of the assistance which would have been afforded had the matter been the subject of argument before that tribunal. The principle underlying the decision in the Maryland case appears largely to be due to the consideration of text books on international law. In one sense the case undoubtedly affects international matters, but it does not necessarily follow that it involves consideration of international law. The real question must depend upon the true effect of a judgment in one country relating to damages that are measured in terms of a foreign currency, and in this international relationships do not necessarily enter. Disputes similar to that in the present case could easily arise between two British subjects out of a purely British contract. Where the measure of damage was originally expressed in terms of a foreign currency in such a case, the English court could and ought to measure the damages at the proper date, and then at that date convert the foreign exchange into English currency.

There can be no difference in the principle when one of the litigants is not a British subject.

For these reasons I think this appeal should fail, and should be dismissed with costs.

Lord SUMNER.—A good deal of the effect of the appellants' plausible and ingenious argument is due to two fallacious suggestions, which have crept into and colour the whole of it. The first is that this is in substance a claim by the owners of the *Volturno* for a sum contractually due from the owners of the *Celia* in lire, and the other that, as they have elected to recover it here and not in Italy, the judgment recovered here is merely an attempt to put them in the same position as if a contract had been enforced in Italy.

The collision occurred on the high seas, and, subject to proof that the *Celia* was to blame, she became forthwith liable for the consequences. I may pass over the fact that the *Volturno* was also to blame as not for this purpose affecting the matter. The right to compensation was complete then and there, though it might take time to discover all the consequences and to establish the extent of the mischief. That compensation was

not recoverable in any particular currency, and, although for convenience of proof it would be severable into divers heads and items, it would be one gross sum, recoverable once for all. If there had been prospective or continuing damage the matter would have been more complicated, but I do not think that the principle would have been affected. The currency, in which judgment would be given, would depend upon the place in which the plaintiffs might find the defendants' ship so as to arrest her in proceedings *in rem*, or might succeed in serving process on the defendants themselves as the commencement of proceedings *in personam*. The essential thing to remember which the appellants somewhat ignored, is that the sum in question here is only an item in a general claim for damages for a wrong done at sea, which was the subject of compensation just as naturally in British as in Italian currency.

The deduction of hire for the *Volturno*, which the Italian Ministry of Marine made from the sums payable by them to her owners under the charter, is, therefore, for the purposes of this case, mere evidence of damage inflicted on them by the collision. Though proved in a different way from the physical damage to the ship, it is on the same footing, for it measures their loss suffered by having the ship laid up, just as their repair bills measure their loss suffered by having her side stove in. If the question of damage had not been simplified by an agreement between the parties, and if all the damages had gone to the registrar and merchants for assessment together, no one would have thought of raising any questions of the rate of exchange as at the date of the judgment. The cost of the temporary repairs incurred at Gibraltar would, I suppose, have been proved in sterling; if they had been done at Marseilles or Cadiz, they would have been proved in francs or in pesetas, just as the repairs at Newport News would have been proved in dollars, and in each case these currencies would have been converted into sterling as at the date when liability for the several outlays accrued, because when the damage is proved by the actual cost of repairing it, conversion of that cost forthwith into the currency with which the High Court deals, is simply the process of completing that proof. When the owners of the *Volturno* came to their next item, namely, the money value of the use of the ship, of which the damage suffered in collision deprived them, why should any different rule as to exchange be applied? The charter furnished very precise evidence of the then value of the ship in use day by day, but it was evidence only and was not conclusive: (*The Argentino*, 6 Asp. Mar. Law Cas. 433; 13 P. Div., per Bowen, L.J. at pp. 202, 203). The owners of the *Celia* would have been at liberty to challenge it, if they could, and, if there had been no charter, the Italian owners might have shown what employment in Greece or in Norway could have been got, and so have measured their loss in drachmas or in kroner instead of in lire. If the damages were such as need not be repaired at all, the whole loss might have been measured by the immediate depreciation of the ship in consequence of the collision, for the *Volturno's* owners would not be bound to repair her merely for the benefit of the owners of the *Celia*. In that case there would either be no question of exchange, if the evidence of sound and damaged values could be given in sterling, or, if there was any conversion into sterling, it would have been calculated at the rate current at the time of the collision.

I am quite unable to understand why the owners of the *Volturno* should be subjected to any different rule merely because they have had the good sense to eliminate all questions that could be agreed, and to present in the most naked form the one question as to which the parties were in difference. All that was agreed was the number of lire actually deducted by the Italian Ministry of Marine during the period when the *Volturno* was off hire, with the dates and the commencement and ending of those periods. Whether any adjustment was made for the expenses of running the ship while earning hire which would be saved while she was off hire does not appear. I do not gather that anything in the agreement was meant to vary any of the rights of the parties.

The appellants, however, completed their argument by saying that the court, having ascertained how many lire the collision cost the owners of the *Volturno* in respect of detention terminated its judicial functions at that point, and thereafter in bringing into the judgment a certain amount of sterling to correspond with that finding, was merely making its decision available to the judgment creditors as the best way in which they could be assisted by an English court to get the lire to which they were really entitled. I think this, again, is a fallacy. For the purposes of a collision action it is the judgment that is the final judicial act, and it is the judgment that is the decision of the court. The agreed numbers of lire are only part of the foreign language in which the court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues which it is used to describe.

The matter may be tested in this way. Suppose that, as an incident of the collision, some seamen belonging to the *Celia* had taken possession on behalf of her owners of a parcel of Italian currency notes, the property of the owners of the *Volturno*, and that the former had received and kept it. The owners of the *Volturno* could have claimed damages for conversion of the notes or their return with damages for their detention, as they chose. In the first case, the value of the notes would be taken and exchanged into sterling as at the date of the conversion, and as the foundation of the damages in the second case the same date would have been taken. Why should damage to the ship and her owners by collision be measured otherwise?

No authority was forthcoming which really supported the appellants' propositions. There have been, during the past one hundred years, several English cases, in which these propositions might, and indeed ought to have been applied, if they are sound, yet very learned judges proved to be unconscious of their existence; the best example is *Scott* v. *Bevan* (2 B. and Ad. 78). The case in the Court of Appeal in 1898 (*Manners* v. *Pearson*, 78 L. T. Rep. 432; (1898) 1 Ch. 581) really negatives them.

On the other hand considerable support for the view which I have ventured to express above is to be found in the judgment of the Privy Council in *Pilkington* v. *Commissioners for Claims on France* (2 Knapp, 7), which was pronounced by Sir William

Grant, M.R. Referring to acts of the French Revolutionary Government, whereby between 1793 and 1796 debts due by French subjects to British subjects and payable in France had been sequestrated, and to subsequent arrangements by treaty between England and France, under which compensation was to be made by France in respect of these acts as for unjustifiable confiscation and funds were deposited with Commissioners for that purpose, he is reported as having said (p. 19), "we think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. . . The Republic themselves, in effect, confess that no such decree ought to have been made. . . Therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrongdoer who must undo, and completely undo, the wrongful act he has done, and, if he received the assignats at the value of 50*d.*, he does not make compensation by returning an assignat, which is only worth 20*d.*; he must make up the difference between the value of the assignat at the different periods." It is true that these observations are stated to be not strictly necessary to the decision (p. 21) and that Dr. Knapp prints his report from notes by another hand, but I think these circumstances detract but little from the authority of the passage quoted.

As to *Marburg* v. *Marburg* (26 Maryland, 8), it is a case of a breach of contract to pay abroad a sum of money, which was the price of goods sold and delivered. It purports to follow *Scott* v. *Beavan*, and has no reference to damages for a wrong not arising out of a contract. Even so, there has been at different times much discussion in the United States as to the true rules governing such actions (Story, "Conflict of Laws," 8th edit., s.s 303-315; Sidgwick on Damages, 9th edit., s. 274); but I think the question need not be pursued, as all such cases turn upon contractual obligations for payment of fixed or calculable sums in a foreign place and in the local currency, which have been put in suit in the courts of the United States. For the same reason, while not intending to intimate any criticism upon it, I have not troubled your Lordships with any examina- of the judgment in *Di Ferdinando* v. *Simon* (*sup.*) in the Court of Appeal. The case of *Delegal* v. *Taylor* (7 Bing. 460) might seem at first sight to be in point for the appellants, for it began with a claim in trover for a parcel of local currency notes seized in Lima, but subsequently an agreement was made with the wrongdoers to give up the notes or pay their value as found by the officer of the court, and, the notes having been lost at sea, the question came before the court in the form of an application for directions as to the course he was to take under this agreement. I think that in substance the direction given was to find what it would cost to get notes of an equal face value in Lima, where they must be presumed to be worth what they appeared to be worth, and in any case it appears not to advance the present appellants' argument.

Finally it was urged that exchanging lire with sterling at the date of the judgment was the best way of eliminating speculative elements, and had the advantage of ensuring that in no case would a judgment creditor get more than the exact sum to which he was entitled. Fluctuations in foreign exchanges inevitably introduce a speculative element into all transactions and affairs, and unless the parties themselves have provided for this by some contract, the law must apply the same principles as if they had remained stable. Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays. The result may favour one side or the other, and there is no answer to this except that already discussed—namely, that the claimant's right is exclusively a right to lire, and would result in a judgment for lire, if only an English court was, so to speak, competent to express itself in Italian. This is a mere assumption. After all the court is an English court and in theory decides the right as at the time when it arises, and does so in plain English. I therefore think that this argument also fails, and that the appeal should be dismissed.

Lord PARMOOR.—The relevant facts may be shortly stated. On the 17th Dec. 1917 there was a collision in the Mediterranean between the steamship *Celia* and the steamship *Volturno*. Both vessels have been held equally to blame for the collision. The *Volturno* was temporarily repaired at Gibraltar, causing a detention of the ship from the 25th to the 30th Dec. 1915, and permanently repaired at Newport, causing a detention of the ship from the 24th Jan. to the 18th Feb. 1918. The *Volturno* was on charter to the Italian Government, and the vessel was off hire during each period of repair. The loss to the respondents from loss of hire during temporary repairs was agreed at lire 47,372.32, and during permanent repairs at lire 257,046.40, but a difference arose as to the date at which the rate of exchange for Italian lire should be taken, in order to ascertain the amount to be paid in English currency. The question for decision is, whether in calculating the amount which the respondents are entitled to recover from the appellants in respect of damages for the loss of hire of their vessel, the rate of exchange should be taken as that ruling when the loss was incurred, or as that ruling when the assessment of damage was ascertained?

The answer to this question depends, not on any technical rule of English procedure but on the principle of insuring to the injured party, as far as possible the full measure of compensation to which he is entitled. The argument on behalf of the appellants is, that, in an action of tort, damages are not ascertained until they have been assessed, and that if, in the interval between the tortious act which has occasioned the damage and the ascertainment of its amount there has been an alteration in the rate of exchange, the party injured will, instead of receiving the amount due to him as compensation, receive a greater or less amount, dependent on whether the rate of exchange has fluctuated favourably or adversely to his interest. I think that there would be no answer to this argument if the probable fluctuations in the rate of exchange between the date at which the loss is suffered and that at which the amount of damage is acsertained are a relevant factor in determining what the amount of damages s ould be. For reasons hereinafter stated, there appears to me to be a fallacy in this contention. The argument for the respondents is, that the amount of loss consequent on a tortious act, such as a collision at sea, falls to be determined at the date when it is suffered, and that the probability of subsequent alterations in the rate of exchange is immaterial, and that the risk of alteration in the rate of exchange is one which affects generally

the financial transactions between the two countries and is in no way connected either with the tortious act or with the ascertainment of the amount payable to the injured party.

In my opinion, this contention is correct. The probability of the alteration in the rate of exchange is not an admissible factor in the ascertainment of the amount of damage, both on the ground of remoteness and on the ground that it is a matter which affects generally all financial transactions and is in no way connected with the tortious act for which the respondents are liable. To prevent misunderstanding, I desire to add that if the probability of alterations in the rate of exchange could be regarded as a relevant factor in ascertaining the amount of damage, it would be within the discretion of a registrar to fix that rate, as at the date of the assessment, or at such other time as in his opinion might be reasonably adopted to obtain a fair figure.

The necessity for transferring into English money damages ascertained in a foreign currency, arises in the fact that the courts of this country have no jurisdiction to order payment of money except in English currency. Considerations which are irrelevant in the ascertainment of the amount of damage are irrelevant in fixing a rate of transfer, and I agree in the judgment of Hill, J. as confirmed by the Court of Appeal. In truth the risk of a subsequent fluctuation in the rate of exchange is a risk which the parties themselves respectively incur. In its incidence it may, in any particular case, either mitigate or enhance the amount which, under a stable condition of exchange, would be payable to the injured party, but in itself it cannot affect the ascertainment of damages.

Of the many cases to which your Lordships were referred, the judgment of the Privy Council in *Pilkington* v. *Commissioners for Claims on France* (2 Knapp 7) is most analogous to the present case. The judgment of Sir William Grant is based on the finding that a wrong act had been done by the French Government, and that restoration in a debased currency is not restoration for the wrong done, and that, if the wrongdoer received the assignats at the value of 50*l*. he does not make compensation by returning an assignat which is only worth 20*l*., but that he must make up the difference of the assignat at the different periods. If the assignat at the later date had been worth more than the value of 50*l*. I think it would logically follow, on the judgment of Sir William Grant, that the wrongdoer would have made full compensation by returning such a number of assignats as would have replaced the numbers received, assessed at the value of 50*l*.

The other cases cited refer to damages on breach of contract, and not on tort. In the case of contract no doubt the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract. In the case of *Di Ferd nando* v. *Simon* (124 L. T. Rep. 117; (1920) 3 K. B. 409) in the Court of Appeal, it was pointed out that fluctuations in value subsequent to the date of the breach were irrelevant considerations, on the ground of remoteness, and that, where there is a market, the damages is the market value of goods at the time and place where they should have been delivered. I agree with the judgment of Scrutton, L.J. and for the reasons given by him. The same view is expressed by Vaughan Williams, L.J. in *Manners* v. *Pearson and Son* (78 L. T. Rep. 432; (1898) 1 Ch. 581): "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." In the same case Lindley, M.R. says that no claim by the plaintiff to damages can be supported, and that the judgment and trial of the action limited the right of the plaintiff to an account of what is due to him from the defendants. He held that the plaintiff was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained. It is not necessary in this appeal to consider the principles applicable to the taking of an account where no damages are claimed, but I do not think that this case supports an argument in favour of the contention of the appellants. In his judgment, Lindley, M.R. adopts the principle expressed by Lord Eldon in *Cash* v. *Kennion* (11 Ves. 314): "I cannot bring myself to doubt that, where a man agrees to pay 100*l*. in London upon the 1st Jan. he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed." I will not detain your Lordships by reference to cases which have already been fully dealt with.

In my opinion the appeal should be dismissed.

Lord WRENBURY.—In my opinion this appeal fails.

The action is for damages for tort. It is not a continuing tort. On the 30th Dec. 1917 and the 18th Feb. 1918 the defendants, the owners of the *Volturno*, were by the plaintiffs' wrong damaged to the amount of 47,372.32 lire in the one case and 257,046.40 in the other case, making together 304,418.72 lire. On the 8th June 1920 the defendants' claim was agreed, subject to the question of the rate of exchange to be taken in assessing the loss. On the 30th Dec. 1917 the rate of exchange was 39.90. On the 18th Feb. 1918 it was 41.30. On the 20th June 1920 it was 66.25. The order under appeal has taken 39.90 and 41.30 as the proper rates of exchange to be taken in measuring in English currency the agreed loss of 304,418.72 lire. The appellant says that this is wrong.

Your Lordships who have preceded me have already reviewed the authorities; it is unnecessary for me to do so again; more usefully can I state in my own words what I think is the true principle. Assume that a judge is sitting in July to try an action for damages for a tort committed on the preceding 1st Jan. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on the 1st Jan. the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on the 1st Jan. the equivalent sum in British currency was, say, 7500*l*. Adjudge that the plaintiff recover against the defendant 7500*l*. There is no difference of principle arising from the fact that the loss is of lire as distinguished from, say, cows. If the

plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: Declare that on the 1at Jan. the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on the 1st Jan. the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150*l*. Adjudge that the plaintiff recover from the defendant 150*l*. It would be *nihil ad rem* to say that in July similar cows would have cost in the market 300*l*. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having on the 1st Jan. deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows; the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

The argument to the contrary is that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed. That is true, but it is necessary to add that, of which we have recently heard so much, in the form of a fourth dimension, namely, the consideration of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act.

All the authorities are in favour of this view except the decision of Roche, J. in *Kirsch* v. *Allen* (122 L. T. Rep. 159) and the American decision in *Marburg* v. *Marburg* (26 Maryland, 8). In *Di Ferdinando* v. *Simon*, Roche, J. himself decided in favour of this view, preferring it (unless the cases could be distinguished) to his decision in *Kirsch* v. *Allen*. His decision in *Di Ferdinando* v. *Simon* was affirmed on appeal (123 L. T. Rep. 105; (1920) 3 K. B. 409). The present case is in substance an appeal from *Di Ferdinando* v. *Simon*. In my opinion that case was well decided. No difference arises by reason of the fact that this is an action of tort while that was an action for breach of contract. There is here no continuing tort.

I think this appeal should be dismissed.

Lord CARSON.—A collision occurred on the 17th Dec. 1917 between the *Celia* and the *Volturno*. At the trial of the action on the 22nd July 1919, Hill, J. held both vessels equally to blame for the collision, and referred the question of damages to the Admiralty Registrar. The damages, however, were agreed on the 8th June 1920, and the reference was, therefore, not held. The damages were agreed in lire and the question this House has to decide is as to the proper date upon which to calculate the rate of exchange in order to fix in English currency for the purpose of entering an English judgment the damages payable by the wrongdoer to a foreign claimant.

The registrar decided that the date of payment, by which I understand him to mean the date at which the judgment is entered, is the time at which the rate of exchange should be taken. He did so on the authority of a decision of Roche, J. in *Kirsch* v. *Allen and Co.* (122 L. T. Rep. 159; 123 L. T. Rep. 105), and he did so treating a decision of Bailhache, J. as distinguishable on the ground that such decision arose in a case of breach of contract.

Hill, J. reversed the decision of the registrar, holding, on the authority of *Di Ferdinando* v. *Simon* and other cases, that where the damages are assessed in a foreign currency they must, in entering an English judgment, be converted into English money at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed. The Court of Appeal simply affirmed this judgment, feeling itself bound by the decision in the case of *Di Ferdinando* v. *Simon*.

The *Volturno* was an Italian ship, and was under requisition to the Italian Government under a charter-party. By the terms of this charter-party hire was payable in Italian lire. By reason of the collision temporary repairs to the *Volturno* were made at Gibraltar, causing a detention of the ship from the 25th to the 30th Dec. 1917. Permanent repairs were made at Newport News, causing a detention of the ship from the 24th Jan. to the 18th Feb. 1918. The loss of the owners of the *Volturno* by reason of such detention was in respect of the first period, 47,372.32 lire; and in respect of the second period, 257,046 lire; and these two sums amounting to 304,418.72 lire, were claimed as damages, and were apparently included in the damages agreed.

It was contended by the owners of the *Volturno* that the rate of exchange should be taken either at the date of the writ or at the respective dates when the loss by detention was suffered, and Hill, J. adopted this latter view.

It is to be observed, as I will try and show later, that there is very little authority until we come to recent decisions which can be held to lay down any rule on this subject, and the fact that the respondents put forward alternative dates shows how uncertain the law is upon this subject. I would also add that all the cases so far as I know relied upon in the judgment of Hill, J. were cases of breaches of contract, and no different rule for damages in contract or tort was suggested in the argument before this House. If I am right in the view I have taken of the matter, the reasons which impel me to that view will apply *a fortiori* to breaches of contract. The argument for the appellants in support of their contention that the date of the entry of the judgment is the proper date to fix the rate of exchange is shortly as follows: The foreign litigant has suffered, as is agreed, damages to the extent of 300,000 lire. On the principle of *restitutio ad integrum*, he is paid 300,000 lire; he gets all the damage he has suffered and it is all he would get if the claim was in Italy instead of in England, and although those damages have referred to and are answered on the basis of a loss at an antecedent date, that affords no reason

for awarding him either more or less owing to the fluctuations of the exchange one way or the other between Italy and England, which only means that the lira will buy more or less English money. The learned counsel for the appellants say further that the object, and the sole object, of translating the lire agreed upon into English currency is to comply with the requirements of English law—that an English judgment for damages must be for a sum of English money in order to make the damages accessible by execution to the foreign litigant. This principle, they say, would satisfy the dictum of Lord Eldon in *Cash* v. *Kennion* (11 Ves. 314), where he lays down: "If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed."

I will deal shortly with the authorities later. On what principle are we asked to enter judgment for the owners of the *Volturno* for a sum of Emglish money which will to-day produce a much larger sum of lire than that which they themselves have agreed upon, or if the exchange had gone the other way and the value of the lira had appreciated, a sum of English money which would produce less than the agreed amount? It is said that the damages must be assessed with reference to the actual periods of detention. It is at that time that the owner suffers damages by loss of use. With that I entirely agree. But when it is added that it follows that that is also the date at which the exchange must be taken for the purpose of conversion with a view to entering judgment I do not follow the reasoning. I assume that in assessing the damages all the necessary adjustments would be made and elements of damage considered. It may be that, for instance, in the present case the temporary repairs at Gibraltar had to be paid in sterling, and it would, of course, follow that the amount of lire which the sterling represented at the rate of exchange at that date should form an item in the damages. Similarly, if goods had to be bought in the market in England to replace English goods not delivered under a contract with a foreigner, the date of such purchase would necessarily fix the rate of exchange in assessing the damages. But I do not think there is any connexion between the fixing of the damages and the rate of exchange to be taken in relation to certain items thereof at certain dates, and the rate of exchange to be fixed for the purpose of entering judgment.

I am, therefore, of opinion that the contention of the appellants is well founded and that the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign currency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry of judgment is being made for the purpose of making the judgment available.

It may be said that where the rate of exchange has gone against the lira, the delay has prejudiced the applicant. I do not think that can be considered, as the rule which has been applied must plainly apply whether the exchange is adverse or otherwise. But in any event to assign this as a reason for the rule would be in reality to give damages for non-payment, which, except under special circumstances, are never awarded in our courts: (for instance, see the judgment of Bailhache, J. in *Barry* v. *Van den Hurk*, 123 L. T. Rep. 719; (1920) 2 K. B. 709).

In *Manners* v. *Pearson* (78 L. T. Rep. 432; (1898) 1 Ch., at p. 587) Lindley, M.R. says: "To substitute English money for Mexican dollars any time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for any breach of it which the plaintiff can prove that the defendant committed, which is a totally different matter."

I have examined the judgments delivered by the Court of Appeal in *Ferdinando* v. *Simon* (*sup.*) and also the judgments *Lebaupin* v. *Crispin* and in *Barry* v. *Van den Hurk*, all decided in 1920, but although they all seem to me to lay down and assert the same rule as that upon which Hill, J., following some of these judgments, acted and which I have already considered, I do not think the learned judges who decided them rest their judgments on any authorites, and rather assume that such a rule existed, or ought, as a matter of principle, to exist. The only case, apart from the recent authorities to which I have referred, which seems to me to give us any assistance is the case of *Manners* v. *Pearson*, from which I have already quoted.

Vaughan Williams, L.J. no doubt in that case laid down the principle which is contended for by the respondents in the present case, but he was a dissenting judge, and his judgment cannot be reconciled with the judgments delivered by the majority of the court, Lindley and Rigby, L.JJ.

Although that action may have to some extent turned on the form of the action, it is to be noted that judgment was given for an account on the 4th Nov. 1897; the account was delivered on the 13th Nov. 1897, showing an amount due to Aug. 1896, yet upon an application by the plaintiff claiming that the rate of exchange should be fixed at the date when the account showed the amount due, namely, Aug. 1896, the court decided that the rate of exchange should be taken not as of that date, but as of the date of the account under the judgment, viz., the 13th Nov. 1897.

We have not been referred to any rule laid down in any English text writers, but under American law the rule, as I have stated it, seems to prevail. Sedgwick, 8th edit., vol. 1, s. 274, states the rule that, generally speaking, the exchange is to be estimated at time of payment, and in support quotes a number of American authorities, including the case of *Marburg* v. *Marburg* (26 Maryland, 8), to which we were referred, and which Sir John Simon admitted was, for what it was worth, an authority in favour of the appellants. Of course, such authorities are not binding in any way upon us, but they seem to me to be sound in principle, and I think the discussion of the question in Story's Conflict of Laws, 8th edit., ss. 308-315, leans to the same conclusion.

I would refer also to Westlake's Private International Law, 5th edit., s. 226, p. 315, where the learned author supports the view I gave already indicated.

I am therefore of opinion that the arguments of the counsel for the appellants should prevail, and that the appeal should be allowed.

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

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

Judicial Committee of the Privy Council.

Oct. 24, 25, *and Nov.* 8, 1921.

(Present: Lords SUMNER, PARMOOR and WRENBURY, and Sir ARTHUR CHANNELL.)

THE RANNVEIG. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Agreement by allies with neutral country conceding right to trade in conditional contraband—Cargo of conditional contraband destined for German base of supplies—Seizure during Armistice.

On the 30th April 1918 an agreement was made between the U.S.A. and Norway, and was assented to by the United Kingdom, under which Norway agreed not to export to Germany food stuffs except fish in quantities not to exceed 48,000 tons per annum. This quantity was duly exported by Norway under Norwegian Governmental licence. the monthly total exported being reported by Norway to the United Kingdom. During the Armistice the R. was on a voyage to Stettin under such licence and within such condition. Stettin was admittedly a German base of supplies. The R. and her cargo were taken as prize by H.M.S. V.

Held, that reading the agreement as a whole, each contracting party undertook certain specified obligations, namely, on the part of the United States, to furnish to Norway certain supplies, and on the part of Norway, to place restriction on her exports to the Central Powers. Norway neither obtained nor acquired a right for her subjects to ship and carry contraband; neither did the belligerent powers release their right to capture contraband.

Held, further, that since the conditions of the Armistice were quite consistent with the maintenance of the German organisations in view of a possible renewal of hostilities, and since the shipowners carried a complete cargo of conditional contraband bound to an enemy base of supplies, both ship and cargo were subject to condemnation.

Judgment of Sir Henry Duke, P. (reported 15 Asp. Mar. Law Cas. 292; 124 L. T. Rep. 635; (1920) P. 177) affirmed.

APPEAL from a judgment of the President of the Prize Court (Sir Henry Duke, reported 15 Asp. Mar. Law Cas. 292; 124 L. T. Rep. 635; (1920) P. 177).

Inskip, K.C. and *Balloch*, for the owners of the *Rannveig*.

Leck, K.C. and *Roland Burrows* for the owners of the cargo.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock*, (S.-G.) and *Pearce Higgins* for the Procurator-General.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—This is an appeal by Norwegian shipowners, the Aktieselskabet Osterjolingen, and by German cargo-owners, the Reichsfisch-versorgung, against a decree whereby a cargo of salted herrings in transit from Christiansand to Stettin and the steamship *Rannveig*, on which it was laden were condemned, the first as being conditional contraband bound to a German base of supply, and the second as having carried it with full knowledge of its character and destination. Both appellants relied chiefly on an international agreement, called the Norwegian-American Agreement, dated the 30th April 1918. The German cargo-owners appeared and claimed the benefit of this agreement and were heard without objection to argue that it was binding on the Crown, which is not contested, and that it assured to the traffic in question, immunity from capture and condemnation. This is the main question in the appeal. The shipowners claimed that under this agreement, read in combination with another called the Tonnage Agreement, made between His Majesty's Government and the Norwegian Shipowners' Association in the previous November, they were entitled to carry this cargo to Stettin without interference, or at least were reasonably warranted in so reading the agreements and therefore should not suffer condemnation of the ship.

There is a passage in the President's judgment which their Lordships will mention before passing on. He observes, and apparently as a step in his train of reasoning: "To license such a transaction on the part of an alien friend would be to license an unneutral act, whereby he must of necessity lose his character of friend. There is nothing in the terms of the agreement which shows an intention to authorise Norwegian traders to do any act inconsistent with neutrality. The Norwegian trade with Germany in fish which is provided for is, in my opinion, that trade only which is consistent with neutrality, and not trade which is contraband."

This passage, doubtless by inadvertence, appears to assume that the carriage of the cargo in question would, apart from the Norwegian-American agreement, have been an unneutral act in the carrier, and that to have permitted it to be shipped would have been a breach of neutrality on the part of the Norwegian Government. It is not, however, the crucial point of his decision. The carriage of contraband, though hazardous, is not an unlawful or an unneutral trade. The fact that it is subject to the right of the belligerent to prevent it by capture on the high seas makes it necessary to consider whether the appellants in this case are relieved from the consequences of such capture by the operation of the agreements in question.

The Norwegian-American agreement had on its face many objects, and in construing it they may be borne in mind. Furthermore, it is material to remember that it was entered into by the Norwegian Government on the one hand through its special representative, and on the other by the chairman of the War Trade Board of the United States, an organisation empowered to make such a contract on behalf of the United States. The agreement subsequently received the adherence of various Allied Governments, and more particularly of that of His Majesty.

When this agreement was entered into Norway had undoubtedly a strong interest in obtaining from the Allied and Associated Powers, especially from the United States, an agreement for a full supply of the commodities which were necessary to her economic life and prosperity, but in Europe, too, there were supplies which she desired to obtain from the Central Powers, and this involved the maintenance of Norwegian exports in exchange and of sea-borne traffic, probably in Norwegians bottoms as much as in German, for the purpose of transporting it. Equally important to her, perhaps more

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

important still, was the observance of her obligations of neutrality and the avoidance of any voluntary discrimination between one combatant power and another. On the other hand, though there is nothing in the record to furnish direct evidence on this point, their Lordships cannot without affectation ignore what must be common knowledge—that in the spring of 1918 the problem of intercepting contraband traffic between Norway and Stettin was one which presented to the Allies difficulties not attaching to the control of traffic in the North Sea. Their Lordships have been invited to hold that the object, or at least one object, of the stipulations of this agreement with regard to the export of herrings to Stettin was to induce the Norwegian Government in effect to do for the Allied Powers what they could not then do for themselves, and to secure by agreement restriction of the traffic in food within moderate limits. It may be so, but their Lordships cannot undertake to determine the meaning of a written agreement by considering the results which may follow from its terms. It is equally possible that its object was to enable Norway, by stipulations made by the Norwegian Government in the interests of the country, to find a profitable and secure outlet for a portion of her herring catch, to obtain by way of *quid pro quo* a corresponding supply of German manufacturers, and above all, to silence any possible complaint from the Central Powers that an agreement had been made which involved discrimination against themselves. The agreement as a whole has compromise writ large upon the face of it. One stipulation answers another; but who can now estimate the relative weight of each? Their Lordships have no information before them which would be an adequate justification for giving to particular phrases a meaning based on the precise objects or the relative importance of the various clauses, and must perforce refer to the words used for their meaning.

Again, in point of form, conventional terms relating to exports of Norwegian commodities from Norwegian waters would naturally be expressed as undertakings by the Norwegian Government, not as licences accepted by it from the hands of foreign powers. A sovereign State, scrupulously mindful of the obligations of neutrality, and justly resolute to maintain its own dignity and independence, would be prompt to reject language which might imply the permission of another power to take this or that action as to the goods to be shipped on board its own ships in its own ports; while, on the other hand, the United States could have no interest in imposing on Norway language suggesting the acceptance of permission from abroad, since for practical purposes the mere undertaking of the Norwegian Government was sufficient to ensure any results that were decided. It cannot, however, be denied that if, upon a sufficient inducement or by inadvertence, the Norwegian Government did, in truth, assent to language clearly expressing the grant of permission by the United States to export herrings in a certain measure from Norway, the matter was entirely within its competence and the language must be read as it stands.

Their Lordships accordingly turn to the wording of the instrument. Art. 3, par. 1, is particularly material. It begins by a statement that, for considerations recited "the Norwegian Government agrees to the following restrictions of her exports to the Central Powers or their allies, viz.: "Norway will not export to the Central Powers or their allies food-stuffs of any kind except fish and fish products. Fish and fish products may be exported in quantities not to exceed 48,000 tons per annum export weight." and then, after defining "fish" and "fish products," it proceeds: "There shall be no export to Germany or her allies of any oil or derivations thereof, of fish or of any marine animals. The quantity of fish and fish products which may be exported to Germany and her allies shall not exceed 15,000 tons in any three months, and the amount which such export is more or less than 12,000 tons in any quarter must be deducted from or added to 12,000 tons the following quarter."

Manifestly in form the whole of the article above quoted is an undertaking by the Norwegian Government, unless the two sentences containing the words "fish products may be exported" and "the quantity . . . which may be exported" can be read as permissive words, uttered by the United States and conferring on Norway an American leave and licence to do certain things.

There is an observation to be made here which, though general, is of actual assistance. It is this: The language of this agreement, when it is the language of the United States, may be treated as being the language of His Majesty's Government, and, whatever its form, if it amounts in substance to a licence from the Crown covering the traffic now in question the appeals succeed. It would be pedantic and unworthy of the dignity of the Crown if their Lordships were to draw a distinction between the promise of a licence to the Norwegian Government and the possession of a licence from the Crown by the particular persons engaged in this adventure. Lord Ellenborough, C.J. in *Usparicha* v. *Noble* (13 East, 332) laid down a similar proposition.

If His Majesty's Government have given assent to a contract which, reasonably construed, involves permission to those engaging in this trade to carry it on free from the exercise of belligerent rights, those rights are waived and a court of prize cannot enforce them. The ultimate question before the President was: "Does the agreement, rightly construed, amount to a waiver of the belligerent rights of the Crown in regard to contraband trade of the kind in question?" Before their Lordships it is: "Have the appellants succeeded in establishing that the conclusion of the President in the negative was wrong?"

With the assistance of counsel their Lordships have examined every relevant word in this document, but it would be unprofitable to repeat at length the arguments on either side, as applied clause by clause and sentence by sentence. It often happens in questions of construction that the meaning of a passage will finally turn on the impression which it produces on individual minds, rather than on logical deductions or grammatical analysis. The word "may," twice used in the passage quoted, is at least indeterminate. Even if it were supposed to be a part of the agreement where the United States speaks, there is the question whether it means "You may export without interference from the Allies' cruisers" or "You may export without its being a breach of contract on your own part, that is without complaint on ours." To read it as meaning "Norway contracts not to export foodstuffs other than fish and fish products; these she may or may not export up to 48,000 tons, ut she undertakes not to export more," is reasonable and more in accordance with the scheme of the article than to read it as meaning "Norway under-

takes not to export foodstuffs other than fish, and the United States permit Norway to export from her own ports 48,000 tons of her own fish."

Thus Norway's agreement relates only to the excess of 48,000 tons, while as to that quantity it remains outside the contract and her original freedom of action is unaffected. The Allies, on the other hand, accept the obligations which Norway imposes upon herself as sufficient, and there is no stipulation on their part which restricts their right to interfere with this traffic. This likewise is left outside the agreement and unaffected. The President's conclusion is in favour of the former reading. It is true that there is a later passage, which runs: "Nothing herein contained shall be construed to authorise or permit the exportation to Germany or her allies of pyrites in any form except pyrites cinders." but this is a denial of a licence, not the grant of one, and all that can be said is that if these words contemplate a licence by the United States to Norway, which need not be decided, the parties showed that their vocabulary contained much more apt words—namely "authorise" and "permit"—than a mere "may," which is adapted to either purpose.

Although objection may be well taken in some respects to his reasoning, their Lordships are unable to say that the construction adopted by the learned President was wrong, or that he ought to have been satisfied that the belligerent rights of the Crown had been waived. Reading the agreement as a whole, the construction which is most consistent with its language, in their Lordships' opinion, is one by which each contracting party undertakes certain specified obligations—namely, on the part of the United States, to furnish to Norway certain supplies, and on the part of Norway, to place restrictions on her exports to the Central Powers. In other respects the rights of each party remain unaffected. Norway neither obtains nor requires a right for her subjects to ship and carry contraband; the belligerent powers make no release of their rights to capture contraband.

There remain but two minor points. It is said that after the Armistice it cannot be presumed that Stettin was still a military or naval base of supplies, as during actual hostilities it had so often been found to be. The answer is that the record contains no evidence of any change and that the Armistice was an Armistice only and quite consistent with the maintenance of the German organisations in view of a possible renewal of hostilities. The other contention is that the shipowners acted in good faith (which is not denied) and reasonably read the agreement as permissive, and therefore should not suffer condemnation of their ship. Their Lordships think that those who know all the material facts, as these shipowners did, and rely on a reading of a written instrument, which proves to be wrong, do so at their peril. They can no more rely on such an error than upon ignorance of the law. If they read it aright they were in the right; not having done so, they are in the wrong. They carried a complete cargo of conditional contraband bound to an enemy base of supplies with their eyes open, and the usual consequences follow.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: for the shipowners, *Botterell* and *Roche*; for the cargo owners, *Wallons* and *Co.*; for the Procurator-General, *Treasury Solicitor.*

Oct. 27 *and Nov.* 21, 1921.

(Before Lords SUMNER, PARMOOR, WRENBURY and Sir ARTHUR CHANNELL.)

EGYPTIAN BONDED WAREHOUSE COMPANY LIMITED *v.* YEYASU GOSHI KAISHA AND ANOTHER. (*a*)

APPEAL FROM THE SUPREME COURT FOR EGYPT, VICE ADMIRALTY JURISDICTION IN PRIZE.

Prize Court—Jurisdiction—Third party procedure—Indemnity.

In Oct. 1915, *a Japanese firm, as owners, obtained from the Prize Court, Egypt, an order for the release of certain goods seized in the German steamship L. The goods were in the appellants' warehouse, who held them as agents for the marshal. A large portion of the goods were in error forwarded to England instead of to Japan as the owners of the goods had directed. They issued a writ in the Prize Court, Egypt, against the marshal claiming damages for negligence. The marshal served on the appellants a third party notice claiming to be indemnified. The appellants disputed the jurisdiction of the Prize Court, but on a preliminary hearing the judge dismissed the objection, the appellants not appearing. The case was subsequently tried and judgment was given for the owners against the marshal, and for the marshal against the appellants. This appeal was brought against the latter part of the judgment, which it was contended was made without jurisdiction.*

Held, that there was no jurisdiction in the Prize Court to decide, as between parties some of whom were not parties to the Prize proceedings, disputes not involving the consideration of the jus belli *and arising out of facts which occurred after an effective release of the goods to a claimant. Further, there was nothing in the Prize Court Rules nor in Order XLV., which provided for the calling in of third parties against whom the right of indemnity is claimed.*

APPEAL by the third parties from a judgment of the the Prize Court, Egypt.

R. A. Wright, K.C. and Hon. *S. O. Henn Collins*, for the appellants.

D. Stephens, K.C. and *Balloch*, for the respondents, the owners of the goods.

Sir *Gordon Hewart* (A.-G.) and *Bowstead*, for the respondent, the marshal.

Their Lordships' judgment was delivered by

Sir ARTHUR CHANNELL.—This is an appeal from His Britannic Majesty's Supreme Court in Egypt, exercising jurisdiction in prize. The appellants, the Egyptian Bonded Warehouse Company Limited, are an Egyptian company who were employed by the marshal of the Prize Court to warehouse goods which came into his charge as marshal. The first respondents are a Japanese firm, who claimed, as owners, 171 cases of aniline dyes which had been part of the cargo of the German steamer *Lutzow*, seized as prize within the district over which the Prize Court of Egypt had jurisdiction, and placed in charge of the marshal of the court, and by him warehoused with the appellants.

On the 4th Oct. 1915, the Japanese firm (the first respondents) obtained from the Prize Court an order for the release to them of the 171 cases which they claimed. It will be necessary to state hereafter in greater detail what was done upon this order, but

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

the result was that through the mistake of someone, 150 out of the respondents' 171 cases got shipped to England instead of Japan, as they had desired and directed. On the 27th Dec. 1916, the first respondents, by a writ issued out of the Supreme Court, and entitled "Vice Admiralty Jurisdiction in Prize," commenced proceedings to recover damages from the marshal for alleged negligence in respect of the 150 cases. There was some delay in proceeding with the action owing, perhaps, to the fact that the then marshal, Mr. Wallis, died, and on the 8th Feb. 1918, the writ was amended by striking out his name, leaving it as a writ against the marshal of the court, without naming the successor in the office. By this time the defence of the marshal had been taken up by His Majesty's Procurator-General in Egypt, presumably for the reason that negligence being alleged against a public officer in the execution of his duty, it was right that the action should be defended at the public expense, and especially as the individual then holding the office could not be personally responsible for any default of his predecessor.

On the 8th March 1918, the procurator-general acting on behalf of the marshal defendant, issued from the court, and procured to be served on the appellants, a third-party notice, stating that the defendant claimed to be indemnified by the appellants on the ground that the negligence complained of was committed by the appellants as his agents, and giving notice to the appellants to enter an appearance if they wished to dispute the plaintiffs' claim in the action, and that in default of appearance they would be deemed to admit the validity of any judgment, and their liability to indemnify. The appellants did not enter an appearance, taking the view that the Prize Court had no jurisdiction to issue the notice. Their main ground appears to have been that as Egyptian subjects they could only be sued by a foreigner in the mixed court, and they must have given some notice of these contentions, for the next proceedings was an argument, before Mr. Peter Grain, one of the judges of the court, on the point of jurisdiction. The appellants were not represented, but the plaintiffs in the action appeared by counsel, and the Procurator appeared for the marshal. Both seem to have argued in support of the jurisdiction.

On the 28th June 1918, the judge delivered judgment to the effect that the Prize Court had jurisdiction. On this the appellants (by leave, necessary owing to the time having expired) entered an appearance under protest, and the case was tried, with the result that judgment was given for the plaintiffs in the action for damages, the amount to be ascertained by an inquiry, which was directed; and for the marshal, as against the third parties, that he was entitled to be indemnified by them. From this judgment the appellants appeal to this board, on the ground that the court had no jurisdiction to entertain and decide on the third-party notice, and also that even if it had, the decision was wrong on the merits. The marshal also entered an appeal, but on petition by him to this board he was, on the 7th Feb. 1921, struck out as appellant and made a respondent on the terms that his argument was to be restricted to his claim to be indemnified by the appellants.

The only appeal now before the board, therefore, is that of the Bonded Warehouses Company against the judgment, holding them liable to indemnify the marshal against the claim of the Japanese firm, and the main question for consideration is whether the Prize Court has jurisdiction to decide any such matter. The interlocutory judgment delivered by Grain, J. goes through and quotes the authorities which show that a Prize Court has jurisdiction over the incidents as well as the principal matter of prize, but he does not refer to the facts of the present case, nor say why he considered they brought the case within the rule which he laid down. It is possible that the facts had not then been brought fully to his knowledge. It must, however, have been clear that the complaint was about matters which had arisen after the release of the goods. The communications which passed immediately after the release were proved at the subsequent trial and are summarised in the final judgment. They were in writing, except that there were a few telephonic communications, the effect of which appears by the letters which are set out in the record. The order of releasc, dated the 5th Oct. 1915, was formally drawn up, and was on the 6th Oct. sent in a letter from the advocates acting for the claimants in prize to the appellants, the Warehouse Company. That company carried on business not only as warehousemen, but also as forwarding and shipping agents and the letter of the 6th Oct. gave directions to the company to take delivery of the goods released, and to arrange for their shipment to Japan.

Further letters passed as to further information which the appellants required in order to be able to ship the goods. The order of release was returned in order that the advocates might get an addition to it which would prevent difficulties with the Customs authorities, and facilitate the shipping. The correspondence from the first shows that the appellants accepted the directions given to them, and agreed to hold for their owners the goods to which the release related, and which were described in a schedule to the order by the marks on them. The Bonded Company, however, kept no books distinguishing for whom they held goods, or even showing what they had in stock, and this the trial judge very naturally held to be negligent. It seems to have been the practice for the marshal to give to the Bonded Company documents called delivery orders, directing the company to hold to their own order goods in their warehouse then standing in his name. This seems to have been done when it was proposed to send goods away to show that the marshal had no further claim, and as an authority to deal with the goods as forwarding agents. Such a document was given on the 18th Oct. in reference to the 171 cases which had been released, but it does not mention the release, or the name of the plaintiffs, or of their advocate to whom the order of release had been given. It was in precisely the same terms as a document which had been given on the 14th Oct., intended to relate to goods which had been condemned, and which it was proposed to ship to England, and in respect of which the Bonded Company was to act as shipping agents for the marshal himself. These documents appear to have been given at the request of the Bonded Company when it was desired to deal with the goods, but it is clear that they were treated as mere matters of form, and that the company did not wait for such orders to be given before they accepted directions for shipment. The document of the 14th Oct. was the cause of the trouble,

because the list attached to it included, as well as the marks of condemned goods, the marks of 150 out of the 171 cases which had been released to the plaintiffs. The case of the marshal is that he employed the company to make out this list, and merely put his signature to it when presented to him for signature. This is the basis of his claim for indemnity. The goods named on it were not shipped until the 27th Oct., but then they were, and no comparison of the lists having been made, the 150 cases were included in the shipment. On the 16th Oct., before the shipment, and when the goods were still in their warehouses, the company had written to the advocate of the plaintiffs a letter distinctly accepting his orders as to the disposal of the 171 cases, but there was further delay in shipping the plaintiffs' goods, as there was a prohibition against exporting aniline dyes from Egypt, and it was necessary to get dispensation for these goods, and it was not until the 4th Dec., when all these difficulties were removed, and the goods were about to be shipped that the mistake was discovered.

On these facts their Lordships are clearly of opinion that before the cause of complaint of the plaintiffs arose, not only had the 171 cases been released to them by order of the court, but the release had been acted on by attornment, if that last step was necessary to prevent their ceasing to be prize goods. They had, in fact, in their Lordships' view, ceased to be prize goods.

Passing now to the authorities on the jurisdiction of the Prize Court, the most important are referred to in the judgment of Peter Grain, J. What they show is that the Prize Court has exclusive jurisdiction over the question of prize or no prize, and also over all questions which depend for their proper determination on the question of prize or no prize, the reason being that prizes are acquisitions *jure belli*, and that *jus belli* is to be determined by the law of nations, and not by the municipal law of any country. Thus in *Le Caux* v. *Eden* (2 Douglas, 594), it was held that an action for false imprisonment for detention of a passenger on a ship alleged to have been wrongfully captured in war could not be entertained by a common law court, because it could not decide the question of rightful or wrongful capture. In that case the whole question was discussed very fully, and with great learning. So the claim for freight on a voyage interrupted by capture, and continued to a different port by direction of the captors, can only be dealt with in the Prize Court, for the right to the freight contracted for for the intended voyage is lost by the non-completion of that voyage, and the only freight which could be recoverable would be that which the Prize Court might award, applying its rules to the particular circumstances of the capture, on which it alone could adjudicate. This was held in the *Corsican Prince* (1915, 112 L. T. Rep. 475; (1916) P. 195; 13 Asp. Mar. Law Cas. 29), and the decision on that point was approved by this board in the *St. Helena* (13 Asp. Mar. Law Cas. 488; 115 L. T. Rep. 465), although there the appeal was allowed on other grounds. This doctrine as to prize jurisdiction over what are called incidental matters, meaning matters which depend for their decision on prize or no prize, is well established, but it obviously has no application to the present case, where the claim for indemnity in no way required the consideration of any question of prize law or international law for its determination. The prize court also has the incidental jurisdiction which is necessary to enable it to keep control over the captured ship or goods, pending the decision as to whether or not they are lawful prize, in order that the court may be able to deliver them to whomsoever they may decide to be entitled. The learned judge in this case quotes a passage from Storey (Pratts' Storey, edit. 1854, pp. 30 and 31), (also quoted by Sir Samuel Evans in the *Corsican Prince* (*sup.*), stating that the Prize Court will follow prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title. "It may proceed to enforce all rights and issue process, therefore, so long as anything remains to be done concerning the subject matter." In a note to Storey at the end of the passage quoted there is a reference to *Home* v. *Camden* (2 H. Bl. 533), where the House of Lords reversed a decision of the Common Pleas, granting a prohibition, in respect of an order made after sentence of condemnation by the Prize Court, but before an appeal from the sentence to the Commissioners of Appeal in Prize had been disposed of. In that case many points were argued, but on this point the judgment proceeded on the view that owing to the appeal the property had not finally vested, and therefore there was jurisdiction. If there had been no appeal (and there has been no appeal from the release in the case now before the board) it would seem that there could have been no jurisdiction after sentence.

Grain, J. concludes his judgment by saying that the Prize Court can follow prize goods through all incidents or torts concerning them, and "its jurisdiction continues so long as anything remains to be done touching the subject matter." He must, therefore, have thought that the tort complained of in this case had been committed whilst something remained to be done in the matter, whereas the further investigation of the facts at the trial seems to their Lordships to show that that was not so. There are matters of form in the procedure of the Prize Court here which must not be lost sight of. If the decision of the court against the marshal is based on the disciplinary jurisdiction of the court over its officer, the usual way of commencing proceedings would be for the party aggrieved to call on the court by motion to exercise its jurisdiction, and not by issuing a writ for damages against the marshal. It was probably the issuing of the writ which led to the idea that a third-party notice might be issued, but there is no trace of any such practice in the Prize Court. There is nothing in the Prize Court rules here, which it is stated were adopted in the Court in Egypt, providing for the calling in of third parties against whom the right of indemnity is claimed, and as it is a new practice introduced by the Judicature Acts, it cannot be incorporated by Order XLV., providing for the old practice of the High Court of Admiralty in Prize being followed in cases not provided for by the new rules. Their Lordships, however, would not desire to base their decision in this case on any matter of form. They base it on the broad view that there is no jurisdiction in the Prize Court to decide as between parties, some of whom have not been parties to the prize proceedings, disputes not involving the consideration of the *jus belli*, and arising on facts which have occurred after an effective release of the goods to a claimant. Their Lordships decide nothing as to the judgment against the marshal, as there is no appeal against

it, and of course nothing as to the right to indemnity, or as to the question of contribution between tort feasors which the appellants desired to raise on the appeal. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Prize Court against the third parites including, of course, the order for costs, should be set aside, and that the appellants should have their costs of the appeal paid by the second respondent, and that the first respondents should bear their own costs of the appeal.

Their Lordships propose to make no order to give the appellants their costs in the court below, as the costs there would mainly have been occasioned by the dispute as to the indemnity decided against the appellants on the facts, and it would involve a difficult taxation to apportion the costs in the court below properly payable by each party.

Appeal allowed.

Solicitors for the appellants, *Vallance* and *Vallance.*

Solicitors for the respondents, *Lattey* and *Hart; Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, June 2, 1921.

(Before Bankes, Warrington, and Scrutton, L.JJ.)

Troy *v.* Eastern Company of Warehouses Insurance and Transport of Goods and Advances Limited (of Petrograd). (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage of goods—Shipping and forwarding agents—Through b ll of lading—Prepayment of lump sum freight — Consignee voluntarily taking delivery of goods at place short of original destination—Freight for unperformed portion of transit unexpended — Principal or agent — Obligation to account.

The plaintiff delivered to the defendants in Liverpool a large quantity of cigars and cigarettes for carriage to Petrograd viâ Vladivostock, at the rates (previously quoted by the defendants) of 4l. 7s. 6d. per ton for the sea portion of the carriage to Vladivostock, and 99l. 10s. per ton for the land portion from Vladivostock to Petrograd, and on the terms of a document in the form of a bill of lading, which stated that "Goods are forwarded on the basis of the present existing tariff and in accordance with the exceptions and (or) conditions of the railway companies, steamship lines, or other transport media concerned in the carriage, and we only act in our capacity as shipping and forwarding agents without responsibility on our part for other transport media concerned in the transport," and "Freight on above goods payable in Liverpool." The plaintiff duly prepaid at Liverpool the amount of the freight, which was 125l. for the sea portion of the carriage, and 928l. for the land portion, and it was assumed by the plaintiff that the rates which the defendants had quoted to the plaintiff were intended to cover the defendants' remuneration. The consignee of the goods, owing to the internal troubles in Russia, voluntarily elected to take delivery of the goods at Vladivostock. The defendants had not paid the railway company any sum of money in respect of carriage from Vladivostock to Petrograd. The plaintiff claimed to recover back the sum of 928l. as money received by the defendants as the plaintiff's agents and not expended by them.

Rowlatt, J. held, that as the sum paid to the defendants by the plaintiff in Liverpool was a lump sum for procuring the carriage, and included the defendants' remuneration, they were under no obligation to account to the plaintiff for any portion of the money which was not expended by reason of the consignee electing to take delivery at a place short of the original destination of the goods.

Held, that on the facts the defendants were in this transaction acting, not as forwarding agents, but as principals, and that the judgment of Rowlatt, J. was right.

(*a*) Reported by T. W. Morgan and W. C. Sandford Esqrs., Barristers-at-Law.

Appeal by the plaintiff from a judgment of Rowlatt, J. in an action tried in the Commercial Court.

The plaintiff claimed from the defendants 928*l.* 5*s.* as money had and received by the defendants as the plaintiff's agents and not expended by them. In Oct. 1916 the plaintiff employed the defendants, who were shipping and forwarding agents, to arrange for the carriage of a quantity of cigars and cigarettes for the plaintiff from Liverpool to Petrograd *viâ* Vladivostock. The goods were to be delivered at Petrograd to one Aristotles Kalogeropulo. The defendants had, at the plaintiff's request, quoted for the sea portion of the carriage to Vladivostock and for the land portion from Vladivostock to Petrograd by "Grande Vitesse." The plaintiff delivered the goods to the defendants at Liverpool for carriage to Petrograd at the rates so quoted—namely, 4*l.* 7*s.* 6*d.* per ton for the sea portion to Vladivostock and 99*l.* 10*s.* per ton for the land portion from Vladivostock to Petrograd, and on the terms of a document which provided (*inter alia*) that the defendants were acting only in their capacity as shipping and forwarding agents, without responsibility for other transport media concerned in the transport, and that the freight on the goods was to be payable in Liverpool. The defendants delivered to the plaintiff an account which included an item of 928*l.* 5*s.* for the carriage and charges in respect of the goods from Vladivostock to Petrograd; and the plaintiff duly paid the same to the defendants. Nothing was expressly arranged with regard to the remuneration of the defendants, but it was assumed by the plaintiff that the rates quoted by the defendants to him (the plaintiff) at his request, included their own profit.

When the goods arrived at Vladivostock the consignee considered it advisable, in view of the condition of affairs in Russia at the time, that the goods should not be forwarded along the Siberian Railway to Petrograd. He accordingly intercepted the goods at Vladivostock and accepted delivery of them there, and the remainder of the transit was abandoned. Thereupon the plaintiff brought this action, claiming to recover back from the defendants the sum of 928*l.* 5*s.* which related to the part of the transit which was abandoned,

alleging that as that sum was paid by him to the defendants in respect of carriage from Vladivostock to Petrograd, the defendants were liable to repay the sum in question as money received by them as the plaintiff's agents because they failed to make arrangements to enable the goods to be forwarded from Vladivostock to Petrograd. The defendants denied that they were the agents of the plaintiff, and by their defence they alleged that the consignee intercepted the goods at Vladivostock, and thereby released and discharged them from all responsibility, liability, and obligation with respect to the goods or to any further carriage or forwarding thereof.

Sir *M. M. Macnaghten*, K.C. and *W. A. Jowitt* for the plaintiff.—The plaintiff is entitled to recover the amount claimed as money received by the defendants as the plaintiff's agent and not expended by them.

H. Simmons for the defendants.—The plaintiff is not entitled to recover, because the payment was an absolute payment to the defendants of a lump sum for services rendered, and not as agents for the plaintiff, and they are not accountable for any sums not expended. Moreover, the consignee intercepted the goods and thereby released the defendants from any further responsibility in the matter. But the contract between the plaintiff and the defendants was one undivided contract. The defendants were ready to fulfil their part of the contract. He referred to:

London and North Western Railway v. *Bartlett*, 5 L. T. Rep. 399; 7 H. & N. 400;
Hough and Co. v. *Manzanos and Co.*, 4 Ex. Div. 104; 27 W. R. 536;
Byrne v. *Schiller*, 1 Asp. Mar. Law Cas. 111; 25 L. T. Rep. 211; L. Rep. 6 Ex. 319;
Jones v. *European and General Express Company*, 15 Asp. Mar. Law Cas. 138; 124 L. T. Rep. 276; 90 L. J. 159 K. B.

Rowlatt, J.—This case raises an important and apparently a novel point. The defendants are shipping and forwarding agents. The plaintiff desired to consign some cigars from Liverpool to Petrograd *viâ* Vladivostock, and he approached the defendants with a view to getting this transaction carried through. The defendants quoted rail transit prices from Vladivostok to Petrograd, (1) for carriage by "grande vitesse" and (2) for carriage by "petite vitesse." The plaintiff elected to have the goods sent by "grande vitesse" and delivered the goods to the defendants, who issued a document in the nature of a bill of lading, the exact meaning of the terms of which I need not, I think, determine. The defendants sent in an account to the plaintiff quoting a price from Vladivostock to Petrograd. No doubt they made a profit for themselves on the transaction, but the amount of their remuneration does not appear in the account. The question is whether the plaintiff can recover back from the defendants the amount which they would have paid for railway carriage from Vladivostock to Petrograd, having regard to the fact that the consignee elected to accept delivery of the goods on their arrival at Vladivostock. It cannot be contended that the plaintiff would be entitled to get back all the money paid by him to the defendants in respect of the procurement of carriage from Vladivostock to Petrograd, because if he revoked the agency he could not expect to recover profits to which the defendants are reasonably entitled. My attention was called to a decision of my own in which I said that forwarding agents were not carriers and were not responsible beyond making the arrangements with the carriers. In other words, they are agents to effect carriage and not carriers. *Jones* v. *European and General Express Company* (*sup.*).

To say, however, that the defendants' duties were not higher than that of agents does not help much. This case cannot be decided merely by labelling the defendants "agents" or "non-agents." It turns on this fact. The defendants were paid a lump sum to procure carriage out of which they were to pay the actual carriers and get their own remuneration. They are not accountable for the way in which they spent that sum. Whether they paid more or less does not concern the person who employed them. No one can, therefore, revoke any part of the contract for the carriage and call on the defendants to account for the sum saved by the defendants by reason of the agency having been revoked and full advantage not having been taken by the consignee of the original contract.

For these reasons, I am of opinion that the plaintiff's claim fails, and there must be judgment for the defendants with costs.

Judgment for the defendants.

The plaintiff appealed.

Sir *M. M. Macnaghten*, K.C. and *W. A. Jowitt* for the plaintiff.

H. Simmons for the defendants was not called.

Bankes, L.J.—This is an appeal from a judgment of Rowlatt, J., and the material facts appear to be these. The plaintiff, a merchant in London, was anxious to make the necessary arrangements for the conveyance of a large quantity of cigars and cigarettes, running into tons by weight, to Petrograd, to a customer there, under conditions that would enable him to secure payment for his goods from his customer, and he apparently employed a firm of Messrs. Morgan to inquire as to the arrangements that it was possible to make, and Messrs. Morgan got into touch with the defendants, whose full name is "The Eastern Company of Warehouses, Insurance and Transport of Goods with Advances Limited (of Petrograd)," and one can gather the nature of their business partly from their title, and partly from the places where their branch offices are situate, apparently all over Russia and in Persia and all over the Continent of Europe as far as Samarkand, Taschkent, and other places.

The goods were in London and therefore it would be necessary to arrange for the transmission of the goods from London to any port to which they were shipped, and also to arrange the route by which they should be conveyed. Apparently different routes were discussed, but finally the route settled on was Liverpool to Vladivostock, and Vladivostock to Petrograd; that meant, of course, a conveyance partly by sea, and partly by land. Messrs. Morgan apparently discussed with the defendants the land portion of the conveyance, and a question arose as to whether the goods when they arrived at Vladivostock should be sent on by "grande vitesse" or "petite vitesse." In order to enable Messrs. Morgan, or Mr. Troy, to decide which method of dispatch should be adopted, the defendants quoted prices for the "grande vitesse" and the "petite vitesse," which prices appear in a letter of the

20th Sept. 1916; they quoted 32s. per pood of 36 lb. by "grande vitesse" and 15s. per pood by "petite vitesse," which runs into big figures, being 99*l.* odd a ton by "grande vitesse." There is nothing to indicate, and it is not suggested, that that was a quotation obtained from the Trans-Siberian Railway and was the Trans-Siberian Railway's charge, it was the defendants' figure which they were prepared to include in a through rate from Liverpool to Petrograd, and a through rate which was to form part of a payment which had to be made in advance. Messrs. Morgan decided for Mr. Troy that the goods should go by "grande vitesse," and after enquiries it was ascertained that there was an available steamer, the *Tydeus*, belonging to Messrs. Holt, which was sailing, I think in October, and which could take the goods, if they were in Liverpool in time to be put on board. It was decided to send the goods by that vessel, and Messrs. Morgan issued a consignment note to the defendants notifying that the goods had been sent from London to the defendants' order at Birkenhead (on quay) for the *Tydeus*, for the purpose of being forwarded to this Russian customer at Petrograd. The freight and other charges were to be paid by Messrs. Morgan. The goods arrived at Liverpool and were put on board the vessel, and the shipowner issued a bill of lading in respect of the goods, the freight for which was payable in advance, and that was a freight arranged between the defendants and the shipowner. The vessel arrived at Vladivostock and the goods were discharged there. All we know about the state of things at Vladivostock is that there was certainly a very considerable difficulty in getting goods from Vladivostock to Petrograd by the Trans-Siberian Railway, and if the Russian customer had insisted upon their being taken to Petrograd, very considerable delay would have occurred before there would have been any "grande vitesse" to take them there.

I think the only conclusion one can arrive at on this part of the case is that for reasons, the full details of which we do not know, it suited the Russian customer's purse better to take delivery of the goods at Vladivostock than at Petrograd, and he did so. There is no evidence that it was impossible to convey the goods from Vladivostock to Petrograd, or that the circumstances were such that that part of the adventure must be said to have been frustrated. The learned judge offered the plaintiff an opportunity of considering whether his position would not have been better by obtaining the necessary evidence and perhaps putting forward a different form of case, but the plaintiff did not accep that offer and was willing to stand upon the position which he made before the learned judge, and which he has repeated here to-day, which is that the defendants were in the position of agents merely, and therefore were in the position of persons who had, as agents, received instructions to make the necessary arrangements for the conveyance of these goods from Vladivostock to Petrograd by "grande vitesse," that the instructions and authority to make those arrangements were revoked before the arrangements had been made or the defendants had entered into responsibility, and that, under those circumstances, the plaintiff is entitled to recover so much of the amount which he paid the defendants in advance for the entire journey as represents the portion of the journey from Vladivostock to Petrograd.

That case depends entirely upon the plaintiff being in a position to show that the defendants were in the position of agents merely. In my opinion, the plaintiff, upon the documents, fails in establishing that position. He can only found the case by laying undue emphasis upon the part of the defendant's title in which they describe themselves as "forwarding agents," and the accident that the defendants let him know how they made their charge for doing what they did in regard to these goods for the journey of the goods from Liverpool to Petrograd. When the documents are looked into, it appears to me in this case that although the defendants describe themselves as forwarding agents, and although they disclaim any personal responsibility for any mishaps on the voyage due to acts of any person employed by them, they, in fact, did accept the position of issuing themselves the through bill of lading for the goods with all the liabilitites attaching to that position, subject, of course, to the protection which they afford themselves by the exceptions.

Under those circumstances it appears to me that this is not a case of principal and agent at all, but of two independent contracting parties, one of whom describes himself as a "forwarding agent," but although under the circumstances and on occasions the defendants may act as mere agents in this case they have not acted or purported to act as mere agents carrying out their principal's instructions; they were required to undertake the position of principals, it was an essential condition of their obtaining this business that they should themselves issue a through bill of lading, and by issuing the through bill of lading, they made manifest the fact that in this particular transaction they were independent contracting parties.

It was one of the terms of their contract that they should be paid the full freight in advance. The freight, it is true, was made up of three items; one was the "sea freight to Vladivostock at 87*s.* 6*d.* per 40 cubic ft.; carriage and charges from Vladivostock to Petrograd per "grande vitesse," and bills of lading—two sets 5*s.*" It was a mere accident that the defendants rendered their account in that form. They were under no obligation to do so; they might have charged a lump sum, in which case it would have been very difficult as it seems to me for the plaintiff to have even formulated a case founded on his present contention, but it was, and is described in the through bill of lading as "freight on the above goods payable in Liverpool." The amount was paid in Liverpool; it was freight paid in advance, and in my opinion Rowlatt, J. was quite right in saying that upon the facts of this case there was no reason for departing from the rule applicable under ordinary circumstances to freight payable in advance, and it gave the plaintiff no right of action to say: "You describe yourselves as 'forwarding agents,' and, in fact, quoted me the figures and showed me the figures which made up the total claim which I paid and under those circumstances I am entitled to treat you as my agent to whom I gave instructions to make a contract with the Trans-Siberian Railway; you have not done it, and therefore you must pay me back so much of the total amount as has reference to that part of the journey. In my opinion, the view taken by Rowlatt, J. on the facts was right. This case is quite distinguishable from the case cited to the learned judge (*Jones* v. *European and General Express Company Limited*,

15 Asp. Mar. Law Cas. 138; (1920) 124 L. T. Rep. 276; 90 L. J. K. B. 159; 25 Com. Cas. 296), and I think his decision in that case was quite right upon the facts as far as they are disclosed in the reports. I think, for the reasons I have given, the two cases are clearly distinguishable.

WARRINGTON, L.J.—I am of the same opinion. On the 14th Oct. 1916 the defendants, who are described as "The Eastern Company of Warehouses, Insurance and Transport of Goods with Advances Limited (of Petrograd)," gave to the plaintiff through their agents, Messrs. Morgan, in Liverpool, a document which is, in fact, a through bill of lading. It states that they have "received for shipment in apparent good order and condition" and so on "per steamer *Tydeus* or other steamer from Liverpool to Vladivostock, thence by conveyance to Petrograd, there to be delivered unto Mr. Aristoteles Kalogeropulo, Petrograd," the goods which are described in the document and they are "to be delivered at the aforesaid port (or so near thereto as she can safely get) subject to the conditions and exceptions hereof." The document also contains the stipulation "Freight on above payable in Liverpool." The goods were duly delivered to the defendants and were shipped by them on the steamship *Tydeus*, and on the 18th Oct. the defendants sent to the plaintiff through their agents, Messrs. Morgan, an account expressed to be an account for freight and charges. The freight was divided into two parts: 125*l.* as freight and charges to Vladivostok, and carriage and charges from Vladivostock to Petrograd 928*l.*, and on the 20th Oct. the plaintiff, in accordance with the contract, paid the whole of that freight, 1053*l.* 19*s.* 8*d.* In fact the goods instead of being carried from Liverpool to Petrograd, were carried from Liverpool to Vladivostock, and there, to follow the allegation in the points of claim, Mr. Kalogeropulo took delivery of the goods and the goods were not carried from Vladivostock to Petrograd.

The plaintiff brings this action for the recovery of 928*l.*, that part of the freight which represents the carriage from Vladivostock to Petrograd, and he contends, and he puts his case upon the footing that the defendants were mere agents entrusted with the sum in question to be expended by them in procuring the carriage of the goods from Vladivostock to Petrograd, and that as that sum was not expended, or as to so much of it as was not expended, the plaintiff is entitled to recover from the defendants as his agents. It is admitted on the part of the plaintiff, that if the defendants were not the mere agents, as he alleges they were, but if they had been the actual carriers of the goods, then the plaintiff, having paid the whole freight in advance, could not have recovered any part of it by reason of part of the transport not having been effected by the defendants. The question to my mind is whether the defendants are to be treated as if they were mere agents, such as they are alleged to be by the plaintiff, or whether they are independent contractors who have contracted with the plaintiff for the transport of the goods from Liverpool to Petrograd. In my opinion, the question turns entirely upon the construction of the document to which I have already referred. That document is to all intents and purposes a through bill of lading; it contains an obligation on the part of the defendants, having accepted the goods, to deliver them to the ultimate consignee at Petrograd. I think the true view of that contract is this: that they, the defendants, are not the actual carriers; the contract is nevertheless one for carriage of the goods, it being understood between the parties that the actual carriage has to be performed not by the defendants themselves, but by persons employed by them. It is admitted that the plaintiff would have no right to inquire into the mode in which the sum in question had been expended by the defendants had they actually procured the carriage of the goods from Vladivostok to Petrograd, and it seems to me once you have that admission, it is impossible to say that the defendants were mere agents such as they are suggested to be by the plaintiff. I think, as I have already said, the true effect of the contract is that it is really a contract of carriage, and that the case must be decided in the same way as it would have had to be decided had the defendants been ordinary carriers to whom freight had been paid in advance and, therefore, the plaintiff's claim, which is for the return of part of that freight, has, rightly, been held by Rowlatt, J. to fail. The judgment of Rowlatt, J., in my opinion, must be affirmed, and the appeal dismissed.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellant, Hon. *F. F. Macnaghten.*

Solicitors for the respondents, *Leader, Plunkett,* and *Leader.*

Friday, July 8, 1921.

(Before Lord STERNDALE, M.R., ATKIN and YOUNGER, L.JJ.)

THE BRISTOL CITY. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Limitation of liability—Vessel not equipped with proper ground tackle—Collision—Unseaworthiness—"Actual fault or privity" of owners—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

Sect. 503 *of the Merchant Shipping Act* 1894 *casts the onus upon plaintiffs in limitation actions of showing that what happened occurred without their fault or privity.*

The B. C. *was an unfurnished vessel not fully equipped with ground tackle, and not supplied with engine power. The builders (representing her owners) gave instructions that she should be towed from Cardiff to Bristol by two tugs. One tug was late in arriving, and the marine superintendent in charge started the towage with one tug only. The weather, which was not good, became unexpectedly worse, and the tow rope, which was rotten, broke. The* B. C. *had only one anchor on board, and about forty-eight fathoms of wire rope, no cables, no windlass, and no hawse pipes. This equipment failed to hold her, and she drifted across the bows of the* J. E., *a sailing vessel at anchor, doing her much damage. The owners of the* B. C. *claimed, under sect.* 503 *of the Merchant Shipping Act* 1894, *to limit their liability.*

Held, upon the advice of the nautical assessors, that the B. C. *ought to have been furnished with at least*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

two anchors and proper ground tackle, and that she was not seaworthy, that the collision was due to the lack of equipment, and that the builders (who were also owners of vessels) being aware of the facts as regards the equipment of the vessel, could not establish that the collision took place without their "actual fault of privity," within the meaning of the section, and were not, therefore, entitled to a limitation decree.

Judgment of Duke, P. affirmed.

Appeal by the plaintiffs from a judgment of Duke. P. refusing to grant to the plaintiffs a decree of limitation of liability.

The plaintiffs were the builders of the *Bristol City*, but by an amendment were substituted as plaintiffs in the place of the owners.

The Merchant Shipping Act 1894, by sect. 503, sub-sect. 1, provides:

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,) . . . (*d*) Where any loss or damage is caused to any other vessel . . . by reason of the improper navigation of the ship; be liable to damages beyond the following amounts . . . (ii.) In respect of loss of, or damage to, vessels . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

Bateson, K.C. and *Noad* for the appellants.—The plaintiffs were depending on the towage being made with two tugs, and if it had been so made, there was an ample margin of safety. It is true she had no hawse pipes, but she would have been safe without them with two tugs. The plaintiffs are not mariners, nor did they know that the weather was bad, and that there was only one tug towing, and they were not doing anything unreasonable in giving the instructions which they gave:

Lennard's Carrying Company v. *Asiatic Petroleum Company*, 13 Asp. Mar. Law Cas. 81; 113 L. T. Rep. 195; (1915) A. C. 705.

The accident was due to two causes—Captain Barclay started with one tug only, and a rotten tow rope broke. The plaintiffs were not responsible for these causes. If the plaintiffs' instructions had been followed, the vessel would have been in a fit condition for the towage.

Laing, K.C. and *A. E. Nelson* for the respondents.—The vessel had no hawse pipes nor ground tackle, and Mr. Hill knew of this. He is a shipowner, as well as a ship builder, and should know that in this condition the ship was not seaworthy. He knows that accidents may happen, and that if such an accident should happen as in fact did happen, ground tackle would be necessary. There was, therefore, actual fault or privity on his part, in letting the ship put to sea in an unseaworthy condition, and he is not entitled to a limitation decree.

Bateson, K.C. replied.

Lord Sterndale, M.R.—The *Bristol City* was an unfurnished vessel, built at Bristol by the plaintiffs, and sent from there to Cardiff to take on board her engines. From there she was to be towed back to Bristol to be fitted. The voyage was a short one. She was taken across by two tugs, and the intention of the owners was that she should be brought back by two tugs. She was not in fact so brought back. When she had her engines on board the second tug had not arrived, and Captain Barclay the marine superintendent in charge of her, decided to start with only one tug. She had then only one anchor on board and about forty-eight fathoms of wire rope, no cables, no windlass, and no hawse pipes. As she was coming across the tow rope, which was rotten, broke, and Captain Barclay, after trying unsuccessfully to pick up the tug, let go the one anchor, which did not hold. The *Bristol City* drifted for, it is said, about ten minutes, and finally brought up simply by coming across the bows of the *John Ena*. Much damage was done to the latter vessel, and the plaintiffs now seek to limit their liability.

To limit liability is always hard upon the person injured; yet one cannot help feeling a certain sympathy with the plaintiffs, because two unfortunate things happened which they could not have contemplated. They did [not contemplate that Captain Barclay would start with one tug only. It appears that he made inquiries about the weather and as to the state of the barometer before starting. The weather at that time was not good; it unexpectedly got worse before the *Bristol City* tried to anchor, and that, no doubt, was the cause of her drifting. The President seems to have thought that Captain Barclay was justified in starting when he did, but it appears to me that, on the evidence, I should have been inclined to hold the contrary. The other thing that the plaintiffs did not know was that the tug's rope was rotten, and they could not be expected to know that. The President, however, has found, on the advice of the Elder Brethren, that without proper ground tackle the ship was not seaworthy—that is to say, that although she might, and in all probability would, have come across safely if all had gone right, still, if anything had happened to make it necessary for her to help the tugs, then she was not properly equipped with ground tackle so as to be in a position to help. It seems to me that that is to a great extent a matter of nautical skill, and we have therefore taken the opinion of our assessors. I put the question to them in this way: "Considering the ordinary chances of navigation on such a voyage as this, was the *Bristol City*, in the condition in which she was, reasonably fit for the voyage, taking into account the fact that it was intended that she should be attended and towed by two tugs?" The answer was: "No, the anchor and length of wire were insufficient; she should have had two anchors and a proper amount of cable." That agrees with the advice given to the President; and even if I wished I should have difficulty in differing from it, but I need hardly say that I do not wish to differ from it.

That leaves the questions, (1) Was the absence of proper equipment the cause of the accident? and (2) did the accident happen without the fault or privity of the plaintiffs? On the first question, it seems to me that the lack of proper equipment was the cause of the accident. It is very likely that if Captain Barclay had not started with only one tug the accident would not have happened, nor would it have happened if the tow rope had not broken but all these things having happened, the last factor is that the vessel, not being provided with proper ground tackle, did not bring up, but drifted down on to the *John Ena*. I have not asked the assessors to put the chances into figures, but the Elder Brethren in the court below thought that it was about ninety-nine chances to one that, with proper ground tackle, the collision would have been

averted. I think, therefore, that the want of that equipment was a real cause of the accident.

The next question is whether the accident happened without the actual fault or privity of the owners within the meaning of sect. 503 of the Merchant Shipping Act 1894. [His Lordship read the section.] I think by the section the onus is upon the plaintiffs to show that what happened occurred without their fault or privity. In the court below Mr. Hill, senior, was called as representing the plaintiffs. He evidently knew very little about the matter. The plaintiffs did not really know what fault or privity was going to be alleged against them, and they only called the elder Mr. Hill because he happened to be in London. Upon this appeal being entered, an affidavit was put in by his partner, Mr. Hill, junior, who did know something about it, for he said that the business connected with the vessel going to and from between Bristol and Cardiff was under his management and supervision, and he knew that the ship was not fitted with hawse pipes, that she had no windlass, and was provided with one anchor. He goes on to say that the equipment was identical with that of other vessels under the same conditions. Then he says: "I am not a mariner, and have no knowledge of the handling of vessels." But he knew the facts, and the statement that he was not a mariner is not sufficient to show that he did not know that this equipment was inadequate. Mr. Hill, senior, did know something about these matters, for he gave an answer that, in the ordinary course of events, a vessel would not be sent to Cardiff and back without hawse pipes if it could be helped. I do not think it unfair to Mr. Hill, junior, to say that probably he would have given a similar answer to his father. But I do not base my judgment on that. Mr. Hill is a ship-owner, as well as a builder, and it seems to me that the two things must be taken together. The one capacity cannot be separated from the other. He has been sending vessels up the Channel for some time, and, in my view, persons in his position must be taken to know something about their business, and the equipment necessary to make a vessel seaworthy. It is true he says that he has on other occasions sent vessels equipped like this; but he does not say that he does not know the consequences of sending a vessel on a voyage, however short, without some proper ground tackle; and that obligation is not displaced by his saying: "I am not a mariner." I daresay he has no knowledge of the handling of vessels, and could not navigate a vessel across the ocean. But that is insufficient. I have considerable sympathy with the plaintiffs; but I feel obliged to say that I cannot interfere with the judgment of the President, and the appeal must be dismissed with costs.

Atkin, L.J.—I agree. [His Lordship stated the facts.] I am not sure what decision I should have come to if left to myself, but we have the assistance of nautical assessors, and they advise us in the same sense as the President was advised, and, in view of their findings, I find myself unable to come to a different conclusion of fact. Therefore, it must be taken that the vessel was not properly equipped. As regards the question whether the loss was caused by that defect, I have no doubt but that it was so caused. Perhaps it would not have happened if there had been two tugs, or if the rope had not parted, but these events having happened, I think there is no doubt that, in the end, the accident did happen through the want of proper ground tackle.

Then there is the further question, whether the accident happened without the fault or privity of the owners.

It seems that the Hills, junior and senior, between them knew the facts, and the question is whether they can negative the knowledge that the ship was in effect unseaworthy. Lord Sumner, then Hamilton, L.J., in *Asiatic Petroleum Company* v. *Lennard's Carrying Company*, says this (12 Asp. Mar. Law Cas. 381; 109 L. T. Rep. 433; (1914) 1 K. B. 436): "Where the Legislature has selected one adjective for employment, I think little is to be gained, and often much to be lost, by paraphrasing it with another. Actual fault negatives that liability which arises solely under the rule of '*respondeat superior*.' In that sense it conveys the idea of personal fault, but it does not necessarily mean that the owner must have laid the train or set the torch himself. Nor again does it mean that the owner must have been the sole or next or chief cause of the fire. It is fire 'without his actual fault' not fire 'except where caused by his natural action.' The question is, could it be said of the fire that the owners had nothing to do with it but only their servants, or that for this fire not they but only their servant, if any person, were to blame? It is not enough that the happening of the fire is the servant's fault. It must also not be the owner's fault." Here then was knowledge of the two managers as to the facts, and they were responsible for the vessel's equipment. It might be said that they yet did not know what ground tackle was necessary, but it is quite plain from the evidence of Mr. Hill, senior, that they were owners as well as builders, and under these circumstances I think that they should have had a knowledge of what is seaworthy and what is not. In my view, the onus is upon the plaintiffs to establish that they did not know that this vessel was not properly equipped, and I think it is impossible to say that they have discharged that onus. I think therefore that the appeal fails.

Younger, L.J.—So soon as it is found that the damages are attributable to the absence of proper ground tackle on the *Bristol City*, it is, I think, clear that the plaintiffs have not established that that state of things happened without their fault or privity; and I am constrained, although with reluctance, to accept that position and concur in a finding against them. I have found it difficult, however, in the circumstances of this case, to disabuse my mind of the impression that the relevant cause of the accident was not so much the absence of ground tackle as that, without the fault or privity of the plaintiffs, the vessel started from Cardiff with one tug only. I have had difficulty in getting rid of the impression that the accident was due to the fact that Captain Barclay undertook this voyage disregarding the provisions of the owners in the matter of tug power. I have found it difficult to disabuse my mind of the conviction that had the *Bristol City*, on her return voyage from Cardiff, been in charge, as it was intended, of two tugs, the absence of proper ground tackle would have been innocuous, but I have abandoned that impression in view of the strong opinions held by my Lord and the Lord Justice.

Appeal dismissed.

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

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

June 23 *and* 24, *and July* 15, 1921.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.).

CHELLEW *v.* ROYAL COMMISSION ON SUGAR SUPPLY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

General average expenditure—Port of refuge—Subsequent total loss of ship and cargo—Liability of cargo owner for general average—Termination of adventure—York-Antwerp Rules 1890, *r.* 17.

By rule 17 *of the York-Antwerp Rules* 1890, *the contribution to a general average shall be made upon the actual values of the property at the termination of the adventure.*

A steamship left Cuba with a cargo of sugar, which under the bills of lading was to be carried to Queenstown for orders and to be delivered at the port of destination to certain consignees. The bills of lading provided that general average should be payable according to York-Antwerp Rules. During the voyage the ship incurred general average expenses at a port of refuge, and soon after resuming her voyage, she and her cargo were totally lost at sea by fire. The shipowner claimed general average contribution from the consignees of the cargo.

Held, that, under the York-Antwerp Rules which were incorporated in the contract, the claim failed, because at the termination of the adventure, namely, on the total loss of the ship and cargo, the cargo had no value.

Quaere, *whether the claim would have succeeded at common law, apart from the York-Antwerp Rules.*

Decision of Sankey, J. (infra ; (1921) 2 *K. B.* 627) *affirmed.*

APPEAL from a judgment of Sankey, J. on the award of an arbitrator stated in the form of a special case.

The material parts of the award of the learned arbitrator were as follows :

In Jan. 1919 the *Penlee* loaded a cargo of sugar at two ports in Cuba. Various bills of lading for the cargo were issued, under which the cargo was to be carried to Queenstown for orders and to be delivered at the port of destination to the Royal Commission on the Sugar Supply. Each bill of lading contained the provision "general average payable according to York-Antwerp Rules." The respondents were at all material times the owners of the cargo and holders of the bills of lading.

The *Penlee* sailed from Cuba with the cargo on the 20th Jan 1919. She encountered a hurricane on the 10th Feb. and sustained damage to her hull and engines. In consequence of the damage her master prudently determined to put into Horta in the Azores as a port of refuge, where she arrived on the 22nd Feb. At Horta certain repairs were done and she sailed from Horta upon their completion on the 15th March.

At Horta certain expenses of the nature of port of refuge expenses were incurred by the claimant amounting in all to 717*l.* 6*s.* 3*d.* As the damage to his ship which occasioned resort to Horta was of the nature of particular average, and did not arise from any general average sacrifice, the claimant would not have been entitled to assert that he had a right at common law to a contribution in general average towards any of the above expenses in view of the decision in *Svendsen* v. *Wallace* (5 Asp. Mar. Law Cas. 453 ; 52 L. T. Rep. 901 ; 10 App. Cas. 404. But under Nos. 10 and 11 of the York-Antwerp Rules 1890 the claimant was *primâ facie* entitled to say that all the above expenses amounting to 717*l.* 6*s.* 3*d.* ought to be treated as a general average expenditure. The said expenses were incurred for wages and maintenance of the officers and crew at Horta, and port charges, and did not include any outlay for discharging or reloading cargo, or otherwise directly incurred in relation to the cargo or its preservation.

The *Penlee* having sailed from Horta on the 15th March for Queenstown, signs of fire on board were discovered on 18th March. This fire apparently broke out in the cargo in No. 2 hold, but there was no evidence as to its cause. The fire increased so rapidly and seriously that on the 20th March her master and crew were compelled to abandon the vessel and take refuge on another ship. The *Penlee* and her whole cargo thus abandoned were totally lost at sea.

The claimant subsequently procured an average adjustment to be prepared in which the above sum of 717*l.* 16*s.* 3*d.* was treated as a general average expenditure. This was apportioned over the steamer valued at 89,250*l.* the cargo valued at 140,000*l.*, and the shipowners freight at risk valued at 1184*l.* The value of 89,250*l.* for the steamer was the estimated value she would have had on arrival in the United Kingdom, and the value of 140,000*l.* for the cargo was the estimated value that the cargo would have had if it had arrived at the port of delivery in good condition.

Upon the above apportionment the cargo's proportion of the 717*l.* 16*s.* 3*s.* was 436*l.* 2*s.* 2*d.* The claimant requires the respondents to pay this sum of 436*l.* 2*s.* 2*d.*, and on their refusal the dispute was referred to me.

It is apparent that upon these facts there arises this question of law ; if subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost ?

The learned arbitrator then enumerated the various text books dealing with the question of law, and which are cited in the judgment below and continued :

I conceive firstly that the rule might be either (1) general average expenditure at a port of refuge gives the shipowner an immediate right of contribution to that expenditure from the other interests then existing and at their then values, irrespective of their subsequent fate or subsequent values ; or (2) such expenditure gives the shipowner a right of contribution from the other interests at their value at the agreed port of destination, and if for any reason an interest, otherwise liable to contribute, has no value at the port of destination it cannot be made to contribute. And secondly I conceive that reason must be shown to establish any logical distinction between the rule as to the right of contribution towards a general average sacrifice (*e.g.*, if a master jettisons cargo worth 100*l.* or sacrifices a mast worth 100*l.*) and the rule as to the right of contribution towards general average expenditure (*e.g.*, if the master expends 100*l.* on port of refuge expenses).

After discussing the views of the various authors above referred to on the distinction between the rule as to sacrifice and as to expenditure the learned arbitrator continued :

The supposed hardship that the shipowner having made the expenditure, and having lost his ship, is in a poor way unless he can get contribution from the owners of the lost cargo) does not, I think, exist under the conditions of commerce. The shipowner in the present case, after expending 717*l.* 16*s.* 3*d.* at Horta

(*a*) Reported by W. C. SANDFORD and R. F. BLAKISTON, Esqrs., Barristers-at-Law.

could have insured that sum by a policy on average disbursements on the voyage from Horta to the United Kingdom, against the risk of the total loss of the ship and cargo, or against the risk of the loss of cargo involving the loss of any contribution from cargo. *Brigg's* v. *Merchant Traders Company* (13 Q. B. 167). And I think he could have added the premium for this insurance to the 717*l.* 16*s.* 3*d.* as part of his general average expenditure reasonably incurred. . . .

The most relevant authorities on the suggested distinction between sacrifice and expenditure seem to me to be the following: *Birkley* v. *Presgrave* (1 East. 220), *Fletcher* v. *Alexander* (18 L. T. Rep. 432; L. Rep. 3 C. P. 375), *Ocean Steamship Company* v. *Anderson* (5 Asp. Mar. Law Cas. 401; 50 L. T. Rep. 171; L. Rep. 13 Q. B. Div. 657). My own conclusion is that the rules of the common law are as follows:

(1) The right of a shipowner to contribution in general average is the same whether his claim is for contribution to a general average sacrifice or for contribution to a general average expenditure.

(2) The extent of the right of a shipowner to contribution in general average is the same as the extent of the right to such contribution of any other party to the contract of affreightment.

(3) A claim to contribution in general average by any party to the contract of affreightment must be assessed upon the properties of all parties to that contract upon the values of such properties at the port of adjustment, and the port of adjustment, if voyage has not been abandoned at an earlier port, is the port of the agreed destination under that contract.

(4) If the property of any party to the contract of affreightment, who is called upon to contribute in general average to another party or parties, has no value at the port of adjustment, either by its arrival in a worthless condition, or by its not arriving at all, that party cannot be made to contribute.

I should arrive at the same result in the present case upon another and narrower ground. The shipowner's right to treat this sum of 717*l.* 16*s.* 3*d.* as general average expenditure arises solely as matter of contract, by the incorporation in the bills of lading of the York-Antwerp Rules 1890. In construing the contract so made I think Nos. 10 and 11 of the rules must be read in conjunction with No. 17, and that so construed the result is as suggested above.

I award that the claimant is not entitled to recover the sum of 436*l.* 2*s.* 2*d.* or any sum from the respondents. I direct that the claimant shall pay the costs of this my award, and if the respondents shall in the first place pay such costs the claimant shall repay them. And I direct that the claimant shall pay to the respondents their costs of the reference to the taxed if not agreed.

If the court shall be of opinion that the claimant is entitled to claim contribution in general average from the respondents to the said sum of 717*l.* 16*s.* 3*d.*, and is entitled to have such contribution assessed upon the values of ship, freight and cargo as they would have been at the port of destination if the voyage from Horta had been safely accomplished, then I award that the claimant shall recover from the respondents the sum of 436*l.* 2*s* 2*d.* I direct in that case, that the respondents shall pay the costs of this my award, and if the claimant shall have paid such costs they shall repay them to him. And I direct that the respondents shall pay to the claimant his costs of the reference to be taxed if not agreed. If the court shall be of opinion that the claimant is entitled to claim contribution in general average from the respondents to the said 717*l.* 16*s.* 3*d.* and is entitled to have such contribution assessed upon the values of ship, freight, and cargo, as they existed at Horta, then I award that the claimant is entitled to recover from the respondents such proportion of 717*l.* 16*s.* 3*d.* as the value of the respondents' cargo at Horta bore to the combined values at Horta of the ship, the freight at risk and the said cargo.

The York-Antwerp Rules 1890 provide:

Rule 10. Expenses at Port of Refuge, &c.—(*a*) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average. (*b*) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage. (*c*) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average. (*d*) If the ship under average be at a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by (sic) another ship, or otherwise forwarded then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule 11. Wages and maintenance of crew in port of refuge.—When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in rule 10, the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. . . .

Rule 16. Amount to be made good for cargo lost or damaged by sacrifice.—The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule 17. Contributory values.—The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act, or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average. . . .

Jowitt for the claimant.—The point involved in the case is a new one. The question is whether the shipowner should be saddled with all the expenses incurred at a port of refuge in the event of the ship and cargo becoming ultimately a total loss. This involves the question as to where the value of the cargo should be taken for the purpose of general average contribution, before arrival at the port of

destination. The charter-party in the present case is subject to the York-Antwerp Rules and reference may be made particularly to rules 10, 11, 16, 17, and 18. There is a distinction between a general average sacrifice and a general average expenditure. (See Carver, Carriage by Sea, 4th edit. (1895) pars. 428-30). If the passage referred to is sound in law, it is impossible to fix an accrued liability at the port of destination. The termination of the adventure does not mean the port of discharge. Reference may be made to Lowndes' General Average, 5th edit., sect. 61. In a passage later on he gives a definition of the phrase "termination of adventure." *Primâ facie* the rate of contribution is to be taken at the port of refuge. If anything in the nature of a loss occurs between the port of refuge and the port of destination an equitable adjustment should follow. One portion of the cargo might be affected and others not. The following authorities may also be usefully referred to:

Phillips' Law of Insurance, 5th edit., pars. 1317-1319, 1373-4;
MacArthur on Marine Insurance, 2nd edit., pp. 204-6;
Arnould on Marine Insurance, 9th edit., p. 1212.

The arbitrator in the present case has said that because the cargo is a total loss there is no contribution; the claimant contends that the ship, freight and cargo each contribute one third of the loss. It is difficult to see why the shipowner who has expended money on behalf of other parties should not be entitled to recover a proportion of his expenditure. I refer the court to the cases of:

Fletcher v. *Alexander*, *sup.*;
Anderson v. *Ocean Steamship Company*, *sup.*

The shipowner is entitled to contribution and the decision of the arbitrator cannot be upheld.

Le Quesne for the owners of cargo.—The narrow ground on which the shipowner can formulate his claim is on the construction of the York-Antwerp Rules. But the termination of the adventure is not equal to abandonment. The two things are quite distinct. In the present case there was no property and no value at the termination of the adventure. The cargo never did arrive at its destination. On the broader ground, however much text writers have differed, one principle has always been recognised—namely, that where there has been no benefit no need for contribution exists. And no benefit accrues until all the risks of the adventure are at an end. It is the general practice of adjusters to fix contributions by the value at the port of arrival. The cases referred to by counsel for the claimant show that the same principle is to be applied whether a claim arises from sacrifice or expenditure. Phillips and Arnould take the view that there may be contribution without benefit in the case of expenditure, but not in the case of sacrifice; but there is no real ground for saying that there can be contribution without benefit.

Jowitt in reply.—Sacrifice and expenditure must be kept distinct. In expenditure the shipowner has incurred a debt, but the cargo owner has not. The distinction is well shown in Benecke on Marine Insurance, at p. 298.

March 23, 1921.—The following judgment was read by

Sankey, J.—This is a special case stated by a legal arbitrator to raise the following question of law. If subsequently to the incurring by a ship owner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost? The facts are as follows: In Jan. 1919 the *Penlee* loaded a cargo of sugar at two ports in Cuba. Various bills of lading for this cargo were issued. By such bills of lading the cargo was to be carried to Queenstown for orders and to be delivered at the port of destination to the Royal Commission on Sugar Supply. Each bill of lading contained the provision "general average payable according to York-Antwerp Rules." The respondents were at all material times the owners of the cargo and holders of the bills of lading. The *Penlee* left Cuba with a cargo on the 29th Jan. 1919. She encountered a hurricane on the 10th Feb., and received damage to her hull and engines. In consequence of the damage her master prudently determined to put into Horta, in the Azores, as a port of refuge, where she arrived on the 22nd Feb. At Horta certain repairs were done and she left Horta upon their completion on the 15th March. At Horta certain expenses, of the nature of port of refuge expenses, were incurred by the claimant amounting in all to 717*l.* 16*s.* 3d. As the damage to the ship which caused resort to Horta was of the nature of particular average, and did not arise from any general average sacrifice, the claimant would not have been entitled to assert that he had a right at common law to a contribution in general average towards any of the above expenses in view of the decision in *Svendsen* v. *Wallace* (5 Asp. Mar. Law Cas. 453; 52 L. T. Rep. 901; 10 App. Cas. 404). But under Nos. 10 and 11 of the York-Antwerp Rules 1890 the claimant was *primâ facie* entitled to say that all the above expenses, amounting to 717*l.* 16*s.* 3*d.*, ought to be treated as a general average expenditure. The said expenses were incurred for wages and maintenance of the officers and crew at Horta, and post charges, and did not include any outlay for discharging or reloading cargo, or otherwise directly incurred in relation to the cargo or its preservation.

The *Penlee* left Horta on the 15th March for Queenstown, and signs of fire on board were discovered on the 18th March. This fire apparently broke out in the cargo in No. 2 hold, but there was no evidence before the arbitrator as to its cause. The fire increased so rapidly and seriously that on the 20th March her master and crew were compelled to abandon the vessel and take refuge on another ship. The *Penlee* and her whole cargo thus abandoned were totally lost at sea.

The claimant subsequently procured an average adjustment to be prepared by Messrs. Manley, Hopkins, Sons, and Cookes, in which the above sum of 717*l.* 16*s.* 3*d.* was treated as general average expenditure. This was apportioned over the steamer valued at 89,250*l.*, the cargo valued at 140,000*l.*, and the shipowner's freight at risk valued at 1,184*l.* The value of 89,250*l.* for the steamer was the estimated value, which she would have had on arrival in the United Kingdom, and the value of 140,000*l.* for the cargo was the estimated value that the cargo would have had if it had arrived at the port of delivery in good condition. On the above apportionment the cargo's proportion of the 717*l.* 16*s.* 3*d.* was 436*l.* 2*s.* 2*d.* The claimant required the respondents to pay this sum of 436*l.* 2*s.* 2*d.*, but the respondents

refused, and this was the dispute referred to the arbitrator.

The question which falls for determination is not easy to decide. There is apparently no judicial authority on the matter, but it is one which has been considerably discussed by distinguished jurists who have written on the subject, namely, Arnould on Marine Insurance, Carver on Carriage by Sea, Lowndes on General Average, McArthur on Marine Insurance, and Phillips on Insurance. These authors differ from one another without always assigning the most satisfactory reasons for their conclusions. With regard to a general average sacrifice, the law would appear to be settled. Bovill, C.J., in *Fletcher* v. *Alexander* (*sup.*) says, at p. 382: "If, however, after the jettison or the matter which is the subject of average has arisen, the remainder of the goods are entirely lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand, and the benefit derived on the other." Lowndes, at p. 302 of the 5th edit., says: "On this point all the authorities and the practice are agreed. The question as to which there is room for a difference of opinion is whether the rule thus laid down for jettison is to be applied to the case of expenditures."

Both Phillips, 5th edit., ss. 1317 and 1319, and Amould, 9th edit., s. 976, distinguish between sacrifice and expenditure, the latter saying: "As regards sacrifices, then the law is clear, but in the case of expenditures attention must be paid to some different considerations." He sets them out and concludes the section by saying: "Hence the long-established rule used to be that disbursements for the general benefit must be fully reimbursed in general average whether the ship and cargo be eventually saved or not." But at sect. 977 he states: "Notwithstanding these considerations, however, the general practice of adjusters is, as we have already observed, not to give practical effect to this distinction, but to allow contribution, and to assess the contributory values, in all cases with respect to the state of facts as existing at the port where the adventure is terminated. Whether the claim for contribution arises out of sacrifices or expenditures. In neither case, therefore, does any property contribute which does not ultimately arrive, and such property, moreover, only contributes on its arrived value." On the other side there is the authority of Carver, 4th edit., who states in sect. 428: "Hence, it has been repeatedly laid down by writers of authority both in England and the United States that the rule as to contribution to an expenditure is different from that as to a sacrifice. It is said that all the parties interested in the adventure become, there and then, as soon as the advance is made, liable to pay their shares, and that those shares should be in proportion to the values of the property at the time of the expenditure without regard to subsequent losses or deterioration. There has not however, been any decision on the point, and adjusters in practice do not recognise the supposed distinction. They take the state of things at the termination of the adventure as the bases for contribution both with regard to sacrifices and expenditures." Then he says: "It is therefore established in the case of a sacrifice that the contribution shall be in proportion to the benefits ultimately derived. The reasons for this equally apply (with the one reservation) in the case of an expenditure. The rule of law should therefore if possible be the same in both cases." McArthur, 2nd edit., p. 205, footnote (*a*) says: "There appears no sufficient reason for altering the rule that with the exceptions above mentioned contribution to expenses should be made upon the same basis as to sacrifice, namely, upon the net value of the property at the temination of the venture, that is to say, assuming that the amount of the general average is within the net value of the property."

To sum up the matter, Phillips and Arnould appear to distinguish between sacrifice and expenditure. Carver and McArthur appear to treat them on the same footing subject to certain exceptions, one of which is stated by Carver in the above-mentioned section to be that: "If after general average disbursements have been made a total loss of ship and cargo occurs, it seems clear that the disbursements should not be borne by the shipowner entirely; or if the value of what is ultimately saved of the adventure is less than the expenditure it is equally clear that the excess of expenditure should not fall wholly either on the shipowner or on the owners of what has been saved."

Lowndes, 5th edit., at p. 302, sets out the argument on both sides with a leaning to the view held by Arnould. Those who are in favour of distinguishing between sacrifice and expenditure contend that an expenditure of a nature, as in the present case, incurred in the middle of a voyage constitutes a debt which at the moment it is incurred is due rateably from each contributor. Their opponents argue (1) that the state of facts at the termination of the adventure is to be regarded, (2) that the claim to contribution in general average must be assessed upon the value of the property of all parties to the contract of affreightment at the port of adjustment, (3) that if the voyage has not been abandoned at an earlier port, the port of adjustment is the port of the agreed destination under the contract.

In my opinion, the arguments in favour of taking the state of facts at the termination of the venture are more weighty, especially because: (1) The value of the property when it reaches the hands of its owners can be ascertained with precision, (2) there ought to be only one adjustment of the nature of general average. Endless confusion would result from a multiplicity of adjustments made on a multiplicity of different considerations, (3) the whole law depends, as was said in *Fletcher* v. *Alexander* (*sup.*), on the loss to the one and the benefit—that is, in my view, the ultimate benefit—to the other (see Lowndes, p. 303). It is true that Carver, as above pointed out, suggests one reservation to the principle that contribution in the case of expenditure should be the same as in the case of a sacrifice, namely, in proportion to the benefits ultimately derived, but he appears to me to give no good or logical reason for this reservation.

It was urged that in the *Mary Thomas* case (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108) the Court of Appeal affirming, Gorell Barnes, J., as he then was, suggested a distinction between a sacrifice and an expenditure but that case was not a direct decision on the law

of general average, but upon the rights of a shipowner under an insurance policy when different considerations may apply. Neither do I think that the case of expenditure by a ship's master in reward or salvage operations is a true analogy or a safe guide, because if a shipowner pays a cargo's proportion of salvage he must reclaim it from the cargo owners, not as a contribution to a liability he has incurred, but as indemnity for a payment he has made on behalf of and as agent for the person directly liable.

I agree with the conclusions stated by the learned arbitrator in par. 18, which are as follow: (1) On the question of principle the law demands the loss of the one and the ultimate benefit of the other, and (2) on the question of practice, certainly and convenience, instead of confusion are to be obtained by one adjustment at the port of destination. Apply that question of principle and that question of practice to the present circumstances; I am of opinion that as no cargo arrived at the port of destination the shipowners are not entitled to claim contributions from the cargo owners. The result is that the award of the learned arbitrator will be upheld.

Award upheld.

The claimants appealed.

Jowitt, for the appellant,

Le Quesne, for the consignees, the respondents.

Cur. adv. vult.

July 15, 1921.—The following judgments were read:

Bankes, L.J.—This is an appeal from a judgment of Sankey, J. upon a special case stated by an arbitrator. The case was stated to raise a point of law which is formulated by the arbitrator in par. 7 of the special case in these terms: "If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost?"

The cargo in this case was being carried under bills of lading which contained the clause "General average payable according to York-Antwerp rules." The learned arbitrator in the special case discusses at length all the authorities on the point, upon which no judicial decision has ever been given, in order to discover what the proper answer to the question of law would be were the matter governed by the common law. He then goes on to say in par. 19 of the special case as follows: "The shipowner's right to treat this sum of 717*l.* 16*s.* 3*d.* as general average expenditure arises solely as matter of contract by the incorporation in the bills of lading of the York-Antwerp rules 1890. In construing the contract so made I think Nos. 10 and 11 of the rules must be read in conjunction with No. 17 and that so construed the result is the same as I have suggested in par. 18."

For the reasons given by Scrutton, L.J. I agree with the view taken by the arbitrator that the present case falls within rule 17. I express no opinion upon what the common law rule should be. The appeal must be dismissed with costs here and below, the court expressing its opinion that the award of the arbitrator as stated in par. 20 of the special case is correct.

I may say that Atkin, L.J. agrees with the judgment I have just read.

Scrutton, L.J.—This appeal was stated to raise a very controversial question in the law of general average, namely, whether there is any difference between the principles of adjustment in cases of general average sacrifice and general average expenditure where after the sacrifice or expenditure the ship and goods are lost by other perils before arrival at the port of destination. And, if the facts raised this point, they would raise a question of considerable difficulty. There is an absence of case law on the subject, an embarrassing abundance of contradictory opinions of text writers, and a varying practice of average adjusters. But in my view the facts do not raise this question. The parties to the contract of affreightment agreed that their contract should be governed by York-Antwerp rules. These rules, the result of two conferences of leading representatives of underwriters, shipowners, and average adjusters, were intended to avoid by agreement difficult questions on which lawyers and experts disagreed. For instance, the English law on port of refuge expenses, as appears from the cases of *Atwood* v. *Sellar* (42 L. T. Rep. 644; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286), and *Svendsen* v. *Wallace* (52 L. T. Rep. 901; 5 Asp. Mar. Law Cas. 453; 10 App. Cas. 404), was far from clear. The York-Antwerp rules solved the difficulty by making rules not in accordance with the existing decisions under which all the port of refuge expenses in the present case are treated as general average.

The first question therefore is to see whether the York-Antwerp rules provide an agreed answer to the present problem. Rule 17 provides that "The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure." When the adventure arrives at its intended port of destination it is agreed therefore that the contributing values are to be those at that port and not at the port where the expenditure was incurred, thus avoiding the question most in dispute as to expenditure, whether the values should not be taken as at the port where the expenditure was incurred. What happens when ship and cargo are lost and never reach the intended end of the adventure? Though the adventure terminates prematurely it seems clear to me that it terminates, and the actual values are then nothing and no contribution can be levied on them. If part of the interests get to the intended end of the adventure as if cargo be trans-shipped and freight earned, there are contributing values available. But having regard to the conflicting language of text writers and conflicting practice of average adjusters, it appears to me that rule 17 was intended to avoid the decision of the difficulties by agreeing a rule. And in my view that rule decides that in this case there was no contribution to the shipowner's general average expenditure, because at the termination of the adventure there were no contributing values. If this is the true view of the case there is no need to discuss what would be the law if the parties had not agreed on York-Antwerp rules, and I notice that the learned arbitrator is of opinion that the York-Antwerp rules decide the question adversely to the claim, though he was unable to resist the temptation of deciding what would be the law if the rules did not exclude the claim.

I reserve to myself full liberty to consider the question of common law in the absence of agree ment when it arises, as in my view there is a great

deal to be said in principle for the view of Mr. Phillips and Sir Joseph Arnould supported by the analogies of liabilities for salvage both maritime and by agreement, and by the view of Gorell Barnes, J. in *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108), as to the rights of the person making general average expenditure against his underwriters. It may be that practical difficulties giving rise to a practice of average adjusters may overcome the advantages in principle of this view, but I prefer to postpone the decision of this difficult question till it arises. In the present case in my opinion it does not, as the parties have avoided the difficulties by an agreed rule of adjustment and contribution. The person incurring the expenditure under the agreed rule runs a risk of loss which he can cover by insurance of his interest in the arrival of the interests on which he has a lien for contribution to his expenditure.

For these reasons in the result the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

Solicitors for the respondents, *Waltons* and *Co.*

July 7, 8, *and* 15, 1921.

(Before BANKES, WARRINGTON and SCRUTTON, L.JJ.)

POLEMIS *v.* FURNESS, WITHY, AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Exceptions — "Fire . . . always mutually excepted" — Fire caused by negligence of charterers' servants—Damages which could not reasonably have been anticipated—Liability of charterers—Negligence — Remoteness — "Natural and probable cause."

In a time charter-party "fire" was "always mutually excepted." Fire broke out in the ship, which was totally destroyed. Arbitrators found that the fire arose from a spark igniting petrol vapour in the hold; that the spark was caused by a board, knocked into the hold by the charterers' servants, coming into contact with some substance in the hold; and that the causing of the spark could not reasonably have been anticipated, though some damage to the ship might reasonably have been anticipated. The charterers contended: (1) *That the exception of "fire," in the charter-party protected them from liability; and* (2) *that the damages were too remote, as it could not reasonably have been anticipated that the falling of the board would have caused a spark:*

Held (1), *that the exception of "fire" did not relieve the charterers from loss by fire caused by the negligence of their servants as there was no express term to that effect in the exceptions clause; and* (2) *that, the fall of the board being due to the negligence of the charterers' servants, the charterers were liable for all the direct consequences of the negligence, notwithstanding that the consequences could not reasonably have been anticipated.*

The question whether the damage that ensues can reasonably be anticipated is material only on the question whether an act is negligent or not.

Dictum, of Pollock, C.B, in Greenland *v.* Chaplin (1850, 5 *Ex.* 248) *disapproved.*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

APPEAL by the charterers from the judgment of Sankey, J. on an award in the form of a special case.

The owners of the Greek steamship *Thrasyvoulos* claimed to recover damages from the charterers for the total loss of the ship by fire.

By a charter-party of Feb. 1917, Messrs. Polemis and Boyazides, the owners, chartered the ship to Furness, Withy and Co. Limited, for the period of the duration of the war and at charterers' option up to six months afterwards from the day she was placed at the charterers' disposal ready to load in the port of Cardiff. By clause 3, the owners were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, to pay for insurance of the vessel, war risks excepted, and also for all the engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for ordinary cargo service. By clause 4 the charterers were to provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated. By clause 5, the charterers were to pay for the use and hire of the vessel at the rate of 9572*l.* 16*s.* per calendar month commencing on the day of delivery as above with a clean and clear hold, "hire to continue from the time specified for commencing the charter until the hour of her redelivery to owners (unless lost) at a port in the United Kingdom or continent in same good order and condition as when delivered to them fair wear and tear excepted." By clause 21: "The act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and (or) restraint of princes, rulers, and people, collision, any act, neglect, or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all and every of the dangers and accidents of the seas, canals, and rivers, and of navigation of whatever nature or kind always mutually excepted."

The facts appear from the headnote and judgments.

The owners contended that the charterers were liable for the loss of the ship; that fire caused by negligence was not an excepted peril; and that the ship was in fact lost by the negligence of the stevedores, who were the charterers' servants, in letting a sling strike the board, knocking it into the hold, and thereby causing a spark which set fire to the petrol vapour and destroyed the ship.

The charterers contended that fire, however caused, was an excepted peril; that there was no negligence for which the charterers were responsible, inasmuch as to let a board fall into the hold of the ship could do no harm to the ship and therefore was not negligence towards the owners; and that the danger and (or) damage were too remote—*i.e.*, no reasonable man would have foreseen danger and (or) damage of this kind resulting from the fall of the board.

The arbitrators made the following findings of fact:—

(*a*) That the ship was lost by fire. (*b*) That the fire arose from a spark igniting petrol vapour in the hold. (*c*) That the spark was caused by the falling board coming into contact with some substance in the hold. (*d*) That the fall of the board was caused by the negligence of the Arabs (other than the winchman) engaged in the work of discharging. (*e*) That the said Arabs were employed by the charterers or their agents the Cie Transatlantique on behalf of the charterers, and that the said Arabs were the servants

of the charterers. (*f*) That the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. (*g*) There was no evidence before us that the Arabs chosen were known or likely to be negligent. (*h*) That the damages sustained by the owners through the said accident amount to the sum of 196,165*l.* 1*s.* 11*d.* as shown in the second column of the schedule hereto.

Sankey, J. affirmed the award. The charterers appealed.

R. A. Wright, K.C. and *S. L. Porter*, for the charterers.—The damage caused could not reasonably have been anticipated, and, being therefore too remote, cannot be recovered. In *Greenland* v. *Chaplin* (5 Ex. 248) Pollock, C.B. said, following a recent dictum of his own in *Rigby* v. *Hewitt* (1850, 5 Ex. 240): "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever the case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur." Salmond on Torts, (2nd edit., p. 106), says: "Damage is too remote if it is neither the intended nor the natural and probable result of the wrongful act. Every man is responsible for damage which he intended to result and which did result from his wrongful act, however improbable it may have been. Every man is also liable for the natural and probable results of his wrongful act, even though not intended by him. But no man is liable for consequences neither intended nor probable." In Pollock on Torts (11th edit., pp. 39, 40), the dictum of Pollock, C.B. is cited, and it is said (referring to Beven, Negligence in Law, i., 106): "It is suggested that this rule applies only 'in determining what is negligence,' and 'not in limiting the consequences flowing from it when once established'; and this position is worked out in an ingenious and elaborate argument." In *Cory* v. *France, Fenwick, and Co.* (11 Asp. Mar. Law Cas. 499; 103 L. T. Rep. 649; (1911) 1 K. B. 121) Vaughan Williams, L.J. said: "In my judgment he (the plaintiff) has always to prove that the negligence of which the defendant is proved to have been guilty was a proximate cause of the injury which is complained of in the action. In considering what is a proximate cause, you may often have to ask the question which was asked in the cases of *Rigby* v. *Hewitt* (*sup.*) and *Greenland* v. *Chaplin* (*sup.*), namely, was the negligence which was proved against the defendant of such a character that the consequences which followed might reasonably be expected to result under ordinary circumstances from such misconduct?" In *Dunham* v. *Clare* (86 L. T. Rep. 751; (1902) 2 K. B. 296), Collins, M.R. said that "the liability is measured by what are the reasonable and probable consequences of his breach of duty." See also *Re London, Tilbury and Southend Railway Company* (62 L. T. Rep. 306; 24 Q. B. Div. 329), per Lord Esher, M.R.; and *Sharp* v. *Powell* (26 L. T. Rep. 436; L. Rep. 7 C. P. 253). The *dicta* of Channell, B. and Blackburn, J. in *Smith* v. *London and South-Western, Railway Company* (23 L. T. Rep. 680; L. Rep. 6 C. P. 14) are applicable only to the particular facts of that case. [They referred also to *Clark* v. *Chambers* (38 L. T. Rep. 454; 3 Q. B. Div. 327) and *Scott* v. *Shepherd* (1773, 3 Wils. 403; 2 W.B. 892; 1 Sm. L. C., 12th edit., 513); and *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 599; (1920) A. C. 983.)] Secondly, the charterers are exempted from liability by the exception of "fire" in clause 21, even if the fire was caused by negligence. The general rule that applies to shipowners, that they are liable for negligence unless protected by clear words, does not apply to charterers. They referred to:

Steinman v. *Angier Line*, 7 Asp. Mar. Law Cas. 46; 64 L. T. Rep. 613; (1891) 1 Q. B. 691;

Baxter's Leather Company v. *Royal Mail Steam Packet Company*, 11 Asp. Mar. Law Cas. 93; 99 L. T. Rep. 286; (1908) 2 K. B. 626;

Chartered Bank v. *British India Steam Navigation Company*, 11 Asp. Mar. Law Cas. 245; 100 L. T. Rep. 661; (1909) A. C. 369.

MacKinnon, K.C., and *Dumas* for the shipowners.—All the damage that flows directly from an act of negligence is recoverable, even though the consequences could not have been reasonably anticipated (*Smith* v. *London and South-Western Railway Company*, *sup.*, per Channell, B. and Blackburn, J.; *Weld-Blundell* v. *Stephens*, 123 L. T. Rep. 599; (1920) A. C. 983, per Lord Sumner). As regards the dictum of Pollock, C.B. in *Greenland* v. *Chaplin* (*sup.*) it is doubtful whether he is correctly reported in the Exchequer Reports. In the *Law Journal* (19 L. J. 292 Ex.), the important words "who is guilty of negligence" are omitted. Secondly, as regards liability for negligence, the same rule applies to charterers as to shipowners and they are not relieved from the consequences of negligence unless the exception clause contains express words to that effect.

S. L. Porter, in reply.

Cur. adv. vult.

July 15.—The following judgments were read:

Bankes, L.J.—By a time charter-party, dated the 21st Feb. 1917, the respondents chartered their vessel to the appellants. Clause 21 of the charter-party was in these terms. [The Lord Justice read it.] The vessel was employed by the charterers to carry a cargo to Casablanca in Morocco. The cargo included a quantity of benzine or petrol in cases. While discharging at Casablanca a heavy plank fell into the hold in which the petrol was stowed, and caused an explosion, which set fire to the vessel and completely destroyed her. The owners claimed the value of the vessel from the charterers, alleging that the loss of the vessel was due to the negligence of the charterers' servants. The charterers contended that they were protected by the exception of fire contained in clause 21 of the charter-party, and they also contended that the damages claimed were too remote. The claim was referred to arbitration, and the arbitrators stated a special case for the opinion of the court. Their findings of fact are as follows. [The Lord Justice read clauses (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), set out above.] Then they state the damages, 196,165*l.* 1*s.* 11*d.*

These findings are no doubt intended to raise the question whether the view taken, or said

to have been taken, by Pollock, C.B. in *Rigby* v. *Hewitt* (5 Ex. 243) and *Greenland* v. *Chaplin* (5 Ex. 248), or the view taken by Channell, B. and Blackburn, J. in *Smith* v. *London and South-Western Railway Company* (23 L. T. Rep. 680; L. Rep. 6 C. P. 21), is the correct one. The doubt which I have indicated in reference to what Pollock, C.B. really said is due to the fact that, as reported in the *Law Journal* (19 L. J. 295, Ex.), the Chief Baron does not use the words on which reliance is placed and which were quoted with approval by Vaughan Williams, L.J. in *Cory* v. *France, Fenwick, and Co.* (11 Asp. Mar. Law Cas. 499; 103 L. T. Rep. 649; (1911) 1 K. B. 122). Assuming the Chief Baron to have been correctly reported in the Exchequer Reports, the difference between the two views is this: According to the one view, the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act; according to the other view, those consequences are the test whether the damages resulting from the act, assuming it to be negligent, are or are not too remote to be recoverable. Sir F. Pollock in his Law of Torts (11th edit., pp. 39, 40), refers to this difference of view, and calls attention to the fact that the late Mr. Beven, in his book on Negligence, supports the view founded on *Smith* v. *London and South-Western Railway Company* (*sup.*). In two recent judgments dealing with the question, the view taken by the court in *Smith* v. *London and South-Western Railway Company* (*sup.*) has been adopted—namely, by the late President (Sir Samuel Evans) in H.M.S. *London* (12 Asp. Mar. Law Cas. 405; 109 L. T. Rep. 960; (1914) P. 76), and by Lord Sumner in *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 599; (1920) A. C. 983). In the former case the President said: "The court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act—*i.e.*, the negligence of the defendants, which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability—namely, the foresight or anticipation of the reasonable man. In *Smith* v. *London and South-Western Railway Company* (*sup.*) Channell, B. said: 'Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.' And Blackburn, J. in the same case said: 'What the defendants might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence,'" and after referring to the various phrases used in connection with remoteness of damages he said: "But it must be remembered, to use the words of a well-known American author (Sedgwick), that 'the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical, the reason for distinguishing between the proximate and remote causes and consequences being a purely practical one'; and again, to use the words of an eminent English jurist (Sir F. Pollock, 11th edit., pp. 35, 36), 'In whatever form we state the rule of "natural and probable consequences," we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.'" In the latter case *Weld-Blundell* v. *Stephens* (*sup.*)—Lord Sumner said: "What are 'natural, probable and necessary' consequences? Everything that happens happens in the order of nature and is therefore 'natural.' Nothing that happens by the free choice of a thinking man is 'necessary,' except in the sense of predestination. To speak of 'probable' consequence is to throw everything upon the jury. It is tautologous to speak of 'effective' cause, or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows* v. *March Gas and Coke Company* (26 L. T. Rep. 318; L. Rep. 7 Ex. 96) and *Hill* v. *New River Company* (18 L. T. Rep. 355; 9 B. & S. 303). As, however, these different epithets and formulæ are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr. Hurst between the respondent and Messrs. Comins and Lowe. Further, no want of care has to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional, or wanton breach. This at once makes it possible to lay aside large classes of authorities. What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation: *Blyth* v. *Birmingham Waterworks* (1856, 11 Ex. 781); *Smith* v. *London and South-Western Railway Company* (*sup.*), per Blackburn, J. Again, what ordinarily happens, or may reasonably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell* (26 L. T. Rep. 436; L. Rep. 7 C. P. 253), unless indeed it be regarded as a decision on negligence or no negligence. At any rate it is not this case.

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the

falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants' junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

The other point relied upon by the appellants was that the damage having been caused by fire they were protected by clause 21 of the charter-party. To this it was replied that the clause had no application in the case of a fire caused by the negligence of the charterers' servants. I see no reason why a different rule of construction of this exception contained in the charter-party should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence.

For these reasons I think that the appeal fails, and must be dismissed with costs.

WARRINGTON, L.J.—A ship owned by the respondents was destroyed by fire while under a time charter to the appellants. The respondents claimed as damages the value of the ship and some incidental expenses. The appellants disputed the claim and the matter was referred to arbitrators, who made their award in the form of a special case in favour of the respondents, the owners, subject, of course, to the opinion of the court.

The only question for the court is whether on the findings of the arbitrators as to facts they were justified in law in making an award in favour of the respondents. Sankey, J. has held that they were so justified. The charterers appealed.

The accident happened in the port of Casablanca, in Morocco, to which the ship had been directed by the charterers with a cargo which included cases of benzine and/or petrol stored in No. 1 hold. These cases had leaked on the voyage and there was a considerable quantity of petrol vapour in the hold. Arab stevedores employed by the charterers were engaged in shifting certain cargo in the hold, and for the purpose of their work had placed some heavy planks across the forward end of the hatchway. In the course of the work one of the planks came in contact with the sling or the rope by which the sling was worked, was thereby dislodged, and fell into the hold. The fall was instantly followed by a rush of flames, and the result was the total destruction of the ship. The findings of fact have already been read by Bankes, L.J. and I need not read them again.

The charterers contend, first, that they are relieved from liability by the exception clause in the charter-party; and, secondly, that damages for the loss of the ship cannot be recovered, inasmuch as the causing of the spark was something that could not reasonably have been anticipated, and therefore the destruction of the ship was not the natural or probable consequence of the negligent act, and the damage was too remote.

As to the first point, the exception clause is in the following terms. [The Lord Justice read it.] There is, therefore, no express exception of loss by fire caused by negligence. The present claim is based on negligence. It appears to be well settled that in such a contract as the present the exceptions would not be construed so as to excuse the shipowner for loss of the nature described if caused by the negligence of himself or his servants, unless expressly so framed; Carver on Carriage by Sea (sects. 14, 22); and as to bills of lading per Bowen, L.J. in *Steinman* v. *Angier Line* (7 Asp. Mar. Law Cas. 46; 64 L. T. Rep. 612; (1891) 1 Q. B. 691), and in my opinion the same construction must be given to the clause when it is the liability of the charterers which is in question. This defence therefore fails.

As to the second point, it is contended that "a person guilty of negligence is not responsible in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated" (5 Ex. 248). We are asked, in effect, to say that the doubt on this point expressed by Pollock, C.B. in *Greenland* v. *Chaplin* (5 Ex. at p. 248) is well founded and that his tentative view set forth in that case and in *Rigby* v. *Hewitt* (5 Ex. at p. 243) ought to prevail. There is some doubt whether the words of the Chief Baron in *Greenland* v. *Chaplin* (*sup.*) are correctly reported in the Exchequer Reports, for in the report in the *Law Journal* (19 L. J. 295 Ex.) the words "guilty of negligence" are omitted, so that in the *Law Journal* report the passage reads: "I entertain considerable doubt whether a man is responsible in respect of mischief," and so on, leaving out the words "guilty of negligence." However this may be, the law on this point is, in my opinion, correctly stated in Beven on Negligence, 3rd edit., vol. i., p. 85. I need not read the passage.

The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by *Smith* v. *London and South Western Railway Company* (23 L. T. Rep. 680; L. Rep. 6 C. P. 14), in the Exchequer Chamber, and particularly by the judgments of Channell, B. and Blackburn, J. Channell, B. says: "I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B. in his judgment in *Blyth* v. *Birmingham Waterworks Company* (11 Ex. 781) referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Blackburn, J. says:

"I also agree that what the defendants might reasonably anticipate is, as my brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: (see per Lord Sumner in *Weld-Blundell* v. *Stephens*, 123 L. T. Rep. 599; (1920) A. C. 983).

On the whole, in my opinion, the appeal fails and must be dismissed with costs.

Scrutton, L.J.—The steamship *Thrasyvoulos* was lost by fire while being discharged by workmen employed by the charterers. Experienced arbitrators, by whose findings of fact we are bound, have decided that the fire was caused by a spark igniting petrol vapour in the hold, the vapour coming from leaks from cargo shipped by the charterers, and that the spark was caused by the Arab workmen employed by the charterers negligently knocking a plank out of a temperorary staging erected in the hold, so that the plank fell into the hold, and in its fall by striking something made the spark which ignited the petrol vapour.

On these findings the charterers contend that they are not liable for two reasons: first, that they are protected by an exception of "fire" which in the charter is "mutually excepted;" secondly, that as the arbitrators have found that it could not be reasonably anticipated that the falling of the board would make a spark, the actual damage is too remote to be the subject of a claim. In my opinion, both these grounds of defence fail.

An excepted perils clause, if fully expanded, runs that one of the parties undertakes to do something unless prevented by an excepted peril, in which case he is excused. But where he has an obligation to do some act carefully, if he fails in his obligation, and by his negligence an excepted peril comes into operation and does damage, the excepted peril does not prevent him from acting carefully, and he is liable for damages directly flowing from his breach of his obligation to act carefully, though the breach acts through the medium of an excepted peril. It is a commonplace of mercantile law that if a peril of the sea is brought into operation by the carelessness of the shipowner or his servants, he is liable, though perils of the sea are excepted perils, unless he has also a clause excepting the negligence of his servants. In the same way, though the charterer has an exception of fire in his favour, he will be liable if the fire was directly caused by his servants' negligence, for it was not fire that prevented them from being careful. This disposes of the first defence.

The second defence is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that some one finding the cheque should commit forgery: *London Joint Stock Bank* v. *Macmillan* (119 L. T. Rep. 387; (1918) A. C. 777); while if some one negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 599; (1920) A. C. 956). In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact caused sufficiently directly by the negligent act, and not by the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in *Smith* v. *London and South-Western Railway Company* (23 L. T. Rep. 680; L. Rep. 6 C. P. 21), and by the majority of the court in banc in *Rigby* v. *Hewitt* (5 Ex. 240) and *Greenland* v. *Chaplin* (5 Ex. 243), and approved recently by Lord Sumner in *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 599; (1920) A. C. 983), and Sir Samuel Evans in H.M.S. *London* (12 Asp. Mar. Law Cas. 405; 109 L. T. Rep. 960; (1914) P. 76). In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused.

For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the charterers, *Downing, Handcock, Middleton,* and *Lewis.*

Solicitors for the owners, *Holman, Fenwick,* and *Wilan.*

Friday, July 15, 1921.

(Before Lord Sterndale, M.R., Atkin and Younger, L.JJ.).

The Cap Palos. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Contract for towage—Loss of tow—Negligence—Exceptions clause—"Default of the steam tug-owner"—Tug-owner not sending assistance to tow while in danger—Liability of tug-owner.

The defendant contracted to tow the plaintiffs' motor-schooner Cap Palos *on a round voyage. The contract contained an exceptions clause, which relieved the defendant from liability for "the acts, neglect, or default of the masters, pilots, or crews of the steam tugs, or of consulting engineers, ships husbands, or other persons in his employment . . . . or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, . . . through collision or otherwise, whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug-owner, or any of his servants or employees, or by any defect or imperfections in the steam tugs. . . ." The towage contract was carried out with interruptions until on the 24th Oct.* 1919 *the tugs left the tow at anchor in a position of some danger. The defendant knew of the danger, and ordered a tug to go to the assistance of the* Cap Palos, *but countermanded the order upon the ground that assistance was being sent by the Salvage Association. No assistance reached the* Cap Palos, *and on the 26th Oct. she was driven on the rocks and became a constructive total loss.*

Held, that the exceptions did not protect the defendant from liability, as they were limited to a time when the defendant was doing, or omitting to do, something in the actual performance of the contract, and did not apply to a time when he had ceased, even though temporarily, to do anything at all, and had unjustifiably left the performance of his contractual duties to others.

Decision of Hill, J. reversed.

Appeal from a decision of Hill, J., in an action for damages for breach of contract.

The plaintiffs, the appellants, were the owners of the five-masted motor-schooner, *Cap Palos.* The defendant was George Alder, tug owner of Middlesbrough.

The plaintiffs claimed that the loss of the *Cap Palos* was due to the insufficiency of power of the defendant's tugs and to his failure to supply a tug of sufficient power to continue the performance of the contract.

The defendant pleaded that the loss of the vessel was due to the negligence of those in charge of her in attempting to get under way and failing to wait until towage assistance arrived or the weather moderated. In the alternative the defendant relied on the exceptions in the towage clause.

The facts are taken from the judgment of Lord Sterndale, M.R.:

"The contract was to tow the *Cap Palos* on a round voyage, of which the first stage was from Immingham to Hartlepool in ballast. No tug was named for the service, but it was admitted by the defendant that under the contract there was an obligation to provide sufficient tug power. The first tug provided was not of sufficient power, but the defendant provided a second, and the towage proceeded with interruptions until the tugs and tow found themselves in Robin Hood's Bay. The tugs lost their hawser, which had parted, and left the tow in that bay. After vainly trying to get out of the bay, she anchored there on the night of the 24th Oct. On the 25th she again tried to get out of the bay, but failed; and on the 26th she was driven on to the rocks, and became a constructive total loss. It is for this loss that the plaintiffs make their claim upon the defendant. The *Cap Palos* was fitted with an auxiliary motor, but it was out of gear, and she had to depend upon her sails. It was not contemplated by either party that the motor should be used. The details of the towage up to the time of getting to Robin Hood's Bay are, in my opinion, not relevant to the question before us and are quite sufficiently dealt with by Hill, J. Owing partly to the defective power of the first tug, and partly to other causes, the towage took much longer, and there were many more interruptions than were expected or than there should have been; but the towage did go on, and, in my opinion, did go on under the contract. The only point made at the trial on this part of the case was that the tugs and tow got out of their course and into the bay, because the two tugs, attached as they were to the tow and to one another, were of of insufficient power to avoid their being set out of their course towards the shore. Hill, J., was advised by the Elder Brethren that the tug power was sufficient if properly handled, and the same advice was given to us by our assessors. The learned judge came to the conclusion that they got into Robin Hood's Bay by bad navigation in not making allowance for a change of wind, not hauling out when a mist came on from a course which would take them very near the bay, and by not using the lead; but he held that the defendant was protected from the consequences of this negligence of the tug-masters by the exceptions in his contract. I agree with the learned judge on this part of the case.

"The question as to the rest of the case is quite different. I agree with Hill, J., that if assistance had been sent to the *Cap Palos* at any time up to midday on the 26th Oct. 1919, which was Sunday, she could have been saved from becoming, as she did, a total constructive loss, although she might have been damaged to a certain extent. It was the defendant's duty under his contract to send such assistance, and he did not send it; and the questions are whether, upon the facts, he is excused from performing that duty, and, if not, whether he is protected by the exceptions. The reason why nothing was done on Friday, the 24th, is not quite clear; but I think the result is that the defendant attributes it to a combination of bad weather and unpreparedness of the tugs, which had arrived in Hartlepool without their hawsers, which, they said, they had lost in Robin Hood's Bay, and had not yet been supplied with new ones, which the defendant took steps to supply. According to the defendant the tugs were ordered to go to the *Cap Palos* on the morning of Saturday, the 25th, and were fitted to do so; but the masters refused to go, because of the weather. I doubt whether the weather was bad enough to prevent their going, and also whether they ought to have left the *Cap Palos* in Robin

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

Hood's Bay and gone to Hartlepool; but it is not necessary to decide either of those points, because, in my opinion, these omissions of duty, if they existed, were those of the masters of the tugs, against which the defendant is protected by the exceptions in his contract. Some explanation of the circumstances may be afforded by the fact that the master of one of the tugs, the *Symbol*, was not in the service of the defendant, but of a firm from whom the defendant had just bought her, and was only in command of her for the purpose of taking her round from Southampton and delivering her to the defendant. On her way round she was sent to perform this towage. As appears from the correspondence, the master seems to have been anxious to get back with his crew to Southampton, and very likely did not want to renew a towage on the East Coast in weather that was not good, while the master of the other tug may have been influenced by his example. The question, however, is not very material, because the defendant is not excused from the performance of his duty, if he had means of performing it without using these tugs. It is clear that he had these means, for he had another tug, the *J. P. Rennoldson*, which he in fact ordered on the 25th Oct. to go to the *Cap Palos*, after he had been to Robin Hood's Bay and heard of the refusal of the other tug-masters. Unfortunately he cancelled these orders later in the day, and from this the whole trouble has arisen, for there is no reason to think that the *J. P. Rennoldson* could not have reached the *Cap Palos* in time to be of use. The reason given for the cancellation of the orders to the *J. P. Rennoldson* is as follows: The defendant gave evidence that a Mr. Milburn, the brother of Lloyd's agent at Whitby, and then acting for him in his absence, showed the defendant a telegram to the effect that Grimsby underwriters were sending two powerful tugs, expected to arrive that night. Mr. Milburn denied having shown him any telegram of that kind. I think it is probable that the defendant did get some intimation of the kind, because the facts were that the captain of the *Cap Palos* had communicated with Lloyd's agent, whose son, acting for him, did communicate with the Salvage Association, who, of course, act for underwriters in these cases; that the Salvage Association at Grimsby did send a powerful tug; that the ship's agent at Grimsby so informed the ship's agent at Liverpool after the vessel had been driven ashore; and that Mr. Milburn, the acting Lloyd's agent, had a faint recollection that he had heard that tugs were coming from Grimsby. The *Cap Palos*, although not insured in England, was re-insured here, and the matter seems to have followed the ordinary course where the Salvage Association are concerned with a ship in distress. Unfortunately, the tug sent by them was obliged by weather to put into Bridlington Bay, and could not reach the *Cap Palos*. On getting this information as to the tug, the defendant assumed that he might safely leave the matter in the hands of the Salvage Association, so far as getting the vessel into a place of safety was concerned, and cancelled the orders to the *J. P. Rennoldson*."

The plaintiffs brought this action against the defendant, contending that the loss of the *Cap Palos* was due to the negligence of the defendant, and to the breach of the contract to tow.

Hill, J., held that the defendant was protected from liability by the exceptions clause in the contract of towage, and dismissed the action.

The plaintiffs appealed.

Butler Aspinall, K.C. and *Balloch* for the appellants.—The defendant repudiated the contract and cannot therefore rely on the exceptions:

Jureidini v. *National British and Irish Millers' Insurance Company*, 112 L. T. Rep. 531; (1915) A. C. 499;

Braithwaite v. *Foreign Hardwood Company*, 10 Asp. Mar. Law Cas. 52; 92 L. T. Rep. 637; (1905) 2 K. B. 543.

But assuming there was no absolute repudiation of the contract, the defendant was not entitled to suspend the performance of the contract at any rate at a time when the tow was in peril. The learned judge found that the defendant did not perform his contract with reasonable industry. This is not a case of negligence while performing the contract, but of a failure to carry out the contract. The exception, "breach of duty," only applies to a tort and not to a breach of contract. The defendant is not, therefore, protected by the exceptions.

MacKinnon, K.C., *D. Stephens*, K.C., and *Dumas* for the respondent.—The point was not taken in the court below that the defendant repudiated the contract, and it ought not to be taken now. The defendant did not repudiate the contract, but was temporarily prevented by adverse conditions from carrying it out. The tugs which had gone to Hartlepool to get new hawsers were prevented by the weather from returning to Robin Hood's Bay, and the defendant having heard that the Salvage Association were sending two powerful tugs to the assistance of the *Cap Palos*, cancelled the order to his own tugs for the time being. The defendant had not abandoned his contract of towage:

Bradley v. *Newson, Sons, and Co.*, 119 L. T. Rep. 239; 14 Asp. Mar. Law Cas. 340; (1919) A. C. 16.

Butler Aspinall, K.C. in reply.

Cur. adv. vult.

The following judgments were read:

Lord STERNDALE, M.R. stated the facts as set out above, and continued: I agree with Hill, J. that it is not necessary to determine the question, hotly contested at the trial, as to whether this information (as to the sending of tugs by the Salvage Association) was given to the defendant by Lloyd's agent, because I also agree with him that, however the defendant got it, he was not thereby relieved from his obligation to send the *J. P. Rennoldson* or some other efficient tug to the help of the *Cap Palos*, and so continue to carry out his contract. It may be that, when the Salvage Association send a tug to tow a vessel out of danger, and the tug arrives, they do in practice take charge of the operations until the vessel is in a place of safety, without the help or interference of anyone who has a towage contract with her owners, because their tugs are better fitted and equipped and their crews better skilled in such work. But that, if correct, does not discharge such a person from the obligations of his contract. The Salvage Association's tug may, as in this case, not arrive, or other things may happen which require him to discharge that obligation; and I agree with Hill, J. that, in cancelling the orders to the *J. P. Rennoldson* and leaving to the Salvage Association the towage

of the *Cap Palos* from a place of danger to a place of safety, the defendant failed to fulfil the obligations of his contract, and was guilty of a breach of it.

Then there arises the question whether the learned judge was right in holding that the defendant was protected by the exceptions in the contract. The main argument against his decision before us was based on an attempt to show that the defendant, after the *Cap Palos* went ashore, wholly repudiated all obligations under the contract, and could not therefore avail himself of the exceptions. This is a question of fact, upon which there should have been a finding by the learned judge. I am quite satisfied from the pleadings, the arguments of counsel as appearing in the judge's note, supplemented to a certain extent by shorthand notes and by the judgment, that this point was never raised at the trial. The evidence to which we were referred on the point confirms me in this opinion, for, considering the counsel and the judge, I do not believe it would have been left as it is without further investigation if the point had been before the court. It was admitted that the learned judge was not asked for a finding on the point. I doubt, therefore, very much if it was competent for the appellant to raise the point in this court, but it is not necessary to decide this, because of the view that I take of the case on other points, and also because I think that no such repudiation is proved by the evidence. I think what is proved is that the defendant gave up any attempt to tow the vessel from danger to a place of safety, but that he never repudiated his contract to continue his towage after she was brought to a place of safety. There was evidence given by him that he ordered the two tugs originally engaged to go to Robin Hood's Bay in case they were wanted. If this were true, it is some evidence of an intention to go on with his contract; if it were not true, the judge should have been asked for a finding on the point. I do not think that the finding of the learned judge that the defendant gave up any attempt was intended by him to be a finding of more than I have stated—that is, that he gave up any attempt to do what he thought the Salvage Association tug was going to do. No other question was present to the judge's mind, and I do not know how he would have found on any other point which might have been, but was not, brought to his attention.

It was argued that, on these facts, as I have stated them, the exception ceased to apply, because the contract was changed in character on the analogy of deviation, as in the case of *Lilley* v. *Doubleday* (44 L. T. Rep. 814; 7 Q. B. Div. 510). This may be so, and I say nothing to the contrary, but I prefer to base my judgment on another ground. The exceptions clause in the towage contract is as follows: [The Master of the Rolls read the exceptions clause, the material part of which is set out in the headnote, and continued:] Really, the words held to protect the defendant are "damage . . . through collision or otherwise" to a vessel being towed, or having been towed, by reason of the default of the steam tug-owner. These words, isolated from their context, are very wide, and may cover the case, but there are numerous cases which decide that a limitation may be put upon such wide words, if the construction of the whole clause requires it. I think that is the case here. I do not think it is necessary to say that in no case can the words "default of the owner" refer to a breach of contract, but I think that the whole clause points to the exceptions being confined to a time when the tug-owner is doing something, or omitting to do something, in the actual performance of the contract, and do not apply during a period where, as in this case, he has ceased, even for a time, to do anything at all, and has left the performance of his duties to someone else. In other words, I think the exception extends to cover a default during the actual performance of the duties of the contract, and not to an unjustified handing over of those obligations to someone else for performance.

I think, therefore, that the appeal should be allowed, and judgment entered for the plaintiffs, with costs here and below.

Atkin, L.J.—This is an action for damages for breach of a contract of towage, whereby the plaintiffs' ship was lost. The learned judge has held the defendant excused by reason of the exceptions contained in the contract. It is not disputed that the defendant's ordinary conditions of towage were incorporated in the contract made between the parties, and the only question to be determined is whether, under the circumstances, they apply so as to protect the defendant. It is contended by the plaintiffs that they do not apply, because at the time of loss the defendant was not performing, and had temporarily, at any rate, abandoned performance of the particular contract to which the exceptions related. [His Lordship stated the facts.] The history of the towage in hours, as appears from the record, is: Four and a half hours' towage, thirty-seven no towage; one towage, three no towage; nine and a half towage, sixty-one no towage, of which only six hours' towage was efficient—a remarkable divergence from a contract for about fifteen hours' continuous towage. This closely resembles Alice's "jam every other day"—tug yesterday and tug to-morrow, but never tug to-day. The figures appear to me to indicate such delay as to make the purported performance something quite different from that contracted for, a form of deviation quite familiar in maritime adventures. But the consideration of the defendant's performance of this contract cannot end with a bare enumeration of hours of towage. Evidence was given of his actions during the period from 10.30 on the Thursday, when the towage ceased, and 3 p.m. on Sunday afternoon, when the schooner went aground. On the Saturday the defendant himself visited Robin Hood's Bay, and apparently made arrangements that a fresh tug, the *J. P. Rennoldson*, then at Middlesbrough, should go to the rescue. But on receiving a message, not identified, that two powerful tugs were being sent to the scene on behalf of underwriters on Saturday evening, the defendant cancelled these arrangements, and, as found by the learned judge, gave up any attempt to help the schooner. Much argument was addressed to us to show that this finding was contrary to the evidence. In my opinion, although there was evidence each way, there was ample evidence to justify the judge, who saw the witnesses, in arriving at this finding. The judge has also found that, if the defendant had continued to attempt to carry out his contract with reasonable industry, the schooner could have been saved up to midday on Sunday.

The question that arises is whether, under the above circumstances, the defendant can rely upon the exceptions. In my opinion, they have no

application in the facts of this case. It is immaterial to discuss whether the true view is that the wide words of the exceptions, "default," "omission," and "breach of duty," properly construed, do not extend to cases where the contracting party ceases altogether to perform the contract, or that the exceptions, construed in their widest sense, do not apply where the contract is not being performed at all. The principle appears to me to be common to all classes of contract, and is to be found applied in cases of marine insurance—Marine Insurance Act 1906 (6 Edw. 7, c. 41), ss. 45 to 48; carriage by sea and river—*Morrison and Co.* v. *Shaw, Savill, and Albion Company* (13 Asp. Mar. Law Cas. 400, 504; 115 L. T. Rep. 508; (1916) 2 K. B. 783) and *Davis* v. *Garrett* (1830, 6 Bing. 716); by land—*Malleti* v. *Great Eastern Railway* (80 L. T. Rep. 53; (1899) 1 Q. B. 309) and *Lilley* v. *Doubleday* (44 L. T. Rep. 814; 7 Q. B. Div. 510); and contracts of bailment. "The principle is well known, and perhaps *Lilley* v. *Doubleday* (*sup.*) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it"—per Scrutton, L.J., in *Gibaud* v. *Great Eastern Railway* (125 L. T. Rep. 76; (1921) 2 K. B. 435). If the tugs, on the orders of the defendant, had cast off the tow in a storm on a lee shore for the purpose of engaging in a more profitable salvage operation, and the tow were in consequence damaged, could it be suggested that the intention of the contract was that the defendant should be protected? It is not as was contended, a question of a repudiation of contract which has to be accepted by the other party in order to give rise to a claim for breach. The tow might go to the bottom protesting to the last moment and claiming fulfilment of the contract, and yet the defendant would, in my judgment, in such a case fail to be protected by his exceptions. I am far from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default, but he must use very clear words to express that purpose, which I do not find here.

For the above reasons I come to the conclusion that the exceptions in this case afford no defence to the claim, and that effect must be given to the learned judge's findings of fact, and judgment be entered for the plaintiff for damages to be assessed by the registrar and merchants.

Younger, L.J.—I am entirely of the same opinion. One of the respondent's conditions of towage, to which reference has been made in the judgments just delivered, is as follows: "If a steam tug is engaged to tow a ship to any port or station, but through stress of weather or other unavoidable circumstances, she is separated from the ship, the steam tug-owner shall be paid (*pro rata*) for the distance towed, unless otherwise mutually agreed." This condition seems to supply some indication of the circumstances in which separation of the tug from the tow was, in the contemplation of this contract, regarded as permissible. The circumstances did not exist here. The tugs, the learned judge finds, negligently left the *Cap Palos* in Robin Hood's Bay on the morning of the 24th Oct. That negligent act, however, was the act of the masters, and from that the conditions protect the respondent. But the constructive total loss of the vessel was not due to that negligent act. It was due to the neglect and default of the respondent himself, fully cognisant as he was of the facts, and of the situation of the *Cap Palos*, in not sending before noon on the 26th Oct. a tug or tugs to assist her in the position of danger in which she had been left, and incidentally to proceed with the completion of the first part of his contract of towage, the prosecution of which he had for the time abandoned. I agree in the view that from that personal neglect and default of his own, at such a time and in such circumstances, the conditions of towage afford no protection to the respondent, even if the explanation he offers of his failure to send the tug *J. P. Rennoldson* to the assistance of the tow can on the evidence be accepted, a subject upon which I refrain from further observation.

I think the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the respondent, *Van Sandan* and *Co.*, agents for *Belk* and *Smith*, Middlesbrough.

July 11, 12, *and* 25, 1921.

(Before Bankes, Warrington and Scrutton, L.JJ.)

Elliott Steam Tug Company Limited *v.* Shipping Controller. (*a*)

APPEAL FROM THE TRIBUNAL CONSTITUTED BY SECT. 2 OF THE INDEMNITY ACT 1920.

Emergency legislation—Charter-party—Requisition of ship by Admiralty—Compensation—Claim by charterers—Direct loss—Interference with business—Injury to ship—Indemnity Act 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-ss.* 1 (*b*), 2 (*iii.*) (*b*); *schedule, part II.*

By sect. 2, *sub-sect.* 1 (*b*) *of the Indemnity Act* 1920, *any person not being the owner of a ship, who has "incurred or sustained any direct loss or damage by reason of interference with his . . . business . . . through the exercise . . . during the war of any prerogative right of His Majesty or of any . . . power under any enactment relating to the defence of the realm . . . shall be entitled to payment of compensation in respect of such loss or damage."*

By sub-sect. 2 (*iii.*) (*b*), *if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in part II. of the schedule to the Act.*

A towage and salvage company hired the use of a tug for the purposes of their business by a charter-party which entitled them to the services of the tug for as long as they pleased with the right to terminate the hiring by a fourteen days' notice. During the currency of the charter-party the tug was requisitioned by the Admiralty.

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law

Held, by the whole court, that, apart from the Indemnity Act 1920, *the charterers would not have had any legal right to compensation.*

Held, by Bankes and Warrington, L.JJ. (Scrutton, L.J. dissenting) that the loss of the average net earnings of the tug while requisitioned was "a direct loss or damage" by reason of the interference with the charterers' business within sect. 2 (1) (*b*) *of the Act, and that they were entitled to compensation, which must be assessed as directed in part II. of the schedule to the Act.*

APPEAL from the decision of the tribunal constituted by sect. 2 of the Indemnity Act 1920.

The Elliott Steam Tug Company claimed compensation under sect. 2, sub-sect. 1 (*b*) and sub-sect. 2 (iii.) (*b*), of that Act and part II. of the schedule to the Act [which are set out in the judgment of Warrington, L.J.] for direct loss or damage by reason of interference with their property or business through the exercise during the war of powers conferred by the Defence of the Realm Act.

Stuart Bevan, K.C. and *van den Berg* for the appellants.

Sir *Gordon Hewart* (A.-G.), *MacKinnon*, K.C. and *Ricketts* for the respondents.

Cur. adv. vult.

July 28.—The following judgments were read.

BANKES, L.J.—This is an appeal from a decision of the tribunal set up by the Indemnity Act 1920. By sect. 2, sub-sect. 1, an appeal is given upon any point of law to a party aggrieved by any direction or determination of the tribunal. By the recent Order LVB. of the Rules of the Supreme Court rules are provided regulating appeals from the tribunal. Rule 40 provides that the notice of motion to this Court shall state the point or points of law by the direction or determination on which the appellant feels aggrieved. The point of law raised by the appellants in this appeal is stated in the notice of appeal as follows: "And further take notice that the points of law by the determination of which the claimants feel aggrieved are that the court was wrong in holding that to award the claimants further compensation than the amount above mentioned would be to contravene the principles laid down in part II. of the schedule to the Indemnity Act 1920, and furthermore the claimants will contend that upon the evidence called and the facts so found, they are entitled to the compensation claimed as aforesaid."

The facts which gave rise to the appellants' claim for compensation as found by the tribunal are shortly as follows. The appellants carry on business as tug owners. In Nov. 1914, they chartered the tug *Frank* from her owners upon terms which entitled the appellants to retain her as long as they pleased, with a right to determine the hiring on fourteen days' notice in writing. The hire was at the rate of 155*l.* per calendar month. On the 19th May 1917, the tug was requisitioned by the Admiralty, and she was retained under the requisition until the month of Nov. 1919. The appellants did not determine the charter-party, because having regard to the favourable terms on which they had acquired the tug, they were anxious to keep her at their disposal when she was released from requisition. The claim put forward by the appellants for compensation represented what they claimed to be the direct loss to them arising from the requisitioning of the tug. It was made up under two heads, (1) the amount of hire which they continued liable to pay to the owners during the whole time that the tug was under requisition: (2) the loss of the profit which they would have made during that period by the use of the tug. They were willing to give credit for all sums which the Admiralty had paid to the owners, and which the owners had passed on to them. The view taken by the tribunal with regard the first head of claim was that with the view of minimising the damages resulting from the requisitioning of the tug it was the appellant's duty to have given the fourteen days' notice terminating the charter, and had this been done the obligation to pay any further hire would have ceased. The tribunal however considered that the appellants should be allowed a reasonable time within which to decide what course to take, and as a result they allowed one month to cover both the consideration period, and the notice period, and gave the appellants their full claim under both heads of damage for that month. This decision was challenged by the appellants, as a matter of law, upon the ground that there was no evidence to support the finding of the tribunal that it was a reasonable course to take, and consequently their duty, to put an end to the charter-party in order to minimise the damage. This court held that the point was not raised by the notice of appeal, and would not allow it to be proceeded with. This disposes of any question of damage in reference to the hire paid by the appellants under the charter during the period of requisition.

There remains the claim for loss of profit, or expressed more accurately the loss of what would be the average and ordinary net earnings of the tug during the period of requisition. This claim cannot be disposed of upon the grounds on which the claim for the hire was disposed of. If the appellants' duty was to put an end to the charter for the purpose of minimising damages, and they had in fact done so, it would not have been a voluntary act, and would have been done merely for the purpose of minimising the damages which resulted from the requisitioning of the tug and would have left the other branch of the claim for damages untouched. Whether the appellants had any right to those damages depends upon the construction of the Indemnity Act, because apart form that Act it is I think clear that they could not have had any legal right to damages. The Act by sect. 2, sub-sect. 1, provides that any of the persons indicated in the section who has "incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned." By awarding the appellants damages limited to the period of one month the tribunal have found (as I think upon the evidence they were entitled to find) that the business of the appellants had been interfered with by the requisitioning of the tug, and that the appellants had sustained direct loss thereby. By their cross notice of appeal the respondents complain of the inference drawn by the tribunal, that the interference with the appellants' business caused them any direct loss. In my opinion the

decision of the tribunal upon this point was correct, and in accordance with the authorities; see *The Argentino* (6 Asp. Mar. Law Cas. 733; 59 L. T. Rep. 914; 13 Prob. Div. 191; 61 L. T. Rep. 706; 14 App. Cas. 519). The loss of what the tug might reasonably and fairly be expected to earn for the appellants had she not been requisitioned is in my opinion direct loss within the meaning of the sub-section which I have just quoted. It was urged upon the court by the respondents' counsel that it had never been the practice of the Defence of the Realm Losses Commission to award any compensation for loss of profits, and that, as the tribunal was directed by sect. 2, sub-sect. 2, iii. (*b*), of the Act to assess compensation in accordance with the principles on which that commission acted, the tribunal could not award profits. Whether this was the practice of the commission I do not know, but of this I am sure, that since the passing of the Indemnity Act 1920, compensation must be assessed by the tribunal set up by that Act in accordance with the directions of that Act, and not otherwise; and I am confident that the tribunal must be dealing with claims upon that footing. It does not follow that because a person proves a direct loss by reason of interference with his property he is entitled to payment or compensation, because the principles upon which payment or compensation are to be assessed are laid down by the Act. Those principles are set out in the schedule to the Act, and they appear to have been framed with the intention of awarding compensation to individuals who suffered losses over and above what the community in general suffered owing to the war, and to exclude compensation for any special loss or any loss of special profits due to the war, or for any losses arising solely out of the existence of a state of war. It was no doubt difficult to select a form of words which would exactly and clearly convey the intention of the Legislature, and I do not propose to attempt any definition of what the various expressions in the schedule include. In the present case the tribunal have excluded the bulk of the appellants' claim for loss of profit. If they did so on the ground that the appellants failed to prove a direct loss, their decision was not in my opinion correct in law. I am not satisfied that they did so decide, or that they so intended to decide. Indeed their decision awarding any damages indicates the contrary. The written judgment of the tribunal concludes in this way: "It was contended that the impracticability of hiring a substitute tug, owing to the existence of a state of war, combined with the requisition, forced the claimants' decision and so caused the further loss; but it appears to us that to compensate the claimants for such further loss on that ground would be to contravene the principles laid down for our guidance in part II. of the schedule to the Indemnity Act." If by this the tribunal intended to convey that though the loss proved by the appellants was a direct loss it nevertheless was a loss excluded by the express language of part II. of the schedule, and therefore could not be taken into account by the tribunal, we have not at present the materials upon which we can decide the point of law raised by the appellants. This court cannot decide questions of fact. The case therefore must be remitted to the tribunal for them to take such action (if any) as they may consider desirable and to report to the court, if they so desire, any further findings of fact upon which this court can proceed in dealing with the question of law submitted to it. The appeal must be adjourned. The cross-appeal fails and must be dismissed with costs.

Warrington, L.J.—This is an appeal by claimants under the Indemnity Act 1920 from the determination by the tribunal set up under that Act of the amount due to them for compensation.

By sect. 2, sub-sect. 1 (i.), of the Act the right to appeal is strictly limited to any direction or determination of the tribunal on any point of law, and by rule 40 of Order LV.B in the Rules of the Supreme Court 1921 it is provided that the notice of motion, *i.e.*, the notice of appeal, shall state the point or points of law by the decision or determination on which the appellant feels aggrieved. The jurisdiction of this court is therefore strictly limited and we must be careful not to pass the limits there laid down.

The claimants were under a charter-party dated the 2nd Nov. 1914, the charterers of a steam tug *Frank* for a period which was practically so long as they pleased unless previously determined by the charterers by a fourteen-days' notice. The tug was used by the claimants for their towage and salvage work from which they derived profits. She was on the 19th May 1917, requisitioned by the Admiralty. The claimants claimed compensation under two heads: (1) loss of profit from the use of the tug in their business of which use they had been deprived during the period of requisition; and (2) the charter rate of hire paid by them to the owners so far as it had not been repaid out of the hire paid by the Government. The tribunal have awarded compensation under both heads for the amounts claimed, but for thirty days only. The claimants seek to have the limit of thirty days removed so far as concerns the loss of profits. The respondents on the other hand contend that nothing should have been awarded for loss of profits. I have stated the nature of the case in general terms only, but in terms which seem to me to be sufficient to explain what follows. The jurisdiction of the tribunal and the right of the claimants to compensation depend in my opinion on the Indemnity Act 1920. By sect. 1 of that Act the right to institute legal proceedings in respect of acts done in good faith by officers of the Crown, during the war is speaking generally taken away, but by sect. 2 a right to compensation is given. That section by sub-sect. 1 provides that a person (*a*) being the owner of a ship which has been requisitioned shall be entitled to payment or compensation as therein mentioned; "(*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final." This is followed by two provisions, one giving the limited right of appeal above referred to, the other being immaterial. Sub-sect. 2 provides "that the payment or compensation shall be assessed in accordance with the following principles": Of these (i.) and (ii.) are not applicable to the present case. (iii.) is as follows: "(*a*) If the claimant would, apart from this Act,

have had a legal right to compensation, the tribunal shall give effect to that right, but in assessing the compensation shall have regard to the amount of the compensation to which, apart from this Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation: Provided that this sub-section shall not give any right to payment or compensation for indirect loss. (*b*) If the claimant would not have had any such legal right, the compensation shall be assessed in accordance with the principles upon which the commission appointed by His Majesty under commissions dated the 31st March 1915, and the 18th Dec. 1918 (commonly known as the Defence of the Realm Losses Commission), has hitherto acted in cases where no special provision is made as to the assessment of compensation, which principles are set forth in part II. of the schedule to this Act."

In my opinion the claimants in the present case come under sub-clause (*b*). As charterers they had no property in the ship nor had they the possession thereof and they could not at common law have maintained an action against the officers of the Crown who took possession of the ship. Accordingly that part of the schedule which regulates in their case the assessment of compensation is part II., which is in the following terms: "Principles on which the Defence of the Realm Losses Commission has hitherto acted. The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity." The tribunal arrived at the following conclusions: (1) that the business of the claimants as charterers was interfered with by the requisition; (2) that the requisition interfered with the claimants' business so as to cause directly some loss of profit and some loss of charter hire; (3) that to minimise the loss they ought to have given the fourteen days' notice to determine the charter but were entitled to a reasonable time, fixed by the tribunal at thirty days, to consider their position, and accordingly they allowed the claim under both heads for thirty days. The judgment concludes with the following passage: "The further payments of charter hire and the further loss of profits was not caused directly or even indirectly by the requisition. As Mr. Page candidly stated, the claimants themselves in their own business interests after consultation and advice decided to keep the charter on foot for so long a period as the requisition lasted. This decision and not the requisition caused the further loss. It was contended that the impracticability of hiring a substitute tug, owing to the existence of a state of war, combined with the requisition, forced the claimants' decision and so caused the further loss; but it appears to us that to compensate the claimants for such further loss on that ground would be to contravene the principles laid down for our guidance in part II. of the schedule to the Indemnity Act." I now turn to the appellants' notice of appeal. After stating that he intends to appeal he defines his point in these terms; "And further take notice that the points of law by the determination of which the claimants feel aggrieved are that the court was wrong in holding that to award the claimants further compensation than the amount above mentioned" —that is loss during the thirty days—"would be to contravene the principles laid down in part II. of the schedule to the Indemnity Act 1920, and furthermore the claimants will contend that upon evidence called and the facts so found, they are entitled to the compensation claimed as aforesaid." The last contention seems to me to raise really no point of law at all. This is not drawn with the precision which in proceedings such as the present ought I think to be observed, but I think it means that there was nothing in the schedule to justify the limitation to the thirty days.

The respondent's cross notice is as follows: "And further take notice that the point of law by the direction of determination on which the respondent feels aggrieved is the inference drawn by the court that the interference with the claimants' business by reason of the requisition was such as to cause directly some loss of profit and some loss of charter hire and the decision of the court that it was competent to the court to draw such an inference from the facts proved."

I will deal first with the cross-appeal. This, in my opinion, fails. The question turns on the construction of the statute. I will assume that at common law the charterers could have obtained no compensation for interference with mere contractual rights, but the statute has, in my opinion, without reference to the question whether the claimants had rights at law, given compensation to any person who has incurred or sustained any direct loss or damage by reason of interference with his business. The claimants' business was that of employing the *Frank* and other tugs in towage and salvage work. They proved that profits were derived by them by the employment of the *Frank* and they lost these profits by being deprived of the *Frank*, they not being able, as they proved, to obtain on reasonable terms another tug in her place. I think the tribunal were justified in concluding that some loss of profit was direct loss sustained by reason of interference with business. Were the tribunal justified in confining the loss to the thirty days? As regards the minimising the loss by determining the charter, with deference to the tribunal, the determination of the charter, though it would have rendered them no longer liable to pay hire and so have reduced their loss in that respect, would have left the loss of profit resulting from their loss of the tug unaffected, and I think the tribunal were wrong in law in limiting on this ground the period for which loss of profit was allowed. But it is open to argument that the loss after the thirty days resulting from inability to obtain another tug was not suffered by reason of "direct and particular interference" with the claimants' business by the requisition of the *Frank*, but by reason of general measures taken by the Government in consequence of the existence of a state of war, and was thus due "simply and solely" to the existence of that state of war or to "general conditions prevailing

in the locality." I express no opinion on the validity of this argument for we do not know from the judgment with any certainty the view taken by the tribunal. The concluding passage of the judgment seems to indicate that they took some such view as I have suggested, but I think they ought to be requested if they think fit to make further findings of fact or to express their views in terms on the construction of part II. of the schedule. The matter should be referred back to them for this purpose.

The cross-appeal should, in my opinion, be dismissed with costs.

Scrutton, L.J.—This is an appeal under sect. 2, sub-sect. 1 (i), of the Indemnity Act 1920, from the decision of the Defence of the Realm Losses Commission upon a claim by the Elliott Steam Tug Company, charterers of the tug *Frank* owned by Charles Duncan and Co., for compensation for damage done to their business by the requisition of the tug by the Admiralty on the 19th May 1917. Before the requisition of the tug the charterers were making a profit of 5*l.* 11*s.* 4*d.* per day (not including days when the tug was not working) after paying the owners 5*l.* 3*s.* 4*d.* a day. In other words they were making a gross profit of 10*l.* 14*s.* 8*d.* a day, a net profit of 5*l.* 11*s.* 4*d.* day. The Admiralty, who only deal with owners, at first paid the owners 5*l.* 10*s.* a day, which the owners ultimately handed over to the charterers. The charterers had continued to pay 5*l.* 3*s.* 4*d.* a day to the owners for their charter was renewable at charterers' option, and the charterers desired to preserve their rights over the tug, after the requisition ceased. These rights indeed were so valuable that the owners ultimately paid the charterers 2000*l.* to cancel the charter. In the second stage of the requisition the Admiralty took over the maintenance of the tug, and only paid the owners 1*l.* 4*s.* a day, which they paid to the charterers. At this stage the charterers who were paying the owners 5*l.* 3*s.* 4*d.* a day, and only receiving 1*l.* 4*s.* from the Government, were obviously making a heavy loss. The question now is as to the rights of the charterers against the Government.

At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right: see on this point the judgment of Blackburn, J. in *Cattle* v. *Stockton Waterworks Company* (33 L. T. Rep. 475; L. Rep. 10 Q. B. 453), where a contractor making a tunnel on K.'s land claimed against a wrongdoer to K.'s land, whose wrong made his contract less profitable, and was held not entitled to recover. It is for this reason that underwriters cannot sue directly a wrongdoer against property they have insured, but must proceed in the name of the assured, as explained by Lord Penzance in *Simpson* v. *Thomson* (3 Asp. Mar. Law Cas. 567; 38 L. T. Rep. 1; 3 App. Cas. 289). It is for this reason also that charterers under a charter not amounting to a demise do not and cannot sue in the Admiralty Court a wrongdoer who has sunk by collision their chartered ship. The same principle was applied by Hamilton, J. in *Remorquage a Helice (Société Anonyme)* v. *Bennetts* (1911) 1 K. B. 243), to prevent the owner of a tug suing the wrongdoer who had sunk his tow, whereby he had lost the benefit of his contract of towage. When the Court of Appeal in *The Okehampton* (12 Asp. Mar. Law Cas. 428; 110 L. T. Rep. 130; (1913) P. 173) allowed sub-charterers to sue for the loss of their bill of lading freight through a collision by the defendants' wrongdoing, they did so, I think, because it was proved that the sub-charterers, not the owners, had contracted to carry the goods and had received them and had, therefore, a lien for the freight and sufficient possession as bailees to sue for damages to the goods: see *The Winkfield* (85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 249; (1902) P. 42). This is a sufficient reason for the decision, as explained by Hamilton, L.J. at the beginning of his judgment. I do not think the headnote is accurate in speaking of possessory interest in the ship.

But, secondly, at common law, the shipowner suing a wrongdoer for temporary loss of the ship's services would be entitled at common law to recover the loss of profits during that period as a direct consequence of the wrong. This is explained as regards ships by the judgments of Bowen, L.J. and the House of Lords in *The Argentino* (6 Asp. Mar. Law Cas. 733; 61 L. T. Rep. 706; 14 App. Cas. 519). It is indeed every-day practice in injury cases, where the plaintiff is given loss of earnings or profits during the time his injury lasts as the direct consequences of the injury. I used the word "direct," because it is the word preferred after consideration of the alternatives by Lord Sumner in *Weld-Blundell* v. *Stephens* (132 L. T. Rep. 593; (1920) A. C. 983). The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognise him as able to sue for such an injury to his contractual right in the ship.

But, thirdly, at common law the owner of a ship while under a duty to act reasonably to reduce damages is under no obligation to destroy his own property to reduce the damages payable by the wrongdoer. The leasehold tenant of a house would not be bound to stop paying rent to his superior landlord during the period during which a wrongdoer prevented him using the house, because by so doing he would reduce the damages the wrongdoer had to pay if by so doing he lost the tenancy of the house after the wrong of the tort feasor was repaired or finished in its effects. It is common practice at common law to recover (1) net profits lost; (2) standing charges which have reasonably to be incurred and which are not made up by profits by reason of the wrongdoer's action. In other words, in a case of temporary loss of a chattel, gross profits lost are recovered so long as expenses of earning them reasonably continue; and the reasonableness is from the point of view of the owner of the chattel. If the expenses cease their amount is set off against the gross profit otherwise lost. I mention these second and third points because on neither of them do I agree with the view taken by the commission during the argument, which was apparently that loss of profits during requisition could not be the direct consequence of the requisition; and that the charterer was obliged to abandon his charter or rather was not entitled to claim the cost of keeping it alive for his benefit after the requisition.

The charterer then has no common law right against a person who deprives him of the opportunity of earning profits by his contractual rights, by taking away the ship in respect of which he had a contract. As a consequence the Board of Arbitration which dealt with registered ships excluded the charterer from claiming for the same reason. They only allowed the owners to claim, and sect. 2, sub-sect. 1 (*a*), of the Indemnity Act does not apply to the case of a charterer. He does not come under sect. 2, sub-sect. 2 (iii.) (*a*), for apart from the Act he would have no legal right to compensation. He can only get compensation under the Act if he has sustained any direct loss or damage by reason of interference with his property or business through the exercise of prerogative rights, or powers under any statute for the defence of the realm and then only on the principles set out in Part II. of the Schedule to the Act. The commission appear to have rejected all claim for loss of profits because the charterers were unable to replace the requisitioned tug at any reasonable rates on the ground that it was "loss or damage due simply and solely to the existence of a state of war." In one view all requisitions were due to a state of war, but to adopt this interpretation would be to make the schedule illusory and meaningless, even as applied to owners. It is difficult to interpret these very vague words, but they may perhaps exclude that part of the profits or value due to war as compared with the pre-war profits or value.

But in my opinion there is a deeper objection to the appellants' claim based on the common law principles already stated, namely, that the charterer cannot get any damages for the loss of his purely contractual rights, whether in property or business. The owner of a ship requisitioned who had been running it for his own account receives an agreed sum from the Admiralty for hire, say, 5*l.* a day, and the Admiralty only deals with the owner. Suppose he has chartered his ship, does the amount payable by the Admiralty suddenly rise from 5*l.* a day for the ship run by the owner for himself to 10*l.* a day for the same ship run by the owner for the charterer? It clearly does not, in my opinion, and the reason is that the 5*l.* a day is the full value of all interests in the ship. It is probably much less than the market value of an unrequisitioned ship, but that is because of the agreed Blue Book rates. But it is the full value for the purpose of compensation and the charterer is not entitled to any additional payment. Whether he is entitled to any share of the 5*l.* depends on his contract with the owners; in this case he has had the whole of the gross rate and cannot claim any more; he must settle with the owner his share, if any, of the net rate and its advantages.

This view, which is not the view put forward by the tribunal, excludes the claim of the appellants; there is a cross-appeal against the amount awarded by the tribunal rested on the ground that the loss of profits was not direct loss. I think it was direct loss if the charterer had a right to claim, and that, therefore, the cross-appeal fails on the point raised.

Appeal adjourned; cross-appeal dismissed.

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

Solicitor for the respondent, *Treasury Solicitor.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, Feb. 14, 1921.

(Before Rowlatt, J.)

M. Isaacs and Sons Limited *v.* William McAllum and Co. Limited. (*a*)

Charter-party—Ship's name—Implied warranty of nationality—Breach—Shipowner selling vessel to foreign subject—Change of nationality of vessel—Change of flag—Implied term—Damages.

By a charter-party a British ship was chartered by her owners to the plaintiffs for twelve months in direct continuation of an earlier time charter. During the currency of the charter-party the owners sold the ship to a Greek subject, thereby causing her to change her flag. The charterers did not attempt to avoid the charter, but kept the services of the ship until it expired. By the contract of sale the owners reserved the right, and it was agreed that they should retain the right of satisfying any requirement of the charterers with regard to the personal performance of any obligations of the charter-party.

Held that although there was no implied warranty in the charter-party that the ship was a British ship because she was called by a British name, the owners had committed a breach of the charter-party in selling the ship to a foreign subject and causing her to change her flag, and the charterers were entitled to such a sum in damages as would represent the increased difficulty of getting suitable and remunerative employment in consequence of the change of flag.

Action in the commercial list tried by Rowlatt, J.

The plaintiffs claimed damages for the breach of a charter-party. By their statement of claim they alleged that by a charter-party dated the 15th April 1919, the defendants, as owners, chartered to the plaintiffs the steamship *City of Hamburg* for a period of four calendar months. By a second charter-party, dated the 30th Aug. 1919, the defendants further chartered to the plaintiffs the said steamship for a period of twelve months in direct continuation of the charter-party dated the 15th April 1919. At the dates of both charter-parties the steamship *City of Hamburg* was a British ship.

On the 10th Sept. 1919 the defendants sold the vessel to one Denis Anghelatos, a Greek subject, and the sale was carried out with the permission of the British Ministry of Shipping. On the 11th Sept. 1919 the defendants wrote to the plaintiffs giving them notice of the sale, and the next day the plaintiffs replied refusing to consent to the transfer of flag during the period of the charter-party, and stating that they would hold defendants responsible for any damages the plaintiffs might sustain.

On the 13th Oct. 1919 the register of the vessel as a British ship was closed; and on the 8th Nov. 1919 she was transferred to the Greek flag at Leghorn, being renamed the *Panaghis Dracatos*; and on the 12th Nov. she left that port under the Greek flag.

The plaintiffs then brought this action for breach of the second charter-party. By par. 2 of their

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

points of claim they alleged that it was an implied term of the charter-party that the steamship should remain during the period of twelve months under the same flag; and that the plaintiffs entered into the contract on the basis of that implied term, as the defendants well knew; (par. 3) that further, or alternatively, it was an implied term of the second charter-party that the defendants would not lessen the beneficial user of the vessel to which the plaintiffs were entitled; (par. 4) that a steamship trading under the British flag was more valuable than a similar steamship trading under the Greek flag, by reason of the fact that shippers of general cargo were unwilling to ship such cargo on board Greek ships, and for that reason a Greek steamer could not be profitably employed in regular general cargo lines trading to and from the United Kingdom; and, further, that the insurance premiums charged on a Greek ship exceeded by about 50 per cent. the insurance premiums charged on a British ship; (par. 5) that in breach of the said implied terms the defendants during the second charter-party sold the steamship to a Greek subject, and procured the closing of the British register, and the steamship was transferred to the Greek flag and renamed; (par. 6) that by reason of the premises the steamship was delayed at Leghorn from 7 p.m. on the 8th Nov. until 8 p.m. on the 12th Nov. 1919; (par. 7) that by reason of the change of flag and name the plaintiffs were obliged to pay additional sums for insurance on cargo; (par. 8) that by reason of the change of flag and name the plaintiffs, during the remaining period of the second charter-party—namely, the 8th Dec. 1919 to the 21st Oct. 1920, had suffered damage by reason of increased insurance charges and increased difficulty of getting suitable and remunerative employment for the steamship. By par. 10 the plaintiffs alleged that it was necessary for the defendants before selling the steamship to obtain the consent of the British Shipping Controller, whose consent was given subject to a stipulation that the steamship should trade for twelve months within the United Kingdom only; and, by par. 11, the plaintiffs alleged that the defendants, by selling the steamship, and rendering it subject to that stipulation, cut down the limits within which the steamship was authorised to trade under the charter-party, and thereby committed a breach of the charter-party, whereby the plaintiffs suffered damages, of which particulars were furnished. The plaintiffs claimed on all those alleged grounds 28,678*l.*

The defendants admitted the two charter-parties referred to and admitted that the steamship *City of Hamburg* was a British ship at the dates thereof. By par. 2 of their defence and counter-claim, the defendants denied the implied term alleged by the plaintiffs in par. 2 of the statement of claim, and denied that the second charter-party was entered into on such implied terms. By par. 3 the defendants denied the implied term alleged in par. 3 of the plaintiffs' points of claim. They denied that a vessel trading under the British flag was more valuable than a similar vessel under the Greek flag. They said that they were always ready and willing to perform, and could and would, have performed, any voyage within the limits of the charter-party of the 30th Aug. 1919.

D. C. Leck, K.C. and *W. A. Jowitt* for the plaintiffs.

W. N. Raeburn, K.C. and *S. Lowry Porter* for the defendants.

Rowlatt, J.—In this case the plaintiffs chartered from the defendants a ship which was then called the *City of Hamburg*. It was not expressed in the charter-party that she was a British ship, but she was, in fact, a British ship; and the charter was a time charter taking effect, I think, from about Oct. 1919 until last Oct. It followed on a time charter of about four months, which the same charterers, the plaintiffs, had taken from the defendants, so that the plaintiffs knew the ship, although that is not stated.

Shortly after the second charter had been entered into the defendants sold the ship to a Greek gentleman, and her name was changed, and she sailed under the Greek flag. It is in those circumstances that this action is brought. I do not need to mention the steps that were taken to get an injunction, and so on; but what happened was that the plaintiffs have kept to the charter. I do not know whether they could have avoided it or not, and I am not inquiring as to that, and they have kept the services of the vessel, and the time has now expired, and I do not think that anything arises out of the fact of the sale viewed alone. The defendants reserved the right to perform the contract personally. I do not know exactly what is the effect of that when they are selling the ship to the subject of a foreign nationality, with the resulting change of flag, but, at any rate, the charter-party has been performed in the sense that the various voyages have been taken in accordance with the requirements within the charter-party of the charterer, and that is over. What remains is a complaint founded on the fact that these services have been performed with a vessel not of the British flag, but of the Greek flag, and it is said that the plaintiffs are entitled to damages for that breach.

There was no implied warranty in this charter-party that she was a British ship because she was called the *City of Hamburg*. That is clear from the case of *Clapham* v. *Cologan* (3 Camp. 382) cited by Mr. Raeburn, but that does not arise. She was a British ship; if she had not been, the case of *Clapham* v. *Cologan* (*sup.*) shows that no claim could be made on the ground that she was called the *City of Hamburg*.

But she was a British ship, and the way in which it is put by Mr. Leck is that the act of the owner in changing her name and flag and in changing her from a British ship into a Greek ship—as an incident of the sale of the property in the vessel—gave the plaintiffs the services of a different ship from that for which they had contracted, and one which was less valuable.

There has been some little discussion at the Bar about the doctrine of implied terms in a charter-party, but it seems to me that when parties contract for services to be rendered by one of them by means of a specific chattel, that at any rate throws an implied undertaking on the part of the other contractor that the chattel shall not be altered so as to prejudice the services which are to be rendered by it. I think that is only a particular phase of the well-known principle laid down in *Appleby* v. *Meyers* (or *Myers*) (16 L. T. Rep. 669; L. Rep. 2, C. P. 651), a decision at the root of the doctrine as to implied terms in contracts. If a specific thing is contracted for, the contract is not properly carried out if the thing is so altered as to render

less valuable services or different services. I think that is the same thing put in different language.

So I think the question here is whether the change of flag was a material matter. Lots of changes can be made in a ship, I have no doubt, such as painting, altering the colour, altering the mast, or all sorts of things might be made, which should not, in my opinion, affect the contract at all but would affect only the question of damages.

The question I have to decide, then, is whether the change of flag was a material change in the nature of the subject matter; and it seems to me that I must answer that question affirmatively. I do not think it possible to hold that it made no difference under what flag the ship sailed.

The law of the flag has not only direct importance as regards the ship itself, but has also important collateral effects on, for example, the discipline of the ship and the moral of the crew, and many other such matters. This being so, the consideration therefore arises as to damages in any particular case. In my opinion, in the present case there was a breach of the charter-party by the change of the flag during the existence of that contract; and the question that remains is how much (if any) damages should be awarded.

I do not think that the damages are likely to be at all great; but I must give an opinion about them for the guidance of the arbitrator or referee. But I will say what I think about the damages because, even if I am right in deciding in favour of the plaintiffs, it may be that they would like to question my limitation of their damages, so I will say what I think about it and direct the arbitrator or referee accordingly. The first is in respect of delay at Leghorn. That has disappeared. The plaintiffs themselves are responsible for three of the four days claimed, and the other day was merely one day, as it appears from the log that the captain was engaged in starting his fires, I daresay, to start next day. But it is not claimed. Therefore, I do not think that I ought to allow anything under par. 6. Then in par. 7, the sum of 145*l.* is claimed because the plaintiffs are obliged, or ought, to insure themselves against any liability that they might come under to shippers on board the ship in respect of cargo, I suppose, already put on or contracted to be put on, because she changed her flag. I agree with Mr. Raeburn. I think they wasted their money. I do not see how they could be under any such liability, and I do not think they are entitled to anything for that. Then, under par. 8, I think they are entitled to get something. They say that there was increasing difficulty in getting suitable and remunerative employment for the steamship, mainly because shippers did not care for Greek ships, or their underwriters did not care for Greek ships. They have adduced evidence to that effect, although it is contradicted in a way that leaves room for its possibly being true to a certain extent, because the gentleman who gave evidence for the defendants agreed that, in the last few months, at any rate, people were beginning to be shy of Greek ships. But that is the evidence, and I think the plaintiffs are entitled to get a sum to represent the increased difficulty of getting suitable and remunerative employment. But if, and so far as, they have suffered damage by reason of delay or laziness on the part of the captain and crew, and so on, I do not think they can recover that in this action. That is not the damage that flows from the vessel's register being changed. Those damages flow from the breach of duty of the master and crew at the time, and should have been made the subject of that sort of charge. The only damage they are entitled to on this claim is a sum to represent the increased difficulty of getting suitable and remunerative employment for the vessel.

I give judgment for the plaintiffs, and I direct an inquiry before a referee with regard to the damages so resulting to them, and I give judgment for the defendants for an amount admittedly due to them under their counter-claim.

Judgment for the plaintiffs on the claim and for the defendants on the counterclaim.

Solicitors for the plaintiffs, *Lawless* and *Co.*

Solicitors for the defendants, *Downing, Handcock, Middleton,* and *Lewis.*

Monday, May 9, 1921.

(Before GREER, J.)

LESLIE SHIPPING COMPANY *v.* WELSTEAD. (*a*)

Charter-party — Time charter — Monthly hire— Right of owners to withdraw steamer from services of charterers in default of payment—Measure of damages.

Under a time charter-party hire was to be paid monthly in advance, and in default of such payment the owners were to have the faculty of withdrawing the steamer from the service of the charterers. The charterers did not pay the hire, and the owners withdrew the steamer from their service.

Held, that the owners were entitled to recover damages for the chartered period remaining after the withdrawal of the steamer from the charterers' service. The measure of such damages is the difference between the rate of hire provided in the charter-party and the market rate at the date of withdrawal.

ACTION in the Commercial Court, tried by Greer, J.

The plaintiffs claimed damages for the breach of a charter-party. The charter-party was dated the 29th March 1920, and was in the form of the Baltic and White Sea Conference Uniform Time Charter 1912. It was made between the plaintiffs, the Leslie Steamship Company, the owners of the steamship *Raithwaite*, a vessel of about 5176 tons deadweight, summer freeboard inclusive of bunkers, and the defendant, Frederick Welstead, as charterer. By it the plaintiffs agreed to let, and the defendant to hire, the steamship *Raithwaite* for thirty-six calendar months from the time the vessel was delivered to the charterer as therein provided. It was also provided, *inter alia*, by clause 5, that the charterer should pay as hire 25s. per ton on the vessel's summer deadweight for the first twelve months, 22s. 6d. for the second twelve months, and 20s. for the third twelve months, from the time the steamship was placed at the disposal of the charterer, and so *pro rata* for any part of a month until delivery to the owners as therein stipulated; that the payment of the hire should be made in London in cash without discount monthly in advance; and that "In default of such payment or payments, as herein specified, the owners shall have the faculty of withdrawing

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

the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers under this charter." Clause 23 provided that the charterer should have the option of subletting the steamship, but the original charterer always to remain responsible to owners for due performance of the charter. The charter-party also provided that the owners should provide and pay for all provisions and wages for insurance of the ship, and all deck and engine room stores, and maintain the ship in an efficient state, and that the charterer should provide coal, fuel, water for boilers, &c.

On the 28th May 1920 the steamship was delivered to the defendant at Greenock, and the defendant duly paid the first and second month's hire, as provided by the charter. The defendant, however, did not pay the third month's hire due on the 28th July 1920, but in respect of that month's hire the parties agreed that two bills of exchange of that date should be accepted by the defendant payable thirty days after date, one for 6000*l.* and another for 500*l.* 16*s.* 5*d.* These bills were dishonoured on presentation, the defendant alleging that they were accepted subject to a condition which the plaintiffs had not fulfilled. The defendant did not pay the fourth month's hire, and on the 22nd Sept. 1920 the plaintiffs, claiming to do so under clause 5 of the charter-party, withdrew the steamship from the service of the defendant without prejudice to any claims they might have on the defendant under the charter-party.

On the 18th Feb. 1921 the plaintiffs, the shipowners, commenced an action against the defendant, the charterer, claiming damages for breach of the charter-party, and alternatively, for hire thereunder. The plaintiffs alleged that by reason of the defendant's breaches of the charter-party, they, the plaintiffs, had suffered damage, and had lost the amount of hire for which the defendant was liable under the charter-party during the remainder of the chartered period, or alternatively the difference between the amount for which the steamer could on the date of withdrawal have been let in the market upon similar terms. The plaintiffs claimed 184,610*l.* 13*s.* 4*d.*, being the total amount of the hire under the charter-party for the remaining two years and eight months of the chartered period, or, alternatively, 76,501*l.* 5*s.* 8*d.*, being the difference between the total amount of hire, and hire for the remainder of the chartered period at the rate ruling at the date of withdrawal at which the steamer could have been let in the market, less credit for certain bunker coal, 3,920*l.*

The defendant pleaded (*inter alia*) that the alleged damage was too remote and not recoverable. The defendant alleged that he had suffered damage, and counterclaimed sums amounting to over 70,000*l.* At the trial the parties agreed that the plaintiffs' damages should be estimated at 47,743*l.*, subject to the determination of the question of law.

Raeburn, K.C. and *Clement E. Davies* for the plaintiffs.

Barrington-Ward, K.C. and *H. S. Simmons* for the defendant.

GREER, J.—This is an action by Messrs. Leslie, trading as the Leslie Shipping Company, for hire due under a charter-party, less certain credits, and for damages arising from the withdrawal of the vessel in consequence of the defendant's non-payment of hire according to the terms of the charter-party. The charter-party was dated the 29th March 1920, and was for thirty-six months, and it began to run on the 28th May 1920. At the date of the withdrawal two months' hire was due. For one of these two months a bill of exchange had been given, but the bill was dishonoured. The other month's hire had not been paid at all, though it was like the other, due in advance. The question which I have to decide is whether or not, on account of the withdrawal of the vessel in those circumstances, the plaintiffs are entitled to say that, by reason of the defendant's breach of contract, they have lost the benefit of the hire for the rest of the charter-party period, and are therefore entitled to damages based upon the difference between the charter rate and the best possible rate that they could have got during that period outside the charter-party.

The question turns on clause 5 of the charter-party. It is said for the plaintiffs that the damages which they claim—namely, the loss of the chartered hire less the earnings that could be got by the vessel free from the charter, are the natural and probable consequence of the non-payment in advance of the hire fixed by the charter-party. It is said, on the part of the defendant, that these damages are due to the withdrawal of the vessel from the charter-party by the plaintiffs, and that the plaintiffs' only remedy in these circumstances is to claim for hire at the agreed rate up to the date when they withdrew the vessel from the service of the defendant, and to get their vessel back by withdrawal, and that the plaintiffs are not entitled to put themselves in the same position as if the defendant had adhered to the terms of the charter-party during the whole term thereof.

It seems to me that the point is not free from difficulty, and if I had not already expressed my opinion upon it in a previous case tried by me (*Merlin Steamship Company* v. *Welstead* (*The Kenmare*) (unreported) April 5, 28, 29, 1921), I might have taken time to consider the point.

On the whole, my view is that the damages arise as the natural and probable consequence of the defendants' breach of contract in failing to pay the two instalments of hire which were due at the date of the withdrawal of the vessel by the plaintiffs from the defendant's service. What were the circumstances between the parties? The vessel was in the hands of the defendant under this charter-party when the market was going against him. He gave bills for one month's hire which were not met by him; and, in addition, when another bill for another month's hire matured he did not pay that next monthly hire. Would not any shipowner be entitled to conclude in such a case that the charterer did not intend to pay the hire during the subsequent months of the charter? The defendant's own bill for one month's hire he had allowed to be dishonoured; a person in business rarely does that if he can possibly avoid it; and when the next month's hire became due he did not pay it. I think that, apart altogether from clause 5 of the charter-party, such conduct on the part of the defendant would, I think, amount in law to a repudiation of a fundamental part of this contract, and would entitle the plaintiffs to treat it as at an end. Clause 5 was inserted in the charter-party for the benefit of the shipowners,

and not to their detriment, and it seems to me to follow that they possess under it the express right of withdrawing the vessel. It becomes impossible, therefore, that there should be any discussion about it. It seems to me that this clause cannot be treated as cutting down the rights which the plaintiffs would have had in the absence of such a clause.

For these reasons I am against the somewhat belated argument that has been put forward on behalf of the defendant, and my judgment is that the plaintiffs are entitled to recover not only the hire due on the 22nd Sept. 1920, when the plaintiffs withdrew the vessel, and to withdraw the vessel, but also to damages the amount of which has been agreed, calculated on the basis of the evidence that has been given. The amount agreed is 47,743*l.*, and there will be judgment for that amount, without prejudice to any further action by the defendant on his counter-claim. If the defendant thinks that there is any substance in his counter-claim for damages, he can bring an action.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitor for the defendant, *A. H. Baker*.

July 27 *and* 28, 1921.

(Before McCARDIE, J.)

ARMOUR AND CO. LIMITED *v.* LEOPOLD WALFORD (LONDON) LIMITED. (*a*)

Bill of lading—Special form—Reasonableness—"On deck" clause—Duty of shipowner to give notice to shipper of intention to carry on deck—Booking slip.

The plaintiffs shipped a quantity of candles on board the defendants' steamer for carriage from London to Antwerp, on the terms of a booking slip which the defendants had given to the plaintiffs, and which was approved of by the plaintiffs. The booking slip was as follows (inter alia): *"We beg to confirm freight engagement. . . . All engagements are made subject to the conditions, terms, and* (or) *exceptions of our bills of lading and also to the conditions and* (or) *regulations of any steamboat, railway, or canal company by whom the goods may be conveyed and all goods are at the risk of senders or owners thereof until actually shipped on board the steamer. No insurances of any description are booked without special instructions. No cargo shipped unless Walford Line's Bills of Lading are used; no other bills of lading accepted." The goods were shipped on the 18th March 1919, and a bill of lading, dated the 19th March, was given to the plaintiffs. By clause* 11 *of the bill of lading it was provided that: "The company has the right to carry the goods below deck and* (or) *on deck, and in branch steamers, coasting or river steamers or vessels and* (or) *lighters, launches, or boats, and to land or store goods for the purpose of transhipment, reshipment, or further carriage, and shall have the right to sub-contract in respect of any such carriage or part thereof, and shall not be liable for any loss, damage, or injury within the exceptions in this bill of lading whether due to negligence or not, but such exceptions shall apply to carriage by such sub-contractors as if such sub-contractors were specifically mentioned in the said exceptions."*

The goods were stowed on the deck of the defendants' vessel, and there was no suggestion of any carelessness in the way they were arranged and protected. No notice was given to the plaintiffs by the defendants that the goods were, or would be, carried on deck. While on the voyage from London to Antwerp the goods were damaged by sea-water through the ordinary perils of the sea. The plaintiffs claimed damages for alleged breach of contract by the defendants in relation to the carriage of the goods.

Held (1) *that the plaintiffs were bound by clause* 11 *of the bill of lading, notwithstanding its unusual character, because they had accepted the booking slip, which provided that the goods were to be shipped under the defendants' special form of bill of lading, and clause* 11 *applied to the goods actually named in the bill of lading;* (2) *the defendants were entitled to stow the candles on deck;* (3) *there was no implied condition that the defendants should give the plaintiffs notice that the goods in question would be carried on deck, and* (4) *the defendants were therefore not liable for damages.*

ACTION in the Commercial List, tried by McCardie, J.

The plaintiffs claimed damages for alleged breach of contract in relation to the carriage of a certain quantity of candles from London to Antwerp. The plaintiffs were the owners of the goods in question, and the defendants were shipowners who ran a line of steamships to continental ports. In March 1919 the plaintiffs wished to ship 25 tons of candles from London to Antwerp. They communicated with the defendants and, as a result, the defendants sent them a booking slip, confirming the freight engagement and providing (*inter alia*) that "all engagements are made subject to the conditions, terms . . . of our bills of lading . . . No cargo shipped unless Walford Line's Bills of Lading are used; no other bills of lading accepted." The plaintiffs approved of this booking slip, and a portion of the 25 tons of candles was shipped on the defendants' steamship on the 18th March, and on the 19th March a bill of lading was given to the plaintiffs, which contained a clause providing that the company had the right to carry the goods below deck and (or) on deck.

The plaintiffs' goods were placed on the deck of the defendants' ship. There was no carelessness on the part of the defendants in the way they were arranged or protected. But they were damaged by sea water, through the ordinary "perils of the sea," on the voyage from London to Antwerp. The amount of the damages was agreed at 1235*l.* The defendants had not given the plaintiffs any special notice that these goods would be carried on deck.

W. Norman Raeburn, K.C. and *H. Claughton Scott* for the plaintiffs.

R. A. Wright, K.C. and *D. Nowill Pritt* (*H. M. Paul* with them) for the defendants.

Cur. adv. vult.

July 28.—McCARDIE, J. read the following judgment.—The plaintiffs, as owners of goods shipped on board a steamer of the defendants, claim damages for breach of contract. The defendants run a line of steamships to continental ports. In March 1919 the plaintiffs wished to

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

send 25 tons of candles from London to Antwerp. They communicated with the defendants. As a result, the defendants sent to the plaintiffs a booking slip dated the 5th March 1919. So far as material it said: "We beg to confirm freight engagement as follows" (then followed a statement of cargo, rate, port of shipment, and port of destination). The slip proceeded as follows: "All engagements are made subject to the conditions, terms, and (or) exceptions of our bills of lading and also to the conditions and (or) regulations of any steamboat, railway or canal company by whom the goods may be conveyed and all goods are at the risk of senders or owners thereof until actually shipped on board the steamer. No insurances of any description are booked without special instructions. No cargo shipped unless Walford Line's Bills of Lading are used; no other bills of lading accepted." The plaintiffs approved the booking slip. The statement of claim expressly alleges that this slip was part of the bargain between the parties.

A portion of the 25 tons was shipped on the defendant's steamship *Poldiep* on or about the 18th March 1919, and a bill of lading dated the 19th March was given to the plaintiffs. It is as to these goods that the claim arises. The bill contains many clauses. Clause 11 is the only one material to be set out. It is as follows: Clause 11: "The Company has the right to carry the goods below deck and (or) on deck, and in branch steamers, coasting or river steamers or vessels, and (or) lighters, launches or boats, and to land or store goods for the purposes of transhipment, re-shipment, or further carriage and shall have the right to sub-contract in respect of any such carriage or part thereof and shall not be liable for any loss, damage or injury within the exceptions in this bill of lading whether due to negligence or not, but such exceptions shall apply to carriage by such sub-contractors as if such sub-contractors were specifically mentioned in the said exceptions."

I may mention that clause 1 of the bill of lading refers to many classes of goods, ranging from gold dust to statuary, bank notes to laces and furs, and that clause 2 contains a widely-worded negligence and perils of the sea clause in favour of the shipowners. The goods were placed on the deck of the *Poldiep*. It is not suggested that there was any carelessness in the way they were arranged or protected. Whilst on the voyage to Antwerp they were injured by sea water, through the ordinary "perils of the sea." The damage is agreed at 1235*l*.

Such are the broad facts. I take in order the contentions of the plaintiffs, and I will briefly state as to each contention such further facts as are relevant. In the first place, the plaintiffs assert that they are not bound by clause 11 of the bill of lading; that defendants therefore wrongfully placed the candles on deck, and not below deck; and that defendants are consequently hit by the rule stated in art. 48 of Scrutton and Mackinnon on Charter-parties, 10th edit.—that the effect of unauthorised deck storage is to set aside the exception of the bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to the goods so stored.

The plaintiffs assert that clause 11 was unusual; that it was not specifically drawn to their attention; that they were not aware of it, and therefore are not bound by its provisions. I cannot accept this contention of the plaintiffs. I think they are clearly bound by clause 11. They had accepted the booking slip, which provided that the goods were to be shipped under the defendants' special form of bill of lading and none other. The bill of lading is made out in accordance with the booking slip. The form used has been unvaryingly employed by the defendants for seven or eight years, and clause 11 has for that period appeared as it is now. The defendants have but one form of bill of lading. In 1916 and 1917 the plaintiffs made several shipments with the defendants under similar bills of lading with a like clause.

Moreover, in the present case, the plaintiffs' traffic manager got from his stationers several printed forms of the defendants' bill of lading, and sent those forms to the defendants, who signed them and then forwarded them to the plaintiffs. They are the bills of lading for the goods now in question. I hold that the plaintiffs in fact accepted them, as they were bound to accept them, as bills of lading in proper form. Counsel for the defendants called my attention to Carver on Carriage by Sea (6th edit., s. 122), where the learned author considers whether a bill of lading is to be taken as a conclusive statement of the contract of carriage. Several useful cases are there cited. In my view, a bill of lading is not, as between shipper and shipowner, conclusive of the true contract. It may, for example, be inconsistent with a prior overriding, and express written bargain as to the terms on which goods shall be carried or the form in which bills of lading shall be issued.

The law is stated somewhat favourably to the shipper in the article by the late Kennedy, L.J. in Halsbury's Laws of England, Vol. 26, p. 148, where he says: "In some cases the bill of lading is to be regarded as evidence only of a pre-existing contract" (see per Lord Bramwell in *Sewell* v. *Burdick* (5 Asp. Mar. Law Cas. 376; 52 L. T. Rep. 445; 10 App. Cas. 74) and *Wagstaff* v. *Anderson* (4 Asp. Mar. Law Cas. 290; 42 L. T. Rep. 720; 5 C. P. Div. 171) "and the person accepting it is not necessarily bound by all its stipulations" (*Crooks and Co.* v. *Allan* (4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. 800; 5 Q. B. Div. 38) and *Lewis* v. *M'Kee* (19 L. T. Rep. 522; L. Rep. 4 Ex. Ch. 58) "but may be entitled to repudiate them on the ground that he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection" (*Crooks and Co.* v. *Allan* (*sup.*). I respectfully doubt if this passage adequately distinguishes between the mere physical receipt of the bill of lading and the mental acceptance of it, whether it has or has not been fully read by the shipper. It must be remembered that the Statute of Frauds does not ordinarily apply to a contract for carriage by sea. The bargain may be collected from various documents or other sources: (see Carver on Carriage by Sea (6th edit., s. 53) and Scrutton on Charter-parties (art. 8).

Whatever the prior express bargain has been, a shipper is free to accept any bills of lading he chooses. If, therefore, he has chosen to receive without protest a bill of lading in a certain form he should ordinarily be bound by it, for as Mr. Carver well observes in sect. 56 of his book: "Where that has been done it is difficult to suppose that the document can be treated as not being what it seems to be." That learned author

proceeds: "The practice of looking to it as a contract may be said to be uniform and, indeed, has been adopted by the Legislature (Bills of Lading Act 1855); and the scarcity of authority is in truth a strong confirmation of the view that it is the contract; for it shows that in practice the point has not been considered open to question."

Here the plaintiffs, I am satisfied, actually accepted the bill of lading in question as the bargain for carriage. From whatever point of view the case is regarded, be it on the principle of *Richardson Spence, and Co.* v. *Rowntree* (7 Asp. Mar. Law Cas. 482; 70 L. T. Rep. 817; (1894) A. C. 217) or on the point that the bill accorded with the provisions of the booking-slip or the ground that the plaintiffs actually accepted the bill of lading, they are bound by clause 11.

The print of clause 11 is small, and in this connection *Crooks and Co.* v. *Allan (sup.)*, *Roe* v. *Naylor, Limited* (116 L. T. Rep. 542; (1917) 1 K. B. 712), and *Gibaud* v. *Great Eastern Railway Company* (125 L. T. Rep. 76; (1921) 2 K. B. 426) were cited before me. Clause 11, however, is in clear print. It is as plain as the other clauses, and it takes its due place in the sequence of clauses. It is perfectly legible. The cases just cited do not therefore require consideration.

Mr. Raeburn, counsel for the plaintiffs, next contended that, assuming the plaintiffs to be bound by clause 11, yet this clause only applied to the classes of goods which, in the ordinary course of shipping, and according to the ordinary practice of shipowners, were usually placed on deck and not below deck. In my opinion, this contention also fails. Clause 11 would scarcely be needed if its application were limited to goods which, by usual practice, would be placed on deck. Its central object, I think, is to give the shipowners a right to stow on deck those goods which ordinarily would be placed below deck. The clause is very broadly worded. It contains no hint of limitation as to the class of goods to which it applies. *Primâ facie* it applies to all goods. I see no ground for cutting down its *primâ facie* effect. It is part of a body of clauses which includes clause 1. Clause 1, as I have already pointed out, refers to goods of many sorts. In actual practice, moreover, the defendants have carried on deck articles of all kinds—from wheat to lace. This is not unusual with shipowners when carrying on short sea routes. The words of the clause are: "The company has the right to carry the goods below deck and (or) on deck." It seems plain to me that those words refer and must refer to the goods actually named in the bill of lading. Here those goods were the candles in question, and in my view the defendants had the contractual right to stow them on deck.

I respectfully agree with the statement in Scrutton and Mackinnon on Charter-parties (10th edit., pp. 283-4, notes to art. 99), that clauses in a bill of lading must be construed in the light of the commercial adventure undertaken by the shipowner. The decisions upon clauses giving leave "to call at any ports" or "to call at any ports in any order" indicate the restriction which may be placed on language of apparent breadth. But in the present case the words are broad and clear, and I see no method of cutting down their operation, save in such a way as to defeat the very object of the clause itself.

The final point for decision arises on the able argument of counsel for the plaintiffs that the defendants here owed a contractual duty to the plaintiffs to inform them that the goods were about to be or had been placed on deck and not below deck, so as thereby to enable the plaintiffs to effect an appropriate and valid insurance if they so wished.

It is admitted that the plaintiffs were not in fact aware until the goods had actually reached Antwerp on the 26th March 1919, that they had been stowed on deck. The importance of the contention of the plaintiffs lies in the fact that they had actually wished and intended that the goods should be stowed below deck and not on deck. They had taken out ordinary insurance policies which did not provide for cargo carried on deck. Hence the plaintiffs are hit by rule 17 of the Rules for Construction of Policy under the Marine Insurance Act 1906, and cannot recover against their underwriters. They submit that I ought to read an implied condition into the contract that the defendants were under the circumstances bound to notify them of the stowage on deck. It was admitted by one of the defendants' managers, in evidence, that the defendants, as a matter of courtesy, often notify cargo-owners of an on-deck shipment so as to enable due insurance to be made. It was also stated by a witness for the plaintiffs (the shipping manager of a continental line of steamers who use the "on deck" clause) that if they found they had to put a consignment on deck they would thereupon inform the consignor of the fact.

The point before me, however, is not a question of courtesy but of legal obligation. The ever-recurring case of *The Moorcock* (6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 Prob. Div. 64) has offered itself for consideration. There Bowen, L.J. said (14 P. D., at p. 68): "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side." But the equally recurring case of *Hamlyn and Co.* v. *Wood and Co.* (65 L. T. Rep. 286; (1891) 2 Q. B. 488) has also been cited. There Lord Esher said (1891, 2 Q. B., at p. 491): "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

From the above two fertile decisions a vast crop of later cases has been begotten. The principle, however, remains unchanged in spite of the aggregation of case law on the matter. Now, in this litigation before me I cannot create the implied obligation suggested by the plaintiffs. Notice to the plaintiffs by the defendants of "on deck" stowage was not essential to the efficacy of the contract of carriage by sea. The bill of lading was a complete and effective and workable document without any implication of a duty to give notice. Insurance was a collateral thing. It was a matter for the plaintiffs alone. It did not touch the defendants. By the terms of the booking slip

the defendants clearly, though impliedly, disclaimed responsibility for insurance. The plaintiffs knew the terms of the contract of carriage. They were aware of clause 11. There was nothing to prevent them from taking out a policy to cover the contingencies which might arise under that clause 11. The extent of such a policy was a matter for them and not for the defendants. The "on deck" clause is well known. It has existed on numerous lines for many years. Why should the defendants assume that the plaintiffs had not got an adequate assurance? The matter lay within the plaintiffs' concern alone. It seems to me also that the plaintiffs had as much opportunity of knowledge as the defendants. In an earlier shipment of part of the total lot of candles, the plaintiffs' superintendent had watched its stowage on board the steamship *Abeille*. There was nothing to prevent an agent for them from ascertaining whether the candles in question were placed below deck or on deck of the *Poldiep*. If I were to hold that the obligation to give notice existed on the facts before me, it would follow, as Mr. Wright, counsel for the defendants pointed out, that an equal obligation would be cast on the defendant with respect to transhipment or reshipment and the other matters referred to in clause 11.

Mr. Raeburn, counsel for the plaintiffs, cited the case of *Hood* v. *West End Motor Car Packing Company* (14 Asp. Mar. Law Cas. 12; 116 L. T. Rep. 365; (1917) 2 K. B. 426), where the Court of Appeal held that an implied term existed, as between assured and underwriters, that notice should be given to the underwriters within a reasonable time after the assured knew that a motor-car, the subject of an insurance policy, was being carried on deck. That case turned, however, upon the particular requirements of insurance law, as between assured and underwriter, with respect to the Marine Insurance Act 1906 and the Institute Cargo Clause. It is, in my view, plainly distinguishable from the facts now before me. I cannot here imply a condition requiring the defendants to notify the plaintiffs of the stowage on deck.

I am indebted to the leading counsel for the plaintiffs for his able arguments, but, in my opinion, the action fails and must be dismissed with costs.

Judgment for the defendants.

Solicitor for the plaintiffs, *F. L. Long.*

Solicitors for the defendants, *Lawrence Jones* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 10, 11, *and June* 13, 1921.

(Before HILL, J.)

THE JAMES W. ELWELL. (a)

Bottomry bond — Maritime risk — Voyage undefined in the bond — Validity of the bond — Co-ownership — Writ of fi. fa. *— Seizure of the ship by the sheriff — Action* in rem *— Arrest by the Marshal of the Admiralty — Sale by the Marshal — Necessaries men — Execution creditors — Priorities.*

A bottomry bond must define the voyage of which the lender undertakes the maritime risk. An instrument is not a bottomry bond, notwithstanding that the parties to it describe it as such, if its terms provide nothing to prevent the lender demanding repayment at any time, even before the ship has sailed from the port where the bond was given, or if, by leaving undefined the time when repayment shall become due, it enables the lender to maintain a secret maritime lien on the ship at his pleasure.

In determining priorities between necessaries men and execution creditors for whom the sheriff has seized a ship under a writ of fi. fa., *the execution creditors will be preferred to the necessaries men, since the former are secured creditors from the time of seizure, whilst the latter have only acquired a security for such sums as they may become entitled to under a subsequent judgment.*

An American ship, which was jointly owned by two sets of American owners, was seized by the sheriff under a writ of fi. fa. *in execution of a judgment recovered in the King's Bench Division against one set of owners. Soon afterwards she was arrested by the Marshal of the Admiralty at the suit of parties suing* in rem *for necessaries. Other necessaries men subsequently commenced proceedings, and either effected arrest or entered caveats. The ship was then sold by the Marshal acting with the consent of all parties.*

An action was then commenced against her by parties claiming to be holders of a bottomry bond. The bond had been given by the master some months previously in order to provide funds to free his vessel from arrests under which she then lay. By the terms of the bond, which described itself as a bottomry bond, the master agreed "to bond and lien the ship" in the amount advanced, the lenders "to have absolute lien upon the vessel until the said loan is repaid," and undertook to draw no other bond on the ship without the consent of the lenders. In an action on this bond the execution creditors under the judgment in the King's Bench Division intervened.

Held, that this bond was void. No time was fixed for repayment. The loan was therefore repayable on demand, and there was nothing in the documents to prevent the plaintiffs demanding repayment before the ship sailed from the port where the bond was given. Nor was there anything to prevent them from allowing the loan to run on indefinitely and maintaining a maritime lien on the ship all the time. The execution creditors and the necessaries men who had established their right in rem *were, therefore, entitled to the proceeds of the sale.*

As between these claimants, held that the sheriff could effectually seize the shares in a foreign ship, to which no statutory restriction to the contrary applied, in the same way that he could seize an undivided share in any other chattel; but that, on the other hand, seizure by the sheriff did not deprive the Marshal of his power to arrest the ship, since both were alike the servants of the court.

It followed that the execution creditors were secured creditors from the moment of seizure; as such they ought to enjoy priority to the necessaries men who had only obtained a security for sums to which they might become entitled under a subsequent judgment. The rule of the Admiralty Court that necessaries men shared in the proceeds of a sale pari passu *without regard to the dates of arrest and judgment should not be extended to include execution creditors.*

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The shares held by those owners against whom judgment had been signed in the King's Bench Division were, therefore, ordered to be paid out to the execution creditors. The shares held by the other owners were ordered to be paid out to the necessaries men, ranking pari passu.

MOTION by the holders of a bond alleged to be a bottomry bond asking for a declaration of the validity of the bond and for payment out of court of the proceeds of the sale of the American sailing vessel, *James W. Elwell*, execution creditors under a judgment of the King's Bench Division intervening.

The *James W. Elwell* was an American sailing vessel of which, in Aug. 1920, 56-64th parts were owned by the Northland Navigation Company and one Clarke, and the remaining 8-64th parts by one Morrey. On the 4th Aug. 1920 judgment was signed in the King's Bench Division against the Northland Company and Clark by the Svenska Stenkols Aktiebolaget Carl Schylter of Stockholm. On the 5th Aug. 1920 a writ of *fi. fa.* was issued in respect of this judgment, and on the same day an action *in rem* was begun by the American Union Line, claiming for necessaries. On the following day the ship was seized at Falmouth by the sheriff, and very shortly afterwards, on the same day, was arrested by the Marshal of the Admiralty in the action by the American Union Line, both writs being duly nailed to the mast of the vessel.

Other actions were subsequently begun *in rem* against the *James W. Elwell*, in each of which caveats were duly entered. Motions for judgment in default of appearance came before the court at various dates, and a reference was subsequently held.

The sheriff attempted to sell the ship on two occasions, but failed to find a buyer, and she was eventually sold on the motion of Messrs. MacLeod and Hill Limited, one of the necessaries claimants by the Marshal acting with the consent of all parties.

The claimants against the proceeds of the sale then were:

Messrs. MacLeod and Hill Limited, shipbrokers, for necessaries. At the reference it was established that their claim was not for necessaries, but it was agreed by all parties that an advance of £200 made for the payment of the wages of the crew should be deemed to have been made with the consent of the court, and should carry a lien.

The Master of the *James W. Elwell*, for wages and disbursements.

Mr. Brunt, the proprietor of the Sailors' Home at Swansea, for necessaries.

Messrs. Samuel and Co., for necessaries.

The American Union Line, recognising that their claims were not for necessaries, did not take part in the reference.

After the sale an action was begun against the ship by the American Express Company, who claimed to be the holders of a bond of bottomry. This document, the terms of which are fully set out in his Lordship's judgment, was executed by the master at Bordeaux in September 1919, at a time when the *James W. Elwell* was lying at Bordeaux under arrest in claims for necessaries. The bond secured advances by means of which the vessel was released, and proceeded on her voyage to Barry. The American Express Company, in their action, sought a declaration of the validity of the bond, and asked for judgment upon it in default of appearance. The execution creditors, the Svenska Company, intervened.

A. T. Bucknill for the American Express Company.

Raeburn, K.C. and *Clement Davies* for the Svenska Company.

Gilbert Beyfus for MacLeod and Hill Limited.

Digby for Mr. Brunt.

Brightman for Samuel and Co.

June 13.—HILL, J.—This ship, the *James W. Elwell* was an American ship. On the 6th Aug. 1920 at Falmouth she was seized by the sheriff under a writ of *fi. fa.* issued on the 5th Aug. 1920, and received by the sheriff on the 6th Aug. This writ was in execution of a judgment signed on 4th Aug. 1920 and obtained by the Svenska Stenkols Aktiebolaget Carl Schylter, of Stockholm, in the King's Bench Division. A few minutes after the seizure by the sheriff the ship was arrested by the Marshal in a suit *in rem* for necessaries brought by the American Union Line against the owners of the *James W. Elwell* by a writ issued on the 5th Aug. 1920. Other actions *in rem* were brought against the owners, and either the ship was arrested or caveats were entered in respect of the following claims: Messrs. McLeod and Hill Limited, for necessaries, writ issued on the 5th Aug. 1920; Mr. Reid, master, for wages, writ issued on the 7th Aug. 1920; Mr. Brunt, for necessaries, writ issued the 9th Aug. 1920; and Messrs. Samuel and Co., for necessaries, writ issued the 12th Aug. 1920.

Since the sale, to be presently mentioned, a suit in bottomry has been brought by the American Express Company by writ *in rem* issued on the 20th Dec. 1920. No appearance has been entered to any of these writs. The sheriff made two attempts to sell, on the 26th Aug. and the 14th Sept. 1920. There were no bids. That is not surprising in a sheriff's sale. Unlike the Marshal, he could not give a title clear of maritime liens, and buyers would naturally hesitate to buy from the sheriff a ship under the arrest of the Marshal. In the interval between the two attempts McLeod and Hill Limited moved for appraisement and sale. On the 9th Sept. 1920 an order was made in their action. This order directed an appraisement and sale by the Marshal without prejudice to the priorities of the claimants *in rem*, and reserving the rights of the judgment creditors, and it condemned the ship and proceeds in the costs of the motion and in the costs of similar actions by the master, Mr. Brunt, and Messrs. Samuel and Co., and of the attendance on counsel for the sheriff and for the judgment creditors, the Svenska Company. The order was made with the consent of all those persons, and, though not so expressed in the order, with the consent of the American Union Line. The Marshal sold. Together with the ship he sold a small quantity of cargo on board, which has turned out to be the property of the Svenska Company. To the proceeds of that coal, less a proper proportion of the Marshal's expenses of sale, no one has any right except the Svenska Company. The fund resulting from the sale of this ship is not enough to pay all the claimants to it. It has, therefore,

to be determined which of the claimants are entitled to claim against the fund, and it is also necessary to determine the priorities.

I will first consider who has a claim enforceable by an action *in rem*. The American Union Line obtained a judgment in default, but recognising that they could not establish that their advances were for necessaries, they did not proceed to a reference. They have no right *in rem*. McLeod and Hill Limited obtained a judgment in default, but upon a reference it was found that their advances were not for necessaries. They have no right *in rem*. Their advances included a sum of 200*l*. advanced for payment of wages. They made that advance in the erroneous belief that they would stand in the shoes of the crew. The payment of course cleared away a maritime lien. Very properly all parties have assented to McLeod and Hill being treated as if they had paid the 200*l*. with the sanction of the court. The master has established his claim, which of course carries a maritime lien and a right *in rem*. Mr. Brunt and Messrs. Samuel and Co. have established their claims for necessaries. They have a right *in rem*. There remains the claim of the American Express Company to bottomry.

Have the American Express Company a good claim in bottomry against the proceeds of the ship in court? The facts, important for the present purpose, are as follows: The ship, of American nationality, was at Bordeaux, under arrest, in Sept. 1919, in claims for necessaries. The plaintiffs, the American Express Company, had made considerable advances to the owners to clear the arrests. They made a further advance of 20,000 francs on the terms of the document on which they rely as a bottomry bond. The ship was about to make a voyage from Bordeaux to Barry with pit props, and was under charter-party to the Svenska Company for a coal voyage from Swansea to Stockholm. The voyage from Bordeaux to Barry was performed, the vessel arriving at Barry on the 11th Oct. 1919. From Barry the ship went to Swansea, and began to load under the charter-party. Her owners then refused to perform the charter-party. The Svenska Company issued a writ, and obtained an injunction, with the result that the ship lay at Swansea until the sale by the marshal. The Svenska Company have intervened in the bottomry action, and they say that the alleged bottomry bond is not a bottomry bond at all, and that, therefore, the American Express Company have no maritime lien.

As to the bond, firstly the original has been lost, but I accept the copy which has been produced as a true copy. Secondly, the necessity for the loan was not disputed, before the evidence produced by the American Express Company. The ship was tied up by the arrests and could not move until they were cleared and the master had the actual authority of the owners. Thirdly, it is clear that the intention of the parties was that the advance up to 20,000 francs should be on terms of bottomry. The question is whether they have succeeded in creating a valid contract of bottomry. The document is as follows:—

Bordeaux (Gironde), France, September 13, 1919.—Bond of bottomry between A. C. Clark, master of the American schooner *James W. Elwell*, of Portland, Maine, and the American Express Company, 3, Cours de Gourgue. Bordeaux.—I, A. C. Clark, master of the schooner *James W. Elwell*, do hereby agree to bond and lien the said schooner together with her furniture, sails, gear and future earnings to the amount of francs 20,000 for value received, said American Express Company to have absolute lien upon vessel until said loan is repaid together with interest accrued and all other charges relating thereto. I further state that the said vessel was built at Bath, Maine, U.S.A., in the year 1892, and is 196$\frac{3}{10}$ feet in length, 39$\frac{2}{10}$ feet in width, 18$\frac{3}{10}$ feet deep, and that she is of 1192 tons gross and 1081 tons net, as appears by Permanent Register No. 11, issued at Portland, Maine, the 3rd March 1919. This vessel at this date first above written is valued at about 150,000 dollars, and there are no previous attachments against her, to the best of my knowledge and belief, and I further agree not to draw any further bond on the said ship without first having consent from the American Express Company.

Is this an effective bottomry bond or not? Whether it is or not must be gathered from the document itself.

In *The Emancipation* (1 Wm. Rob. 124) Dr. Lushington said, at p. 128: "I shall assume that it was the intention of the contracting parties at the time the bond was executed, to give a good and valid bottomry in the legal and strict sense of the term. Assuming this, I am still of opinion that such mere intention alone is not sufficient for the validity of an instrument of this description, and that this court cannot pronounce in favour of any bond, unless it shall appear in express terms, or by necessary inference from the contents of the bond itself, that the transaction was founded upon a bottomry consideration. The rule of law that the meaning of written instruments must be construed by the tenor of their contents alone, is strictly applicable to cases of this kind. I must, therefore, look to the bond itself in the present instance, without referring to extrinsic evidence at all; and unless I can come to the conclusion from the words of the bond, that any maritime risk is to be directly or indirectly inferred, I must hold that I have no authority to pronounce in favour of its validity."

Compare with this *The Indomitable* (Swa. 446), where the learned judge says, at p. 452: "There must be a maritime risk in the instrument; it matters not in what form of words." In *Simonds* v. *Hodgson* (3 B. & Ad. 50) it was said at p. 57: "No person can be entitled to it (maritime interest) who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly and in terms, though this is often done, it is sufficient that the fact can be collected from the language of the instrument considered in all its parts."

It is said that such bonds should receive a liberal interpretation. Be it so, but the document, given a liberal interpretation, must be one which shows the essentials of a bottomry contract. One of these essentials is often spoken of as a maritime risk. This means that the repayment of the money advanced shall be conditional upon the safe arrival of the ship. *The Emancipation* (*sup.*), at p. 131. That is the meaning of the necessity of sea risk. Compare *Stainband* v. *Shepard* (22 L. J. Ex. 341) at p. 346, where it is said (by Parke, B.): "It is essential to the validity of hypothecation that the sea risk should be incurred by the lender, and that the pledge in the ship should take effect only in the event of its safe arrival."

It is said that the use of the word "bottomry" shows that the lender was lending on terms of some

maritime risk. It may be so. In *The Royal Arch* (Swa. 267), at p. 281, Dr. Lushington said: "The very term bottomry implies sea risk." Compare also the language of Dr. Lushington in *The Emancipation* (*sup.*), at p. 130, where that learned judge pointed out that: "hypothecate" may mean bottomry or mortgage only. And if you have a voyage described, and the contract is expressed to be one of bottomry, there is little difficulty in inferring that the condition of repayment is the safe arrival on that voyage.

But what can be inferred from the word "bottomry" detached from any voyage or anything to denote when the voyage is to begin and when to end? To have a good contract of bottomry you must have a loan with repayment conditional upon safe arrival, that is to say, you must have a voyage the sea risk of which is to be run by the lender.

If further authority is necessary Lord Stowell in *The Atlas* (2 Hag. Adm. 48), at p. 53, said: "The definition of bottomry bonds, which I find in all the writers that have adverted to the subject, are contracts in the nature of mortgages of a ship on which the borrower borrows money to enable him to fit out the ship or to purchase a cargo for a voyage proposed, and pledges the keel or bottom of the ship, *pars pro tanto* as a security for repayment. It is, moreover, stipulated that if the ship is lost in the course of the voyage by any of the perils enumerated in the contract, the lender also shall lose his money; but if a ship shall arrive safe, then he shall be paid back his principal, and also the interest agreed upon, called maritime interest, however this may exceed the legal rate of interest."

No single case has been cited in which there was no voyage specified in the bond, with one exception which proves the rule, namely *The Jane* (1 Dod. 461), at p. 463, where it was said: "This furnishes an answer also to the other objection that the particular voyage on which the ship was destined was not stated in the bond. It is impossible that the master should describe the voyage with precision, because he is subject to the orders of the Government, which may at any time alter the destination of the vessel at its pleasure; the master can only come *cy près*; he must describe his voyage as near as he can."

If there is no voyage at all described, there is nothing to prevent the loan being immediately repayable, or to make repayment conditional on the ship surviving any particular risk. Or, on the other hand, there is nothing to prevent the lender from indefinitely postponing a demand for repayment, and leaving the ship for years subject to a secret maritime lien.

It is said for the plaintiffs that this bond became payable on the vessel's arrival at Barry. The bond does not say so, nor can anything of the kind be implied from its terms. The bond is a contract whereby, in consideration of an advance, the plaintiffs are given an absolute lien on the ship and her future earnings. As no time is fixed for payment the loan is repayable on demand. I see nothing in this document to prevent the plaintiffs demanding repayment before the ship left Bordeaux. On the other hand, I see nothing to prevent them letting the loan run on indefinitely, and maintaining a secret maritime lien on the ship all the time. Called a bond of bottomry it is really only an attempt to create a lien to secure a loan. But it is not a mortgage. I hold it to be void. Therefore, it is unnecessary to decide the question whether the plaintiffs were not so slow in asserting their rights that they ought not to be postponed to the other claimants. The plaintiffs ask leave to amend and to claim as necessaries men. At this late stage I am of opinion that I ought not to give them leave to do so. And it would do them no good, for they never advanced upon the personal credit of the owners, and unless they have a personal claim in debt against the owners for necessaries, they can have no right *in rem*.

The priority of the master being recognised by all, he has already been paid out of the fund. As to the balance, less such costs and charges as are properly chargeable against it, the competition is between the Svenska Company as execution creditors, on the one hand, and Brunt and Samuel and Co. on the other. As between themselves Brunt and Samuel and Co. rank *pari passu*. This issue raises several questions. When a sheriff has seized under a writ of *fi. fa.* before the Marshal arrests in an action *in rem.* to enforce a claim not supported by a maritime lien, *i.e.*, a claim for necessaries, does the execution creditor rank before or after or *pari passu* with the arresting the plaintiffs? In the present case this question is complicated by the further question whether the judgment debtors were owners of the whole of the ship or only of 56-64th shares, and the resulting question as to the powers of the sheriff to seize shares in a ship and the method in which such seizure can be effected.

The defendants in the action brought by the Svenska Company were Eleazer W. Clark, Northland Navigation Company, and A. W. Clark. A. W. Clark was the master at the date of the Svenska Company's writ, and was joined only for the purposes of an injunction. The judgment for damages which the sheriff was executing was against the owners only. Upon the affidavits now before the court I find that in Aug. 1920 the ship was owned as to 56-64ths by the Northland Navigation Company, an American Corporation, and as to 8-64ths by Walter G. Morey. The execution creditors had no judgment against Morey, and the Sheriff had no power to sell Morey's shares. It is true that Messrs. Cooper and Co., solicitors for the defendants in the Svenska action, consented to the sheriff selling the whole ship, but the consent could not prejudice the rights of those who were suing *in rem* and who were entitled to enforce their rights against all the owners, including Morey. It follows that Brunt and Samuel and Co. are alone entitled to so much of the fund as represents 8-64ths of the ship. As to the remaining 56-64ths, the question remains as between execution creditors and necessaries men.

There was much argument as to the method by which shares in a ship could be effectually seized under a *fi. fa.* Much of that argument was based on the assumption that the sheriff could only transfer the shares by bill of sale. In that connection the Irish case of *Harley* v. *Harley* (11 Ir. Ch. R. 451) was referred to. In my view, all this argument was irrelevant. The *James W. Elwell* was a foreign ship to which the Merchant Shipping Act 1894 did not apply. I need express no opinion as to the authority of anything said in the Irish case. If the whole ship had belonged to the judgment debtors the sheriff could have seized it and sold it like any other chattel. No statute would have required a transfer in any

particular way: (*Union Bank* v. *Lenanton*, 3 Asp. Mar. Law Cas. 600; 38 L. T. Rep. 698; 3 C. P. Div. 243). The transfer would be governed by the common law. So with shares in a foreign ship, the sheriff can seize and sell and transfer as he can an undivided share in any other chattel. There is no doubt that at common law an undivided share in a chattel can be taken in execution by seizure of the chattel and sale of the share. The co-owners of the ship are not by reason of the co-ownership partners in the property, though they may be partners in the employment of it. Sect. 23 of the Partnership Act 1890 does not apply. The Merchant Shipping Act has nothing to say to the transfer of shares in a foreign ship. No other statute limits the common law right. The 56-64th shares were validly taken in execution by the sheriff by the seizure of the ship, and the sheriff, if he had found a buyer, could have effectually transferred the shares.

On the other hand, I dissent altogether from the argument that the sheriff, being in possession of a ship, in execution of a judgment obtained against the owner of 1-64th share, could prevent an arrest by the Marshal in an action *in rem* against the owners of the whole 64-64th shares. Whatever difficulties may have arisen in former days out of the conflicting jurisdictions of the common law and the Admiralty Courts, there are no such difficulties to-day. The sheriff and the Marshal are alike the servants of the High Court of Justice. I see no more objection to the Marshal and the sheriff seizing a ship than I do to the sheriff seizing the same chattel twice under two separate writs of *fi. fa.* If difficulties arise as to sale, they can be dealt with by the court as was done in the present case, and the court will be careful to provide that the sale by it shall not prejudice any rights acquired by the several seizures or arrests. In my view the only question is one of priorities. The execution creditors validly seized through the sheriff. The necessaries men validly arrested through the Marshal. The ship has been ordered to be sold without prejudice to priorities *in rem* and reserving the rights of the judgment creditors.

Who have the priority? In my view it is the execution creditors, the Svenska Company. From the moment of seizure by the sheriff the execution creditor is in the position of a secured creditor in regard to the goods seized: (*Ex parte Williams*, L. Rep. 7, Ch. 138; *Slater* v. *Pender*, 26 L. T. Rep. 482; (1872) L. Rep. 7, Ex. 95; *Re Clarke*, 77 L. T. Rep. 417; (1898) 1 Ch. 336). The execution creditor from the moment of seizure had a legal right as against the execution debtor, that is to say, the owner of the goods, to have the goods sold and to be paid out of the proceeds of the sale. At that moment the necessaries men had nothing but a right to sue the owners of the ship *in rem*, and by arrest of the ship to make it a security for any judgment they might ultimately recover. As was said by Lord Esher in *The Cella* (6 Asp. Mar. Law Cas. 293; 59 L. T. Rep. 125; 13 Prob. Div. 82), at p. 87: "The moment that the arrest takes place the ship is held by the court as a security for whatever may be adjudged by it to be due to the claimant." But until the moment of arrest the necessaries man, having no maritime lien, is not in any sense a secured creditor. In my opinion, the arrest cannot deprive the execution creditor of his existing security. It was ingeniously argued by Mr. Digby for one of the necessaries men that the sheriff had not sold, and could not in law have sold, by the time the Marshal arrested, and that the sheriff, when the time for sale came, could only have sold and transferred subject to the right acquired by reason of the arrest effected before the date of sale. I cannot agree. If the argument were sound, then a later seizure under one *fi. fa.* before sale under an earlier seizure, under another *fi. fa.*, would prevent an effective sale under the first seizure and would have the effect of preferring a later to an earlier seizure, whereas the law gives priority to execution creditors in the order of the seizures, or, to speak more strictly, in the order of delivery of writs of *fi. fa.* to the sheriff.

As between several necessaries men suing *in rem* this court has worked out the equitable rule that all share *pari passu*, whatever the dates of the arrests and judgments: *The Africano* (7 Asp. Mar. Law. Cas. 427; 70 L. T. Rep. 250; (1894) P. 141). But I cannot see my way to extend that equitable rule to the prejudice of an execution creditor for whom the sheriff has seized before arrest by the Marshal. In the present case I regret having to come to this decision. There can be no doubt that the fund has been created by the sale by the Marshal, and that it never could have been created by a sale by the sheriff. The necessaries men, or more strictly speaking, McLeod and Hill, have pulled the chestnuts out of the fire for the Svenska Co. But, in my opinion, as to 56-64ths, it was the Svenska Company's chestnut.

The result is as follows: The proceeds of the sale of the cargo of coal, less a proportion of the Marshal's expenses of sale, will be paid out to the Svenska Company, and the proceeds of the sale of the ship, less the Marshal's charges and expenses will be paid out as follows: (1) In respect of costs awarded by the order of the 1st Sept. 1920; (2) 200*l.* to the liquidator of McLeod and Hill Limited; (3) 8-64ths of the residue to Mr. Brunt and Messrs. Samuel and Co., sharing *pari passu*; and (4) 56-64ths to the Svenska Company, subject to deduction of the sheriff's costs and charges, which will be paid to the sheriff. The Svenska Company will have the costs of their intervention in the action by the American Express Company, and of the arguments on the question of the validity of the alleged bottomry bond. There will be no other order as to costs.

Leave to appeal was granted.

Solicitors for the American Express Company, *Ince, Colt, Ince*, and *Roscoe*.

Solicitor for the Svenska Company, *Thomas Cooper* and *Co.*

Solicitor for Mr. Brunt, *Ingledew, Davis, Sanders*, and *Brown*, agents for *Ingledew, Sons*, and *Crawford*, Swansea.

Solicitors for Samuel and Co., *W. A. Crump and Sons*, agents for *Gilbert Robertson*, Cardiff.

June 1 and 14, 1921.

(Before HILL, J.)

THE TARBERT. (*a*)

Salvage — Benefit arising from the services — No pecuniary benefit to the owner—Request services—Tug and tow—Life salvage claimed by tug.

A steamer, whilst being towed in the Mersey, was damaged by collision with another vessel, for which the other vessel was subsequently held to be alone to blame. The master of the steamer, which was sinking rapidly, asked the tug, which had been towing at the time of the collision, to tow his vessel in shore. The tug endeavoured to do so, but the steamer grounded on the Pluckington Bank, at some distance from the shore. In this position she became a constructive total loss. Some of her cargo was, however, recovered, and a substantial sum remained in the hands of the cargo owners after the expenses of recovery had been met.

At the trial it appeared that, had the services never been rendered by the tug, cargo of no less net value would have been recovered than was, under the circumstances, restored to the cargo owners.

Held, that since the cargo had still to be saved in the position in which the tug left it, and as it was then worth no more than it would have been if the tug had done nothing, no salvage service had been rendered, and the tug was entitled to no award.

Held, on the facts, that the requested services had not been performed, and that the lives of the steamer's crew were in no danger.

Semble, *if the lives of the crew had been in danger, an engaged tug, in taking the crew off the steamer which she is towing, is not acting outside the scope of her towage contract in such a manner as to earn a salvage award.*

The action therefore failed.

ACTION of salvage.

The plaintiffs were the owners, master and crew of the steam tug *Knight Templar*. The defendants were the owners of the steamer *Tarbert*.

On the 22nd Dec. 1919 the *Tarbert* was in the Mersey about abreast of the Woodside Stage, a little to the westward of mid-river, heading to the south. She was laden with a cargo of palm oil in casks and palm kernels in bags. The *Knight Templar*, which had been engaged to assist her, was towing her, the engines of the tug working at slow speed. In these circumstances the *Tarbert* was run into by the steamship *Otterdal*, and received very severe damage. The tow rope parted, and was cast off at the moment of the collision. The *Tarbert* was left with whatever way she had on, with the flood tide upon her, and her helm hard-a-starboard. The crew asked to be taken off. The *Knight Templar* was accordingly put alongside and the crew taken off. The *Knight Templar* was then requested by the master of the *Tarbert* to make fast to him and to attempt to tow the *Tarbert* in shore. The *Knight Templar* did make fast, and the attempt was made to get the *Tarbert* to the Liverpool side, where it was thought that she might be beached within 100 ft. of the dock wall, somewhere abreast of the Albert Dock. In crossing the Pluckington Bank, however, the *Tarbert* struck the bottom on the outer part of the bank, heeled over on her beam ends, and there lay.

On the Pluckington Bank the *Tarbert* became a constructive total loss, but cargo of the value of 17,124*l.* was restored to the cargo owners after the cost of recovering it had been paid.

At the trial the evidence of the plaintiffs showed that if the *Tarbert* had been allowed to sink in mid-river, the net value of the cargo recovered would have been not less than 17,000*l.* Less cargo would have been recovered, but at less cost, the net result would have been about the same.

Thereupon counsel for the defendants, without calling evidence, submitted that no case for salvage had been made out.

Laing, K.C. and *J. B. Aspinall* for the plaintiffs.—The cargo was brought into a position of comparative safety. The risk to which it was exposed in mid-river is a matter of speculation. In such a case the court will favour the salvers. In any case, the requested services were performed, and the lives of the crew rescued from danger.

Bateson, K.C. and *Balloch*.—Nothing has been saved. The cargo, to the extent of 17,124*l.* was never in danger.

HILL, J.—After stating the facts said: [in the position in which she was left on the Pluckington Bank] the *Tarbert* became a constructive total loss. Part of her cargo was got out, with the net result that the part that was got out was worth 17,124*l.* On the bank where the *Tarbut* lay she was totally submerged during certain parts of the tide, and partially submerged at all states of the tide. According to the evidence afforded by the charts of her position, there would appear to be at least 16 ft. of water—perhaps rather more—at low water at ordinary spring tide. If she had been left to herself, instead of being taken hold of by the tug, she would have sunk probably—almost certainly—in deep water, probably in considerably deeper water than she did sink.

However, that is a matter of speculation. One might speculate as to how long she would have been kept afloat and how much way she had, if any, at the time when the tug made fast, and as to what would be the effect upon her of the helm being hard-a-starboard, but, at any rate, it is not disputed that she would have sunk somewhere out in the river instead of sinking on the Pluckington Bank. The evidence is that even if she had sunk in mid-river the cargo could have been saved. Perhaps more was saved in the result than was otherwise the case, but at greater expense, so that the net money result would have been approximately the same in any case. That is the effect of the evidence that was called for the plaintiffs, and that is the only evidence that was called. The defendants have not contested the evidence, but were content to rest upon it. Therefore, the conclusion upon that evidence is that when the cargo had been put on Pluckington Bank it was indeed in a position from which it could be, or a portion of it could be, brought to shore, so as to give a net result of 17,000*l.* odd, but that if it had not been put upon the Pluckington Bank and the ship had sunk a portion of the cargo could equally have been saved so as probably to have given the same net result. It is for the plaintiffs to make out that they have rendered a service which entitles them to a salvage award. The first question which arises, and the main question, and I am not sure that it is not the only question, is this: Was any actual benefit conferred upon the cargo by what the tug did?

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

I think that may be expressed in this form: Was the cargo when the tug left her worth more than it would have been if the tug had done nothing? Upon that matter it seems to me that the plaintiffs have failed to prove that it was: on the contrary they have themselves given evidence to show that it was worth no more.

The property—the cargo—was never brought into complete safety, and the most that could be said of it is that it was brought into comparative safety, though on the bank it still had to be rescued from very grave peril. If it was in a position from which it had to be rescued, just as it would have been if it had had to be rescued from mid-river, and if such method of rescue would have given the same results, in my view the only conclusion to arrive at is that what the tug did did not make the cargo worth any more, and in fact did not put the cargo in a position of greater comparative safety than it would otherwise have been in. Of course it might from the evidence that was given have been said that on the bank the work of completing the salving of the cargo was a matter of certainty, whereas if the ship had sunk in the river that would have been a matter of speculation. But the evidence which was given by the plaintiffs, and accepted by the defendants (who, I suppose, had similar evidence if it had been necessary to call it), puts that view out of court, because as I have said, the evidence is equally certain that there would be a salving of cargo in whichever position the ship had sunk. If there was no benefit conferred it is said nevertheless that this was a service rendered at request and the *res* was ultimately saved; therefore it was a service which must be rewarded. But as I understand the rule as to rendering services at request, that rule is this, that if a salvor is employed to do a thing, does it, and the property is ultimately saved, he may claim a salvage reward, though the thing which he does—in the events which happen—produce no effect. But that depends on the question that I have already spoken of as the main question, namely, was the property ultimately saved, and was it brought into a position of greater safety?

Was there by some means or other a benefit conferred upon it? But apart from that one has to look at what the tug was requested to do. What she was requested to do was to tow the ship in shore. That she did not do. She made a very praiseworthy effort to do it, but she did not do it owing to the misfortune of the ship striking on the Pluckington Bank. Therefore I am unable to see that the plaintiffs bring themselves within the doctrine applicable to the payment of services rendered at request.

There remains only the suggestion with reference to the saving of life. I do not think that it has been made out that this tug saved the lives of the master and the crew. It is true that the tug took some of them on board, but there was another tug handy in the Mersey. But apart from that I am not at all prepared to say that an engaged tug which in an emergency takes on board the master and crew of the ship which has engaged her is so far acting outside her duty that she is entitled to claim as a salvor.

For these reasons I think that the plaintiffs' claim fails. I should mention that the plaintiffs have proved loss and damage to their ship to the amount of 206*l.* If they really had succeeded in getting the ship close in shore, the plaintiffs would probably have got a very handsome award. It is one of those cases where they have unfortunately not succeeded in carrying out the service which, if it had been carried out, would have entitled them to a large remuneration. Like other salvors they have got to take the rough with the smooth, and if they have not succeeded in their efforts as salvors they cannot obtain from the court any award.

Action dismissed.

Solicitors for the plaintiffs, *Hill, Dickinson,* and *Co.*, Liverpool.

Solicitors for the defendants, *Batesons* and *Co.*, Liverpool.

July 5 and 12, 1921.

(Before HILL, J.)

THE EVA (*a*).

Actions in rem—*Necessaries—Master's wages—Master also part owner—Priorities—Foreign law—Sale of ship abroad—Right of foreign government to tax proceeds—Sale by order of the court—Practice—Judgment by default—Payment out of court.*

The claim for wages and disbursements of a master who is also part owner of a ship ranks after the claims of persons who have supplied necessaries to that ship, since the master is personally liable to such persons.

The Jenny Lind (26 *L. T. Rep.* 591; 1 *Asp. Mar. Law Cas.* 294; *L. Rep.* 3 *A. & E.* 529) *considered and followed.*

A foreign government which is by foreign law entitled to a percentage on the sale price of ships voluntarily sold out of its national registry is not entitled to claim such percentage when the ship is sold by the marshal in a default action in rem.

When a party has obtained judgment in a default action, he is entitled to move for payment out, but must give notice of that motion to any person who has intervened or entered caveats against payment out. If any other claimants to the fund want to be in a position to resist payment out they must, to entitle them to be heard, intervene or enter caveats.

MOTION to confirm reports of the registrar and for payment out of a fund in court representing the proceeds of the sale of the sailing ship *Eva*. Judgments by default had been obtained in actions *in rem* against the *Eva* by the master and crew for wages, subsistence, and viaticum; Messrs. F. O. Kindberg Limited for repairs; Mr. Assman for necessaries.

The *Eva* was sold in Messrs. Kindberg's action, but the proceeds of the sale were not sufficient to satisfy the amounts found due to these claimants by the registrar. On the motion of the master and crew for confirmation of the report of the registrar, and for payment out, Messrs. Kindberg and Mr. Assman objected to payment out of the sum found due to the master, on the ground that he was owner of one-thirtieth share in the *Eva*, but neither of them had intervened in the master's action or entered caveats against payment out to him.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister at-Law.

Alfred Bucknill for the master and crew.

Stone-Hurst for Messrs. Kindberg Limited.

Ellis Cunliffee for Assman.

July 5.—HILL, J., in adjourning the motion, said (*inter alia*): In order that the practice of the court, which has become a little lax, may be put into proper form, I think it well to state that when any party has obtained judgment in a default action, he is entitled to move for payment out, but he must give notice of that motion to any persons who have intervened or entered caveats against payments out. If that procedure is strictly followed he is not under any obligation to give notice to any other persons. If any other claimants against the fund want to be in a position to resist an order for payment out they must, to entitle them to be heard, intervene or enter caveats. Unless that practice is followed, a party who is going to move the court for payment out has no means of making sure that he has brought before the court all the persons entitled to be heard. In the present case none of the parties now before me have intervened or entered caveats, but I shall adjourn the case for a week to enable them to do so.

When the motion came again before the court, application was made by the Government of Finland, which claimed 2½ per cent. of the purchase price of the *Eva*, to which under the law of Finland they were entitled on the voluntary sale of a Finnish ship out of the registry of Finland.

Stranger for the Government of Finland.

July 12.—HILL, J. said: In this case I have already given judgment for the master suing for wages and disbursements, for the crew suing for wages, for Messrs. Kindberg in respect of repair, and for Mr. Assman for necessaries. I also ordered payment out of 236*l.* to the crew for their wages, because they clearly come first.

In the ordinary course the master's claim for wages and disbursements would also come first, but the matter stood over for argument and evidence, objection being taken that the master could not claim in priority to the necessaries and repairs men, because he was himself a part owner and had himself given orders for the repairs and necessary supplies, and therefore became personally liable on the contract.

It has been frankly admitted for the master that he gave the orders on the instructions of his owners, and also that he is the owner of one-thirtieth share in the ship. That puts him in a very unfortunate position. The authority on the point is *The Jenny Lind* (26 L. T. Rep. 591; 1 Asp. Mar. Law Cas. 294; L. Rep. 3 A. & E. 529), where a master and part owner of a foreign ship ordered necessaries for the ship. The necessaries were supplied, and it was held that the persons who supplied them were entitled to be paid for the necessaries out of the proceeds of the ship and freight in priority to a claim by the master for wages and disbursements. It is true that the case in part proceeded on the assumption that it was a question of competing maritime liens, Sir Robert Phillimore treating the necessaries men as if they had a maritime lien, and Mr. Bucknill sought to distinguish it on that ground; but further reasons for the judgment show that it was not decided only on that ground, reasons which seems to apply quite apart from the question of the necessaries men having a maritime lien. The master, as part owner, was held personally liable to the necessaries men. Consequently if, in the present case, he ranked in priority to them, they would be in a position to attach the debt. There is good reason, therefore, why they should be preferred, and I cannot prefer the master's debt to the debts of the repairs and necessaries men.

Certain costs have to come out first. The fund was realised in Messrs. Kindberg's action and the costs of realisation will come first. Then there are the costs of the master and crew's action. The master and crew joined together, and the crew certainly came before everybody else. The costs of that action are not enhanced by the addition of the master, and, therefore, up to the time of the confirmation of the report, those costs must rank next. The balance of the fund will not be nearly enough to pay Messrs. Kindberg and Mr. Assman, and, therefore, they will rank *pari passu*. That will exhaust the fund.

There remains the application on behalf of the Finnish Government. It is said that the *Eva* is a Finnish ship, and that by Finnish law that Government takes 2½ per cent. of the sale price of Finnish ships sold out of Finnish nationality. That no doubt is imposed to prevent the sale of Finnish ships abroad. Mr. Stranger argues that he is entitled to have that right recognised here. He makes his application without notice of motion and without entering a caveat, but I will treat him as being properly here. He has no affidavit to prove that the *Eva* was a Finnish ship. I have no affidavit to the contrary, but I have an affidavit by the master from which it looks as if the *Eva* were an Esthonian and not a Finnish ship. I will assume, however, that she was Finnish. To my mind the fact that by Finnish law the Finnish Government upon the voluntary sale out of the Finnish Registry of a Finnish ship can charge the owners 2½ per cent. on the sale price, gives them absolutely no right in regard to such a sale as has taken place in this court. It does not appear that in Finnish law there is any right *in rem* or a maritime lien in respect of this charge, although I have no doubt that a ship sold in Finland can be prevented from leaving that country until the tax is paid. But the *Eva* was not sold under Finnish law. She was sold like any other chattel belonging to a foreigner which has been seized in this country under the powers of this court, and the title passes not by reference to Finnish law, but by reference to English law. To such a sale taxes leviable in a foreign country upon the voluntary transfer of a ship appear to me to have no reference whatever. Therefore, even assuming the Finnish Government has properly appeared here, they have no right such as they allege. Therefore I dismiss this application.

Solicitors for the master and crew, *Willis* and *Willis*, for *Edward Fryer* and *Webb*, West Hartlepool.

Solicitors for Messrs. Kindberg, *Botterell* and *Roche*, for *Botterell*, *Roche*, and *Temperley*, West Hartlepool.

Solicitors for Assman, *Bell*, *Brodrick*, and *Gray*, for *Harrison* and *Son*, West Hartlepool.

Solicitors for the Government of Finland, *Best* and *Best*.

Wednesday, July 13, 1921.

(Before HILL, J.)

THE ARZPEITIA. (*a*)

Necessaries—Action in rem—*Payments in respect of the cargo—Liability of the ship—Necessaries to the ship.*

The agents at New York of a steamship made payments in connection with her discharge at New York. . In an action against the steamship in rem *to recover these disbursements as necessaries it was contended that they were made in respect of the cargo only, and were not necessaries to the ship.*

Held, that payments though made in respect of the cargo were necessaries to the ship if she could not go on her business without them. As the business of the ship consisted in entering the port of New York, discharging her cargo, and leaving the port, payment of charges which, being unpaid, would prevent her from doing any of these things was necessary to the ship, notwithstanding that the amount disbursed did not become due, nor was the disbursement made, until after the ship had left New York. Quay rent for cargo, and the cost of destroying putrid cargo, were necessaries to the ship, since by the law of New York she was liable for these charges, and could have been prevented from sailing had they not been paid.

ACTION for necessaries against the Spanish steamer *Arzpeitia* and her bail.

Bateson, K.C. and *G. P. Langton*, for the plaintiffs.

A. T. Miller K.C. and *Noad* for the defendants.

The facts and arguments of counsel sufficiently appear in the judgment.

HILL, J.—This is a claim in respect of disbursements made by the plaintiffs as agents for the defendants steamship *Arzpeitia* at New York, when she was on a voyage inward with a cargo which included a large quantity of onions, in March 1920. The plaintiffs were appointed brokers and agents, and throughout were in touch with the master, and it is sworn that what they did had his approval. They incurred a large number of expenses, and it is quite clear on the evidence that the whole of them were expenses incurred within their authority, so as to bind the shipowners personally, and as the shipowners have appeared to a writ *in rem* they have subjected themselves to the jurisdiction of the court, and there is no difficulty in dealing with the case against them *in personam*.

The controversy has arisen because bail has been given, and the plaintiffs ask for judgment, not against the defendants as owners, but also against the bail, and it is in the interest of the bail, who have apparently failed to secure themselves *vis-à-vis* the Spanish shipowners, to show if they can that there is no right *in rem* against the ship. They seek to show that, not by evidence of their own, but by showing that the plaintiffs have not sufficiently proved that the disbursements were for necessaries, so as to give them (the plaintiffs) a right *in rem* against the ship.

What gives the defendants an opportunity for saying that some of these disbursements were not necessaries is that they were, in fact and immediately payments made in respect of the cargo of the ship, and they say it has become necessary therefore for the plaintiffs to prove that these disbursements made in respect of cargo were necessarily made for the ship, and were necessary in the sense that the ship, as a ship, could not go on her business without them.

It seems to me now that the matter has been ventilated that it is quite sufficiently proved that all these expenses were necessarily incurred on behalf of the ship to enable her to carry out her business. When the ship arrived it was found that a large part of the onions on board were unfit for any use, and the consignees never turned up to claim them. The health authorities interfered. A good part of the onions were finally removed, and dumped somewhere in the sea, and so got rid of at considerable expense. Others were sold. Two or three items show the sort of expenses which the defendants say were not necessary items. A good part of an item 6026.11 dollars, is for quay rent on space occupied by the cargo, some of it at a date before the ship sailed from New York, but the bulk of it subsequently to the time she sailed.

There is another item of 2873.14 dollars nearly all expenses for labour for loading cases and crates for onions into scows in connection with the dumping. These three items together made 12,839 dollars. By a payment on account on the 2nd April 1920 the plaintiffs received from the defendants the sum of 21,122.74 dollars being the whole of the disbursements account except 11,728.37 dollars, the amount claimed in the present action.

If the defendants are right in saying that this 12,839 dollars was not a necessary disbursement they would be right in saying that all the items, which were for necessaries had already been discharged, and that in respect of the balance there is no liability *in rem*.

After the ship arrived, and it was discovered what the condition of the onions was the plaintiffs cabled the shipowners and wrote them in reference to the matter, and saying that they were taking steps with the customs authorities to endeavour to get them to authorise the sale of the onions.

The cost of destroying was a charge upon the ship, and with 43,000 packages the cost would be considerable. On the 31st March the plaintiffs asked for money on account saying that the estimated amount required for dealing with the onions was 21,122 dollars. It was upon that estimate that authority to pay 21,122 dollars was called out, and the amount was paid. There was a statement that otherwise the plaintiffs would be obliged to hold the ship to protect themselves. That seems to me that the obligation of getting rid of the damaged cargo was a charge upon the ship by the law of New York, and would be enforced by the authorities there against the ship.

The employment of the ship that we have to consider is the inward and outward voyage, and any expenditure in relation to the ship or her cargo which she was bound to incur before she could either enter port, or discharge her cargo, or leave port seems to me to be a necessary expenditure for the ship within the meaning of the law. When I have looked at the plaintiffs affidavit it seems to me quite clear that the ordinary method of arranging discharge—the method which they were within their authority fully justified in adopting—was that they should hire quay space on behalf of the ship, and remain liable for the hire so long as the quay space remained occupied by the ship's cargo.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

When the cargo was put out of the ship, she, in the circumstances, became under two liabilities: (1) To pay all expenses of the health authorities, and of the destruction of the cargo; (2) to pay for the quay space as long as the onions occupied it. They were liabilities which were incurred by the ships agents for the ship, not after the ship sailed, but before the ship came in at all. They were the terms which the agents were bound to enter into on behalf of the ship, or were a legal liability on the part of the ship from the moment the agents engaged the quay space for the ship's cargo. And it is quite immaterial that these liabilities accrued into money demands at a date subsequent to the sailing of the ship.

The money payments were all a result of liabilities which the ship's agents incurred in order to provide that which was necessary for the ship in the adventure of entering New York, discharging at New York and leaving New York.

Therefore it seems to me that the plaintiffs have established that the whole of these items were necessaries. There is no dispute as to their having been incurred, and as what I have stated covers the whole matter I see no advantage in sending the case to the registrar and merchants.

Judgment for the plaintiffs for the amount claimed, with costs, against the defendants and their bail.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*.

Solicitors for the defendants, *W. A. Crump* and Co., agents for *Gilbert Roberston* and *Co.*, Cardiff.

July 25 *and Oct.* 28, 1921.

(Before Sir HENRY DUKE, President.)

THE IBIS VI. (No. 2) (a)

Practice—Costs—Seafaring witnesses—Proper allowance for a witness detained on shore.

A. B., the mate of the plaintiffs' trawler, was detained on shore from the 8th Nov. to the 3rd Dec. 1918, *by the plaintiffs to give evidence against the steamer* I. VI. *which had damaged their trawler in collision. The* I. VI. *was held to blame, and the damages were agreed at* 300*l.*

Had A. B. not been detained he would have sailed on a fishing voyage on the 9th Nov., on which he would have earned 280*l.* 11*s.* 3*d.* (*which sum was actually earned by the mate who took A. B.'s place*). *The plaintiffs had paid this amount to A. B., and claimed to recover it on taxation. The assistant registrar allowed the item, and his decision was upheld by the President on appeal. The defendants appealed to the Court of Appeal who held that the amount which A. B. would have received had he not been detained was not necessarily the measure of the sum which the plaintiffs should have paid him, though it was a factor to be considered in determining the sum properly payable to him. The case was sent back to the assistant registrar for reconsideration, and after further consideration he allowed* 250*l.* *The defendants appealed.*

Held, that, the assistant registrar having applied the true measure of damage indicated by the Court of Appeal, the Court would not consider the accuracy of his application of that measure in point of amount.

Decision of the Court of Appeal (The Ibis VI., 125 *L. T. Rep.* 378 ; 15 *Asp. Mar. Law Cas.* 237 ; (1921) P. 255) *considered and explained.*

MOTION by the defendants objecting to the allowance on taxation of a sum of 250*l.* paid by the plaintiffs to their witness Alfred Burton.

Stranger for the appellants (defendants).

Dumas for the respondents (plaintiffs).

The facts and arguments of counsel fully appear from the head note and the judgment.

Oct. 28.—Sir HENRY DUKE, P.—I have had an opportunity of considering the judgments of the Court of Appeal (125 L. T. Rep. 379 ; 15 Asp. Mar. Law Cas. 237 ; (1921) P. 255) in this matter and of applying them to the question raised between the parties. The summons was to review an allowance by the assistant-registrar in respect of the costs of securing the evidence of a witness, who was the mate of a fishing vessel. The allowance is of rather a startling amount. North Sea fishermen at that time were making sometimes enormous profits, and the allowance in the first instance was 280*l.* odd. The basis of the allowance was that the witness had been detained on shore when otherwise he would have been employed on a steam trawler, in which event his share of the earnings would have been the sum of 280*l.*

In the first instance, as I have said, the full amount was allowed, it having been paid to the man by the plaintiffs in the action. The matter ultimately went to the Court of Appeal. Without determining the question of amount, the Court of Appeal decided (*sup.*) that the measure of compensation which had been applied was incorrect, and sent the matter back for review. Upon reconsideration the assistant-registrar has reduced the allowance to 250*l.* From that decision the defendants now appeal, upon the ground of principle that the wrong measure has been applied. Further, it is said that in any event the allowance is excessive. That further ground was always a matter for consideration upon the original taxation, and it has been considered again by the assistant-registrar.

As I say, the amount on the face of it is startling. It arose from the fact that at the time in question the earning capacity of steam trawlers in the North Sea was such as I suppose has never been known before, and may not be known again.

One question is whether the true measure, the proper principle, has been applied. That is important from the point of view of the practice of the court, and is a matter of administrative law. The other question is whether the principle has been applied having regard to the sum allowed, and that is a matter at any rate of some consequence to the parties. I will deal first with the larger question. All I have to do upon that larger question is to say what is the direction of the Court of Appeal on that matter of principle, and whether it has been applied. There is a conflict as to what was the direction of the Court of Appeal. Mr. Stranger, for the appellants, based his argument upon the contention that it is to be found in the reasons for the judgment which was pronounced by Younger, L.J. That learned judge said (125 L. T. Rep., at p. 383 ; 15 Asp. Mar. Law Cas. at p. 241 ; (1921) P. at p. 273)

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

"Little objection, in the bulk of such cases, could, I think, be raised to an allowance for the detention of a necessary seafaring witness if that allowance be based upon a reasonable subsistence payment suitable to a person in his station in life while not exceeding any loss actually incurred by him by reason of his detention or any real remuneration which, but for that detention, the witness would have earned or of which by reason thereof he may have been deprived."

Now that ruling seems to me to set up, as a governing factor, the costs of a reasonable subsistence of the witness. If that were the result, it would be a result contrary to the practice of this court for a long period, and, at any rate, since the time of Dr. Lushington. I have looked at some typical bills of costs set out in the text books, and it is quite clear—as I am so advised in the registry and as appears from the judgment in the Court of Appeal—that the limitation of the allowance for a seafaring witness to the costs of his reasonable subsistence is not the measure which has been applied; but if the Court of Appeal directed that that was the measure it is for every judge sitting in this court to see that measure applied.

I have merely to see whether that is the direction of the Court of Appeal, and, of course, if I find that it is, I should follow it with the most scrupulous care, and it would be followed in the same manner in the registry. It happens that the judgment of the Court of Appeal was expressed in two reasoned statements—the first by the Master of the Rolls, Lord Sterndale (my predecessor here), in which Warrington, L.J. concurred, and the second by Younger, L.J. I have considered both judgments. This was the direction which the Master of the Rolls gave with the concurrence of Warrington, L.J. (125 L. T. Rep., at 379; 15 Asp. Mar. Law Cas., at p. 238; (1921) P. at p. 261). "I think the only direction that can be given is that the assistant registrar must award the reasonable compensation to a person of the class of the witness, taking into account all the circumstances and considering the wages which the witness was earning about the time of detention not as an absolute measure, but an important indication and guide of what is fair. The fact that all persons are under an obligation to give evidence when called upon should also not be ignored."

That obviously is not the measure upon which Mr. Stranger relied. His argument was founded upon the passage referred to in Younger, L.J.'s judgment, which is a statement of reasons for the judgment given by one member of the court, and which is not consistent with the reasons given by Lord Sterndale with the concurrence of Warrington, L.J. What has to be followed here is the judgment of the court. Having now ascertained what was the judgment, I see what is the true measure; and I have to consider whether, upon the answers made by the assistant registrar to the objections, he in fact did apply the true measure. I am satisfied he did. Applying it, he abated the sum originally allowed by 30*l*. Into the accuracy of that application of the rule in point of amount it is not for me to enter, and it is a matter into which I am not competent to enter. The assistant registrar was the judge of fact in this case. I am satisfied that he has applied his mind to the question of fact with full assistance from the direction of the Court of Appeal.

Appeal dismissed with costs. Leave to appeal refused.

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

Solicitors for the respondents, *Nicholson, Graham,* and *Jones,* agents for *J. R. Gaulter,* Fleetwood.

Oct. 20, 21, *Nov.* 1 *and* 4, 1921.

(Before HILL, J.)

THE ZELO. (*a*)

Collision — Collision with submerged wreck — Damage to the wreck—Salvage contractor—Contractor working on the wreck—Possession of the wreck—Bailment of the wreck—Right of contractor as bailee to sue the wrongdoing ship for damage to the wreck.

By a contract between a firm of salvage contractors and the agents for the underwriters of the M., *then lying sunk in Barry Roads, it was agreed that the salvage contractors should endeavour to salve the* M. *on terms of "no cure, no pay." In performance of the contract the salvage contractors used pumps, opened holes, employed divers, fixed apparatus, attended with a salvage steamer on the* M., *and dealt generally with her as they thought fit. The authorities of the Trinity House, however, continued to light the wreck for some time after the salvage operations began, but by a later agreement between the contractors and the Trinity House the contractors undertook the responbility for lighting the wreck, the Trinity House reserving the right to retake possession of the wreck if the lighting was not properly performed. In these circumstances the steamer* Z. *negligently collided with the wreck of the* M., *which was destroyed. No servant of the salvage contractors was present at the* M. *at the time of the collision, nor was the salvage steamer of the contractors present on that night.*

In an action by the salvage contractors against the owners of the Z., *held that the control which the salvage contractors exercised over the* M. *was such as to enable them as bailees in possession to maintain an action against the owners of the* Z. *for damage done to the* M.

The Okehampton (110 *L. T. Rep.* 130; 12 *Asp. Mar. Law Cas.* 428; (1913) *P.* 173) *and* The Winkfield (85 *L. T. Rep.* 668; 9 *Asp. Mar. Law Cas.* 249; (1902) *P.* 42) *held to apply.*

ACTION for damage by collision. The plaintiffs were Maritime Salvors Limited, a firm of salvage contractors, and the defendants were the Pelton Steamship Company, the owners of the steamship *Zelo* of Newcastle.

By a written contract dated the 22nd May 1920 the plaintiffs contracted with the agents of the underwriters on the steamship *Merkur*, which was then lying sunk and damaged in Barry Roads, to salve the *Merkur* on a basis of "no cure, no pay." In performance of this contract salvage operations were commenced by the plaintiffs on the *Merkur* about the 29th May 1920, and successfully continued until some time in September, at which time the plaintiffs alleged that the raising of the *Merkur* and the success of the salvage operations was assured. In the course of the operations a large sum of money and a quantity of material were expended by the plaintiffs, who were patching a

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

hole in the side of the *Merkur*, and had on board her a number of pumps and other valuable salvage plant. The *Merkur* was marked by night by a buoy of the usual wreck marking pattern, placed and maintained by officials of the Trinity House.

In these circumstances the plaintiffs alleged by their statement of claim that the *Zelo* was so negligently navigated that she collided with the *Merkur*, destroying and causing to be lost the plaintiffs' material and rendering the successful salvage of the *Merkur* impossible. The *Zelo* was also sunk. The plaintiffs claimed for the damage they had sustained, including the benefits which they might have received under the salvage contract.

The defendants by their defence denied that the plaintiffs had suffered damage by reason of the collision which they said was caused, not by the negligent navigation of the *Zelo*, but by the improper manner in which the *Merkur* was lighted. Alternatively if the plaintiffs had suffered damage by reason of the successful salvage of the *Merkur* being rendered impossible, the defendants contended that the plaintiffs were not entitled to recover damages from them in respect thereof. The defendants further denied that the *Merkur* was at any material time in possession or under control of the plaintiffs. If the *Merkur* was in possession or under control of the plaintiffs the defendants by their counter-claim claimed the damage which they had suffered by the collision which they said was caused by the negligent and unsafe manner in which the *Merkur* was lighted by the plaintiffs in that they failed to mark the position of the wreck with a light of sufficient visibility.

On the issue of fact:

Butler Aspinall, K.C. and *Noad* for the plaintiffs.

Laing, K.C. and *Balloch* for the defendants.

Darby watched for the Trinity House.

Nov. 1.—HILL, J. pronounced the collision between the *Merkur* and the *Zelo* to have been caused solely by the negligent navigation of *Zelo*.

On the issue whether the plaintiffs were entitled to sue in respect of the damage to the *Merkur*:

Butler Aspinall, K.C. and *Noad* for the plaintiffs.—The case is within the principle of *The Okehampton* (110 L. T. Rep. 130; 12 Asp. Mar. Law Cas. 428; (1914) P. 103). In that case the ship and cargo were bailed to the plaintiffs and they were held to have such a possessory interest as to entitle them to sue and to recover the fruits of their contract with the bailors. Here the *Merkur* was bailed to the plaintiffs who were performing by her use a contract profitable to the bailor and the bailee. The plaintiffs may not necessarily have been bailees because they were working on the *Merkur*, but the evidence shows that they exercised possession on her; the plaintiffs had salvage plant on board the *Merkur*, their salvage steamer attended her, they had done work upon her, and their servants had charge of the salvage operations. In any case the plaintiffs had received possession from the Trinity House, who had notified them that they would retake possession if the wreck was not properly lighted. [HILL, J.—Had the Trinity House ever taken possession?] If the Trinity House had not taken possession the fact that the plaintiffs sought leave of the Trinity House to take possession, and leave was obtained, is evidence that the plaintiffs had possession. It matters not whether the Trinity House had taken possession: they agreed that the plaintiffs should take possession. The case must be distinguished from *La Société Anonyme Remorquage à Hélice* v. *Bennetts* (1911) 1 K. B. 243). If the plaintiffs were bailees in possession they have sufficient interest to maintain an action for damage to the bailed property and the wrongdoers cannot inquire into their liability to the bailors or otherwise:

The Winkfield, 85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 249; (1902) P. 42.

Wrongdoers are estopped from questioning the title of an injured party:

Jeffreys v. *Great Western Railway Company*, 1856, 5 E. & B. 802.

Laing, K.C. and *Balloch* for the defendants.—The plaintiffs were not bailees in possession. If they were bailees in possession they can have no better rights against the defendants than the bailors had. If the owners of the *Merkur* had been plaintiffs they could not, and would not, have claimed anything for the loss of the salvage contract, which was a source of expense, rather than of gain, to them. If the plaintiffs are entitled to recover anything other than the loss of their plant on board the *Merkur* they can only recover for damage to the hull of the *Merkur*. This they have not claimed. [The learned Judge gave the plaintiffs leave to amend their statement of claim by adding a claim for damage to the hull of the *Merkur* if they so desired.] It was the duty of the Trinity House to light the wreck. The Merchant Shipping Act 1894 provides:

Sect. 530. Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or conservancy authority or in or near any approach thereto in such a manner as in the opinion of the authority to be or to be likely to become an obstruction or damage to navigation . . . that authority may . . . (*b*) light or buoy any such vessel . . . until the raising, removal, or destruction thereof.

Sect. 531. [Confers a like authority upon lighthouse authorities in places where no harbour authority has power to act.]

This duty is imperative and not optional:

The Douglas, 47 L. T. Rep. 502; 4 Asp. Mar. Law Cas. 510; 7 Prob. Div. 151.

The duty to light does not necessarily involve taking possession of the wreck, which still remains in possession of the owners;

The Snark, 82 L. T. Rep. 42; 9 Asp. Mar. Law Cas. 50; (1900) P. 150;
The Utopia, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 293.

The plaintiffs did not obtain possession of the wreck from the Trinity House. They were allowed to work upon the *Merkur* on terms, but had no possession. *The Okehampton* (*sup.*) does not apply.

Noad replied.

Cur. adv. vult.

Nov. 4.—HILL, J. said:—The question which remains for decision in this case is whether the plaintiffs are entitled to sue in respect of the damage to the *Merkur*. I decide that question in the plaintiffs' favour, because I find that at the time of the damage done to the *Merkur* the plaintiffs were in possession of the *Merkur*. They say their claim is not a claim merely for the loss of contractual advantages which have been defeated by the

damage to the *Merkur*. It is a claim for damage to the *Merkur* which lies in them by virtue of their possession. It is not a case within the principle of *Cattle* v. *Stockton Waterworks Company* (33 L. T. Rep. 475; L. Rep. 10 Q. B. 453) and *La Société Anonyme de Remorquage à Hélice* v. *Bennetts* (1911; 1 K. B. 243). It is a case within the principle of *The Okehampton* (110 L. T. Rep. 130; 12 Asp. Mar. Law Cas. 428; (1913) P. 173); and of *The Winkfield* (85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 249; (1902) P. 42). It was contended that possession was not in the plaintiffs, but either in the Trinity House or in the owners or underwriters, and that the plaintiffs were merely licensees permitted to do work upon the *Merkur*. It was not proved that the Trinity House ever took possession. They might have done so under their powers under sects. 530 and 531 of the Merchant Shipping Act 1894 They did exercise their powers to light the wreck, but it was not shown that they had yet exercised their powers to take possession. But if the Trinity House did take possession, then, by virtue of the agreement between the Trinity House and the plaintiffs of the 4th June 1920, I am of opinion that the Trinity House transferred the possession to the plaintiffs, reserving to themselves the power, on certain conditions, to retake possession. If the Trinity House did not take posesssion, then possession remained in the owners, or had been transferred to them by the underwriters. It was not proved whether the underwriters had received or had accepted notice of abandonment. But both underwriters and owners had representatives standing by at Cardiff, and whichever were concerned, they were either a party to or consenting to the contract made with the plaintiffs by Messrs Webster. In pursuance of that contract the plaintiffs—as the owners and the underwriters intended should be done, and as they knew was being done—the plaintiffs I say dealt with the *Merkur* in such a way as they thought fit, fixed upon it their apparatus, patched holes, opened holes, and worked at their own discretion under water by their divers, and also at suitable states of the tide above water, upon such portions as were exposed.

For the greater part of the time the plaintiffs salvage steamer was stationed on the spot, leaving it only when driven in to shelter by stress of weather. The plaintiffs, and the plaintiffs alone, were exercising complete control over the *Merkur*, and I hold that they were in possession. They were none the less in possession, because on the 19th Sept., at the time of the collision, there was no salvage steamer, and no servant of the plaintiffs' actually on the spot, the salving steamer having had to go into Barry because of bad weather on the 18th (a Saturday), and not returning until the Monday morning after the collision.

Finding possession in the plaintiffs, I hold that they were entitled to maintain an action for damages arising from damage to the *Merkur*. It is said that no claim in respect of damage to the *Merkur* is alleged in the statement of claim, and that apart from damage to the plaintiffs' plant, the only claim alleged is for the loss of the benefit of the salvage contract. I do not agree. The allegation is that the *Zelo* collided with the *Merkur* rendering the successful salving of the *Merkur* impossible, and it is further contended that the *Merkur* was in possession of the plaintiffs. It might have been more clearly expressed, but the allegation means, in my view that the *Zelo* collided with the *Merkur* and caused the *Merkur* to become a total loss. Insert the words "damaging the *Merkur*," and the allegation is clear of ambiguity. I gave leave to the plaintiffs to so amend, but I did not think that it was strictly necessary. I was informed that the owners of the *Merkur* have also brought an action. Of course care will have to be taken that the defendants are not made to pay twice over for the same damage, but between them, the plaintiffs and the owners, if the owners recover judgment, they will be entitled to recover the value of the *Merkur* as on the 19th Sept., immediately before the collision. Whether it had any value—and, if so, what the value was—will depend on whether the plaintiffs are right in saying that the salvage operations would have been successful, and if they are, then upon an estimate of the expenses subsequent to the 19th which would have been incurred, and an estimate of the salved value, and so forth.

I am not pretending to make an exhaustive statement of all the matters which will have to be taken into consideration. That will involve a difficult inquiry for the registrar, and when it is concluded, if a figure of value is arrived at, another difficult question will remain for the registrar as to what would be the relative interests therein of the plaintiffs and the owners on the one hand, and the underwriters on the other hand, under "a no cure no pay contract," the remuneration, in default of agreement, to be settled by arbitration. That is a difficult question for the registrar, but between them the plaintiffs, and the owners or the underwriters, will be entitled to the whole of the value, whatever it is. The plaintiffs, therefore, in this action in my view are entitled to recover their proportion, when determined, of the whole value. I hold that the plaintiffs are entitled to recover damages in respect to the *Merkur*. I think that is what I hold.

Judgment for the plaintiffs.

Solicitors for Maritime Salvors Limited, *Constant* and *Constant*.

Solicitors for the Pelton Steamship Company, the owners of the *Zelo*, *Botterell* and *Roche*, agents for *Botterell*, *Roche*, and *Temperley*, Newcastle-upon-Tyne.

House of Lords.

Tuesday, Dec. 5, 1921.

(Before LORDS FINLAY, CAVE, DUNEDIN, SHAW, and PHILLIMORE.)

THE KARAMEA. (*a*)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Navigation of entrance to Montevideo Harbour — Rounding the whistling buoy — "Keeping course and speed"—Regulations for Preventing Collisions at Sea, arts. 19, 21, 27, *and* 28.

The K., *when outward bound from Montevideo, sighted the green light of the* H., *on her port bow when the* K. *was nearing the whistling buoy at the entrance to the harbour. The vessels were on crossing courses. When the* K. *had the buoy abeam on her starboard she starboarded to make*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

the turn for the sea, the turn being usually made at the buoy. The H., *when first sighting the* K. *at a distance of two miles, ported slightly but did not blow her helm signal although she was altering not only for the buoy but also in order to manœuvre for the* K., *nor did she at once open her red light. After the* K. *starboarded, the* H. *hard-a-ported to avoid a collision, but did not reverse her engines, and a collision occurred.*

Hill, J. held that the K. *was three-fourths and the* H. *one-fourth to blame. Both vessels appealed.*

Held, by the Court of Appeal varying the decision of Hill, J., that under art. 21 *of the Regulation for Preventing Collisions at Sea it was the duty of the* K. *to keep her course and speed; and there were no special circumstances to relieve the* K. *from obeying the rule; and that under art.* 19 *it was the duty of the* H. *to keep out of the way of the* K. *The* H. *was to blame not only for failing to reverse her engines, but also for not blowing her whistle when she originally ported, as it might have been heard by those on the* K. *and have acted as a warning to them not to starboard. Art.* 28 *requires a vessel to sound helm signals when in sight of another vessel; she is only relieved from this obligation under the article when the other vessel is so far distant that she cannot be affected by the manœuvres which the signal indicates. The* H. *and the* K. *held to blame in equal degrees.*

Held, that the vessels must be held to have been equally to blame.

Judgment of the Court of Appeal (15 *Asp. Mar. Law Cas.* 318; 124 *L. T. Rep.* 653; (1921) P. 76) *affirmed.*

APPEAL and cross-appeal from a judgment of the Court of Appeal, varying a judgment of Hill, J. in the Admiralty Division.

Butler Aspinall, K.C., *D. Stephens*, K.C., and *Dumas*, for the appellants.

Bateson, K.C. and *A. T. Bucknill* for the respondents.

Cur. adv. vult.

Lord FINLAY.—In this case there was a collision between the steamship *Haugland* and the steamship *Karamea* on the 12th Feb. 1919 between 10.10 and 10.25 p.m. near Montevideo.

The *Karamea* was coming out from Montevideo. She had come down the narrow channel marked by a line of buoys on each hand, running N. and S. When she left the channel she made for the Whistling Buoy, which lies S. by E. from the mouth of the channel, intending to get abreast of the buoy with it on her starboard side and then to starboard so as to proceed in a south-easterly direction and out to sea.

The *Haugland* was coming in towards Montevideo from the East. She passed to the S. of Flores Island on a W. by N. course and about an hour afterwards she changed her course to W. ½ N. both magnetic. As she neared the Whistling Buoy she sighted the two headlights of *The Karamea* coming in a southerly direction, on her starboard bow, and when the red light of the *Karamea* was seen the *Haugland* ported, bringing the *Karamea* slightly on the starboard bow. The *Karamea* starboarded and the *Haugland* failed to stop and reverse, with the result that ultimately the two ships came into collision, the stem of the *Karamea* striking the port side of the *Haugland* about amidships.

The above statement gives the case in broad outline, omitting all details which are indeed in some respects obscure.

The case was tried before Hill, J. He found both vessels to blame, and his judgment in this respect was affirmed in the Court of Appeal. In my opinion no ground has been shown for reversing the finding of the Court of Appeal on this point. The *Karamea* was wrong in starboarding, as she ought to have kept her course, and the *Haugland*, whether she was guilty of any other fault or not, was clearly to blame for not stopping and reversing.

The point really in dispute on this appeal is as to the apportionment of the damages. Hill, J., pronounced the *Karamea* liable in three-fourths and the *Haugland* liable in one-fourth of the damages. The Court of Appeal held that the case was one in which no special apportionment should be made, and that the damages should be equally divided.

The clause providing for apportionment in cases of damage is the first section of the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57): "Where by the fault of two or more vessels damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. Provided that, if, having regard to all the circumstances of the case it is not possible to establish different degrees of fault, the liability shall be apportioned equally. . . ."

This section was considered by your Lordships' House in *The Peter Benoit* (114 L. T. Rep. 147; 13 Asp. Mar. Law Cas., 203). It was there laid down that only faults which contribute to the accident are to be taken into account for this purpose. The existence of fault on the part of one of the ships is no reason for apportionment unless it in part caused the damage.

There can be no doubt that the fault of the *Karamea* in starboarding, when she ought to have kept her course and speed, was a substantial cause of the accident. The only question is as to the amount of blame which should be attributed to the *Haugland*. Both courts have found the *Haugland* in default for not stopping and reversing, and it cannot be questioned that this contributed to the accident. Hill, J., thought that this was the only fault on the part of the *Haugland*, and as he considered that the blame of the *Karamea* in starboarding was greater he made the *Haugland* liable only for one-fourth of the damage.

The Court of Appeal, however, found that the *Haugland* was guilty at an earlier stage of another default contributing to the damage, by failing to comply with art. 28 of the Regulations for Preventing Collision at Sea. "When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—One short blast to mean: 'I am directing my course to starboard.' Two short blasts to mean: 'I am directing my course to port.' Three short blasts to mean: 'My engines are going full speed astern.'"

There is no doubt that the *Haugland* was guilty of an infraction of rule 28. The rule is peremptory that when vessels are in sight of one another a steamship under way and taking any course authorised or required by the rules shall indicate that course by the signal specified. In the present case the two vessels were in sight of one another,

and it was therefore the duty of the *Haugland* under art. 28, when she ported to give one blast. The Chief Officer of the *Haugland*, when asked why he did not give the signal gave as his reason: "because it appeared to me that the *Karamea* was too far away; she would not hear it." (Question 64.) This was a clear infraction of the rule. If the vessels are in sight the signal must be given. The obligation is not conditional upon the signal being audible to the other vessel. It is easy to understand why the rule was drawn in these peremptory terms. It would be very dangerous if the officer in charge were encouraged to speculate as to whether the signal, if given, would be heard; he must give it if in sight.

On this point Hill, J. said: "I am not prepared to blame the *Haugland* for not whistling when she first ported. The ships were then too far apart.. The *Haugland* was guilty of disobedience to the rule, but it does not follow that she is liable to contribute to the damages. If it appears that the signal, if given, could not have been heard by the other vessel, the failure to give the signal cannot have contributed to the damage, as the signal would have been useless." Hill, J., must, in the passage of his judgment which I have just quoted, have meant that he found the signal could not have been heard at the distance at which the vessels were from one another, and that the failure to give it was therefore on this question of apportionment immaterial.

The Master of the Rolls in the Court of Appeal said that the Assessors in the Court of Appeal saw no reason in the circumstances (so far as they could judge of them without knowing exactly what the whistle was) why a helm signal should not have been heard by the *Karamea*. The Master of the Rolls referred to the fact that it was in question whether the *Haugland* should not have emphasised her position by porting more decisively as well as whether she was to blame for not giving the signal when she ported, and goes on to say: "Now, taking these two things together, I cannot myself see how the *Haugland* can be held not to blame for her manœuvres then. Had she at once opened her red light there certainly was a further chance of the *Karamea* being warned that she must not starboard. It ought not to have been necessary to warn her because she had no right to starboard by the rule. But as the *Haugland* omitted both to open her red light at once and also omitted to give any sound signal that she was acting for the *Karamea* I cannot help differing from the learned judge when he says that she was not to blame for that earlier port manœuvre. If she were, it seems to me that that is a fault which might very well and very likely did contribute to the collision, because it deprived the *Karamea* of the warning that she otherwise would have had, which might have induced her to correct her wrong manœuvre." On this ground the Master of the Rolls and the Lords Justices were of opinion that the damages should be equally divided.

It must be observed, however, that there is not now any enactment that a vessel breaking a rule shall be held to blame for the collision and therefore liable to bear some part of the damage unless the breach could not have contributed to the collision (*see* sect. 4 of the Act of 1911). The question must be one of fact in each case whether the breach of the rule did so contribute.

It is, of course, the duty of the ship to have a proper and efficient whistle. We have consulted our Assessors as to the conditions affecting the audibility of the blast in the present case. In the preliminary act the *Haugland* put the distance between the two ships when she first saw the *Karamea* as "by estimate about 3 miles," and the evidence from the *Haugland* was that the distance would then be 2½ to 3 miles. The *Karamea* put the distance when she first saw the masthead light of the *Haugland* in the act as about 1½ to 2 miles and in evidence as 2 miles. Our Assessors say that audibility of the sound in the present case must depend upon the exact distance between the vessels when the *Haugland* ported. This distance has not been found in the courts below, and I doubt whether it would have been possible to give it exactly. There are certainly no materials before this House on which we could ascertain that distance with any accuracy.

All the three members of the Court of Appeal indicate that if it were necessary to decide the point they would be inclined to say that the *Haugland* was to blame for not porting more decisively so as to bring red well to red at once, and Hill, J., would seem to have felt some doubt upon this point. It appears to me that the *Haugland* was to blame in this respect. It was essential that the *Karamea* should know the course the *Haugland* was taking. The officer of the *Haugland* says that owing to the distance the signal would not have been heard and that therefore he did not give it. Under these circumstances it was all the more incumbent upon him to make sure that the *Karamea* was informed, by porting decisively. There was nothing to prevent him from doing this, and if the *Haugland*, instead of steadying while the *Karamea* was still on his starboard bow, had brought his vessel round so that she was well port-side to port-side with the other, his red light would have given the information which he says could not be conveyed by signal. In the absence of a finding that the signal, if given, would have been heard I should have difficulty in agreeing with the Court of Appeal that the mere failure to give the signal would have made the *Haugland* contributory to the damage.

I think also that a finding that the signal, if given, would have been heard would be justifiable upon the evidence.

The *Haugland* broke the rule by not giving the signal. It is certainly possible that the signal, if it had been given, would have been heard. All that we have to the contrary is the statement of the officer who wrongfully failed to give the signal that he thought the *Karamea* was too far away to hear. It would be extremely dangerous if any encouragement were given to neglect the duty of giving the signal by accepting without some definite evidence the plea of the officer in default that the signal would not have been heard. I think we ought to presume in the present case as against the *Haugland* that if she had done her duty by giving the signal in the present case it would have been heard. She was in the position of a wrongdoer, and no satisfactory grounds are shown for coming to the conclusion that giving the signal would have made no difference in the result.

For these reasons I think that the appeal and cross-appeal should both be dismissed.

I am authorised to state that Lord Shaw concurs in this judgment.

Lord CAVE.—I have come to the same conclusion, and for the following reasons.

When the two vessels came in sight of one another the *Karamea* was outward bound from Montevideo and was heading south, and the *Haugland* was heading west and had the *Karamea* on her starboard bow. They were, therefore, crossing vessels; and under arts. 19 and 21 of the Collision Regulations it was the duty of the *Haugland* to keep out of the way and of the *Karamea* to keep her course and speed. The *Karamea* did not keep her course, but when abreast of the whistling buoy she starboarded and so brought about a position of danger. For this both courts have held her to blame, and with that finding I agree.

Turning now to the conduct of the *Haugland*, it appears that on seeing the *Karamea* she ported but failed to give a short blast as required by the rules; that she afterwards starboarded slightly; and that when on approaching the buoy she saw the *Karamea* bearing down on her, she put her helm hard aport and went full ahead until the collision occurred. I do not think that she showed her red light to the *Karamea* except for a short time after her first porting and for a few seconds immediately before the collision. The *Haugland* has been held by both courts to be to blame for going full ahead when a collision was imminent instead of reversing her engines; and I think it clear that this was a wrong manœuvre, and that to this extent she was responsible for the disaster. But is the *Haugland* also to be held responsible for not blowing her whistle when she first ported her helm? As to this, her master says that he ported partly to get closer to the buoy and partly for the *Karamea*. He was therefore in sight of the *Karamea* and acted for her; and it follows that he was within art. 28 and by not blowing infringed that rule. It is said that the neglect to blow did not contribute to the collision, or (in other words) that there was no causal connection between the neglect and the damage. But this contention rests wholly on the statement of the chief officer of the *Haugland* that it "appeared to him" when he ported that the *Karamea* was too far away to hear the whistle; and I think it would be dangerous to accept such a statement by the officer in default as a sufficient ground for absolving the ship from responsibility. The vessels were nearly two miles apart, and a light wind was blowing from the *Haugland* in the direction of the *Karamea*. The assessors advising the Court of Appeal saw no reason why at that distance the whistle (if an efficient one) should not have been heard; and the experts advising your Lordships on this appeal did not differ from that view. In the circumstances, it cannot be said to be proved that the whistle would not have been heard; and in the absence of such proof I think the presumption is against the ship which broke the rule. Upon this point I agree with the Court of Appeal and consider that the *Haugland* was responsible on this ground also.

My conclusions on the above points render it unnecessary for me to consider whether the *Haugland* is also to be held responsible for not porting more "handsomely" than she did so as to show her red light more clearly to the *Karamea*. My impression is that she ported sufficiently at the time—her chief officer's evidence is to the effect that she went round 3½ points—and that her mistake was in afterwards starboarding so as to obscure her red light; but the evidence on this point is confused, and it is not necessary to deal with it in detail. Having regard to all the circumstances of the case, I think that it is impossible to establish different degrees of fault, and accordingly that the liability should be apportioned equally.

I agree that the appeal and cross-appeal fail and should be dismissed with costs, such costs to be set off.

Lord DUNEDIN: My Lords, I concur.

Lord PHILLIMORE.—I have had the advantage of reading the opinions of the noble Lords already pronounced, and I desire to express my concurrence with them, and also with the judgments in the Court of Appeal.

There are considerable difficulties in the story of the *Haugland;* but upon the *Karamea's* own showing the vessels were at one time so heading that they might be considered as vessels crossing so as to involve risk of collision, and this being the case it was the duty of the *Karamea* to keep her course and not to starboard, as she did, and certainly her starboarding contributed to the collision. Therefore, she was rightly held to blame.

With regard to the *Haugland*, both courts found her to blame for not stopping and reversing her engines before the collision, and your Lordships have no doubt that this is right, and that she must be held partly in fault. I think that she was further in fault, for not blowing the whistle signal required by the rules to be given by one vessel taking action for another. The *Haugland* was the ship that had to give way, and her proper course was to do so by porting her helm, and signifying the same by a short blast on her whistle. She did not blow a blast when she ported her helm, not till just before the collision. The excuse given by her officer for not doing so is that the vessels were too far apart for the whistle signal to be heard. It is a lame excuse at the best, and in my view it has no firm foundation. If, as suggested, the vessels were two miles apart when the order to port was given, it might be that the signal would not have been heard, but as I read the evidence it is impossible that any effective order to port for the *Karamea* could have been given at two miles; if it had been given, there would have been no collision. I believe that the order to port for the *Karamea* was given much later. There might have been an order to port for the buoy to bring it ahead (I do not say there was), when the vessels were two miles apart, but, if so, it was not given for the *Karamea*. It might be the true explanation for not blowing the whistle, if, in fact, the action was not taken for the *Karamea*, but in the ordinary navigation of the *Haugland* to enable her to run into Montevideo. I believe that when the helm was ported for the *Karamea*, the vessels were within hearing distance.

Then I further agree with the Court of Appeal that the porting of the *Haugland* for the *Karamea* whenever this action was taken, was not sufficiently large and effective. It might be thought as a matter of law that all that the ship which has to get out of the way has to do is to take just sufficiently effective steps in just sufficient time, and it might be thought that she so doing ought not to be found to blame, even if the insufficiency and delay of the proper manœuvre has puzzled the other ship, and led her to do something which she should not.

I pronounce no opinion. But it is in order to prevent this state of things arising that the provisions for these whistle signals have been introduced into the regulations. When I was first acquainted with these matters, these provisions were not in the rules. It was only experience, when steamship collisions became frequent, that showed the necessity for them. Supposing that the *Haugland* had ported just enough to have avoided the collision if the *Karamea* had not starboarded. It was the very smallness and lateness of this porting, coupled with the absence of the affirming signal, which led the *Karamea* to starboard. The two matters cannot be separated. The signal might not have been wanted if the porting had been in itself sufficiently significant, but the porting being insignificant, the signal was required. And the disobedience of the rule in failing to give it was an important contributory cause of the collision.

Appeal dismissed.

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

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

Wednesday, Dec. 13, 1921.

(Before Lords HALDANE, FINLAY, DUNEDIN, SHAW and SUMNER.)

ANCHOR LINE LIMITED *v.* MOHAD. (*a*)

ON APPEAL FROM THE COURT OF SESSION IN SCOTLAND.

Workmen's compensation—Seaman—Round voyage—Accident—Partial incapacity—Rejoining ship while on unfinished voyage—Subsequent desertion during voyage—"Liability" to maintain seaman—Claim to immediate compensation—Merchant Shipping Act 1906 (6 *Edw.* 7, *c.* 48), *s.* 34 (1)—*Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58), *s.* 7 (1) (*e*).

The respondent, a Mohammedan seaman, was engaged by the appellants for a round voyage from Bombay to the United Kingdom and back to Bombay within a year. On the voyage he met with a rather severe accident to his right hand. He was treated in hospital at Marseilles, and then brought by the appellants in one of their steamers to Liverpool and thence by train to Glasgow, where he rejoined the ship. Shortly afterwards he deserted.

The Workmen's Compensation Act 1906 *provides by sect.* 7 (1) (*e*): "*The weekly payment shall not be payable in respect of the period during which the owner of the ship is under the Merchant Shipping Act* 1894 *as amended by any subsequent enactment or otherwise liable to defray the expenses of maintenance of the injured seaman, or apprentice.*"

Held (*Lord Sumner dissenting*), *that when the seaman deserted, the liability of the shipowners, under sect.* 34 *of the Merchant Shipping Act* 1906 *to maintain him, ceased and the seaman was then entitled to put forward his claim for compensation under the Workmen's Compensation Act* 1906.

Judgment of the Court of Session affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice Clerk and Lords Dundas, Salvesen and Ormsdale) reversing the determination of the sheriff-substitute of Lanarkshire, sitting as arbitrator under the Workmen's Compensation Act 1906.

The sheriff-substitute held that sect. 34 of the Merchant Shipping Act 1906 and sect. 7 (1) (*e*) of the Workmen's Compensation Act 1906 should be read together, and that he, as arbitrator, was entitled to refuse an award of compensation. The Second Division held that there was, under the circumstances, a supersession of the right given by the Merchant Shipping Acts because of the desertion of the applicant and his repudiation of his rights under those Acts, and that the applicant had a right to an operative award of compensation at once, and they remitted the case to the arbitrator.

The shipowners appealed.

The Merchant Shipping Act 1906 by sect. 34 (1) provides:

If the master of, or a seaman belong to, a ship receives any hurt or injury in the service of the ship, or suffers from any illness (with certain exceptions) the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master or seaman until he is cured, or dies, or is returned to a proper return port, and of his conveyance to the port, and in the case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages.

Moncrieff, K.C. (of the Scottish Bar) and *B. Sandeman* for the appellants.

Morrice Mackay, K.C., *Craigie M. Aitchison* and *A. H. W. Gillies* (all of the Scottish Bar) for the respondent.

Their Lordships, by a majority (Lord Sumner dissenting) dismissed the appeal.

Lord HALDANE.—The point in this appeal is a very short one, and it turns, in the view which I shall venture to submit to your Lordships, on the construction of a section in the Merchant Shipping Act 1906 and a section in the Workmen's Compensation Act of the same year.

The way in which the question arose was this. It was a question tried under the Workmen's Compensation Act, the arbitrator being the sheriff-substitute of Lanarkshire, and he has made a statement of his findings in the usual form, which is somewhat meagre, but which raises the point.

The respondent, who was a Mohammedan seaman, was engaged by the appellants, apparently at Bombay, for a round voyage from that city to the United Kingdom and back to Bombay within a year, and in the course of the voyage he met with an accident to his right hand, which appears to have been of a somewhat severe character. After the accident the respondent was treated in hospital at Marseilles, where the steamer appears to have stopped, and then he was brought, after treatment, by the appellants in one of their steamers to Liverpool and thence by train to Glasgow, where he rejoined the steamer, the *Circassia*. Just after this, in Sept. 1920, he left the *Circassia* without leave and deserted the service.

Now these are the facts as found, and on these facts the arbitrator raises this question, which went to the second division: "On the facts as stated, and in view of the provisions of the Merchant Shipping Act 1906, s. 34, and the Workmen's Compensation Act 1906, s. 7 (1) (*e*), was I, as arbitrator, entitled to refuse an award of compensation?" The view he took was this, that the two statutes must be read

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

together, and that the right given by the Workmen's Compensation Act was a right which could not be put into operation because of a provision as to liability in the other Act to which I will in a moment call your Lordships' attention. The provision in the Merchant Shipping Act is the one which comes first in the order of date; the two Acts were passed in the same year, but the Merchant Shipping Act was passed, I think, first. It is sect. 34, and provides sub-sect. 1. [His Lordship read the section and continued.] Now that is a right given to the seaman in the present case. The Workmen's Compensation Act, s. 7, sub-s. (1) (*e*), says this: "The weekly payment" (that is in the case of compensation being recovered under the Workmen's Compensation Act) "shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." Now the real question seems to me on those sections to be whether there was liability under the Merchant Shipping Acts to defray the expenses of maintenance.

The case, as I have said, went to the second division, and in the second division their Lordships answered the question adversely to the shipowner, adopting the construction that this was a case in which there was a right to an operative award compensation immediately. They hold that there was, under the circumstances, a supersession of the right which was given by the Merchant Shipping Act because of the desertion of the seaman and his repudiation of the right given by the Merchant Shipping Act for his own benefit. The Lord Justice Clerk, Lord Dundas, Lord Slavesen, and Lord Ormsdale took that view, and in the result they sent back the case to the arbitrator to proceed in the awarding of compensation at once under the Workmen's Compensation Act, taking all circumstances into account and following the usual procedure. They evidently thought that what the sheriff-substitute ought to do was to award compensation and determine its amount, all the circumstances relating to benefits actually already received under the Merchant Shipping Act being taken into account.

Turning back for a moment to the Workmen's Compensation Act, the words are that the weekly payment is not to be payable "in respect of the period during which the owner of the ship is . . . liable to defray the expenses of maintenance." Now, the seaman deserted, and he abandoned thereby his right to claim under the section of the Merchant Shipping Act, and consequently there was no liability on the part of the shipowner. That is the interpretation I put on the two sections. If I am right, then the view taken in the second division was the true one.

For these reasons I move, your Lordships, that the judgment of the court below be affirmed, and the appeal dismissed with costs.

Lord FINLAY.—I am of the same opinion, I concur with the judgments delivered in the second division of the Court of Session. If I may respectfully say so, I think there is a fallacy in the judgment of the sheriff-substitute, and that is this, that he regards the provisions of sect. 34 of the Merchant Shipping Act of 1906 as being to prolong the contract of employment. What he says is this: "Under the contract both parties were bound for the period of a voyage from Bombay to the United Kingdom and back to Bombay, and it appears to me that the effect of sect. 34 of the Merchant Shipping Act 1906" (that is the section which provides for the expenses of medical attendance in case of injury or illness) "is to prevent an earlier termination of the contract through the inability of the workman to continue in the performance of the duties of his service. The defenders, under the contract and the provision of the statute, are under an obligation to maintain the pursuer till they return him to Bombay, and the pursuer is under a reciprocal obligation to remain on the ship and perform the duties of his employment if and when, and to the extent he is able. The defenders may have, and I expect have, an interest to require the pursuer to return to Bombay, where he will be among his own people and have the best chance of obtaining such employment as his diminished capacity must in future restrict him to. In my opinion the pursuer is not entitled to desert his employment and have his rights under the Workmen's Compensation Act determined in advance." That judgment proceeds on the assumption that the contract of employment was continued by virtue of the section in question, and that the case turns on the point whether he can take advantage of his own breach of contract by deserting his service in the ship. It appears to me that the effect of this section is not at all what the learned sheriff-substitute has said. The effect of the provisions of the Merchant Shipping Act is to engraft on the contract of service certain statutory provisions for the benefit of the sailor. It does not prolong the contract of service. The provisions made by the Merchant Shipping Act for the benefit of the sailor are absolutely independent of the question whether the contract of service continues, or whether it does not. It may continue, or it may not continue, but the statutory provisions for the benefit of the sailor do not in the least imply that it does continue, and they do not depend upon its continuance. That seems to me to be the view that underlies the decision of the sheriff-substitute, in which he treats the case as resolving itself into the question of whether the sailor can take advantage of his own wrong in breaking the contract of service and deserting his employment. The question seems to me not to be of that sort at all. The question is whether the sailor is entitled to say: "I do not want the benefits which are conferred upon me by the Merchant Shipping Act. I prefer to go at once for the benefits of the Workmen's Compensation Act." In plain words it comes to this, whether the owners are entitled to say that the man must be repatriated to get compensation, and whether the owners have the right to say that the provisions of the Merchant Shipping Act, which seem to me to be intended in favour of the workmen, must be carried out for their benefit, I do not stop to inquire—it would be mere speculation—what the reason of the owners may be. The sheriff-substitute suggests that it may be because there would be more chance of the man's getting employment in Bombay among his own people so that the workman's compensation would be reduced. It may possibly be that, or it may be some other reason, but to seek for the reasons is to enter into the field of speculation. What we have to do is simply to determine what is the effect of the statutes.

Now, it appears to me that it is not a question of a part of the contract of service; there is no clause in

the contract of service to affect the section of the Merchant Shipping Act for the benefit of the sailor; it is a mere statutory right given to the sailor for his benefit in the events which are contemplated by these sections; and, of course, it is obviously in the highest degree desirable that there should be such provision, for very cruel cases might indeed arise if a sailor were left in a foreign port. Under these circumstances I am of opinion that there was no consent of the owner wanted to a renunciation by the sailor of the benefits conferred upon him. It is not in the least material whether he deserted or whether he did not; what he did unequivocally desire was not to be taken back to Bombay. The owner's case is that he is entitled to require him to go back to Bombay, not in the sense that he could have him arrested and put on board and taken back, but that unless he goes back to Bombay he could not get the benefit of the workmen's compensation. I cannot find that anywhere in the provisions to which we have been referred. After all, the question comes back to be that of the construction of sect. 7 (1) (*e*) of the Workmen's Compensation Act 1906: "The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894 as amended by any subsequent enactment or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." The reading contended for by the appellants is that that denotes the period during which liability under the Merchant Shipping Act might exist. I think it denotes the period during which liability actually exists, and if the workman has done some thing which will afford a complete defence to any claim by the workman against the owner under the provisions of the Merchant Shipping Act for repatriation, maintenance, and all the rest of it, there is an end of the liability under the Merchant Shipping Act in respect of these provisions the owner is no longer liable, and what the heading to sub-sect. (1) of sect. 7 of the Workmen's Compensation Act 1906, means is that so long as the owner of the ship is, in fact, on the facts of the case, liable under that section, the provisions of the Workmen's Compensation Act shall not come into play. As was said by several members of your Lordships' House in *McDermott* v. *Owners of Steamship Tintoretto* (11 Asp. Mar. Law Cas. 515; 103 L. T. Rep. 769; (1911) A. C. 35) I think the object is to prevent the overlapping of benefits, and it appears to me that it would be a very strange reading of the section to say that you are to take some period during which the right to the benefits under the Merchant Shipping Act would continue if the sailor had not renounced them. Inasmuch as the sailor has most effectually renounced them, and there is no possibility of the owner's being made liable under the Merchant Shipping Act, I think all question of overlapping is out of the question, and on the plain meaning of the Act the defence fails.

Lord DUNEDIN.—I have found this case one of considerable difficulty, but in the end I have come to be of the same opinion as those of your Lordships who have already addressed the House.

The effect of the 7th section of the Workmen's Compensation Act 1906, is to apply it to seamen, and the immediate effect of that is that, if there is an accident, a seaman, like other workmen, will be entitled to compensation in terms of the first schedule, and the terms of the first schedule provide for a weekly payment in respect of a "total or partial incapacity." But then sect. 7, while it applies the Act, does so under certain modifications, and one modification is that under sect. 7 (1) (*e*) there is cut out from the payments that the seaman would naturally receive all payments during a certain period, and that period is thus defined: "Compensation shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894 as amended by any subsequent enactment or otherwise, liable to defray the expenses of maintenance of the injured master, seamen, or apprentice."

Now the whole point, I think, is whether that expression in the Act "liable" refers to the period under which there may be what I may call potential liability under the terms of the Merchant Shipping Act, or whether it means the period during which under the exact circumstances of the case there is *de facto* liability. I have come to be of opinion that the more natural way of taking the two Acts together is to take the latter reading.

My great difficulty has arisen from this, that undoubtedly that does allow a person to take advantage of his own default, in this sense, that he may default in order to get the more ample provision under Act two than he would have got under Act one. If the Act gives it to him, it may be bad policy, but still he gets it. I say that because Mr. Mackay made an effort to show that here such benefits as the seamen was entitled to get were benefits outside the contract and after the termination of the contract. I do not go on that at all, because I do not think we have got in this case sufficient facts found to know whether this particular man's contract of service had been terminated or not. That the man's contract could be terminated by being landed at a foreign port I have no doubt. I have equally little doubt that it could not be terminated if he were landed only a few hours, even though a certificate were given. Therefore I have gone, I think, upon the natural meaning of the finding of the sheriff-substitute when he speaks of his deserting his service. Notwithstanding that, I I think, taking the two Acts of Parliament as they stand, they lead to the result to which I have eventually come, and I therefore also agree that the appeal should be dismissed.

Lord SHAW.—I agree. When seamen were included under the benefits of the Workmen's Compensation Act, it was necessary, of course, to provide that there should be, if possible, no clash with the already existing beneficial provisions applicable to seamen under the Merchant Shipping Acts.

In the case of *McDermott* v. *Owners of the Steamship Tintoretto* in this House (11 Asp. Mar. Law Cas. 515; 103 L. T. Rep. 769; (1911) A. C. 35) we found that the principle to be applied was not to refuse the benefits under either Act, except in the sense that there should be no conflicting or overlapping provisions, but that, instead of that, the beneficial provisions of both sections should be applicable.

In the present case I confess that I have two difficulties on the matter of the statement of the case. I do not know to this hour now—nor does any of your Lordships—when this contract was made; accordingly none of us know when the period of twelve months from the making of the contract would have expired. In the second place, I do not know, nor has this House been informed,

when this round voyage, on which this seamen was employed, came to an end. I find myself slow to accept the view that a voyage which began anterior to June—one of the incidents of which was the accident to this workman in the month of June 1920 was the round voyage contracted for which was only in course of completion in the subsequent month of September. The vessel was then in Glasgow, and presumably would reach Bombay in, shall we say, six or eight weeks' time thereafter. That is not in accordance with the usual despatch of vessels of that class; but it may be so. Your Lordships will observe the difficulty in which everybody is placed by the lack of knowledge definitely of that fact. For if the round voyage had been definitely concluded, then it appears to me humbly that this seaman's contract was at an end. It was not a contract for a period of twelve months' service to these owners; it was a contract for one round voyage—not a contract of service on a snippet of portions of a round voyage which counted up together would make one, but one continuous round voyage.

Fortunately the absence of knowledge of these facts does not, on further consideration, prevent us from settling how the law of this case stands. I agree with Lord Finlay that the view taken by the learned sheriff-substitute, which he embodies in a phrase in his note, as to the reciprocal obligations on the part of this seaman to remain and perform his duty, cannot be applied in this case. The seaman was an injured man. It seems out of the question to suggest that there were reciprocal obligations in September when he came back injured and unable to perform, as the learned sheriff-substitue finds, anything other than exceptional duties, or that he was able to continue as an A. B. seaman in the service of these employers.

The whole matter appears to me to be settled, as Lord Dunedin has said, by the construction of the single word "liable" in sect. 7 (1) (*e*) of the Workmen's Compensation Act of 1906. What happened was this. In June the workman sustained his accident; he was put ashore in Marseilles; he remained in hospital for some weeks there, and afterwards he arrived in Glasgow under very proper arrangements, I am certain, made by the owners of the *Circassia*. He went on board the ship which was then going to sail for Bombay, and he left the ship. If the learned sheriff-substitute is of opinion that that was a continuing service, he is justified in using the word "deserting"; but whether the seaman deserted the ship or whether he left it as of right matters nothing in the construction of this section, because I am clearly of opinion that when the owners made this seaman the offer to convey him from Glasgow to Bombay, to his own home port, and when the seaman declined to accept that offer, the obligation of the owners was completely at an end, and it is mere finesse, without any sense or reason, to argue that they still remained liable to perform that obligation.

There is no such liability—it is at an end. And if there be no such liability, I have to construe now these words: "The weekly payment" (such a payment as is asked in this case) "shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." There is no such liability; there are no such expenses to pay; they have been all paid except the return journey, and the return journey is not asked. It is a mere conjectural or imaginative liability that is set up, and I cannot construe the statute in any sense than that it applies to the actual fact of liability, not to an imaginative situation.

For these reasons I concur.

Lord SUMNER.—It is my misfortune to think that the judgment of the second division was wrong; it is my much greater misfortune to be unable to agree with the opinions of your Lordships. With all humility, but without any doubt, I will ask your Lordships to bear with me for a few minutes while I say why.

There is no sounder principle in Workmen's Compensation cases than to abide literally and loyally by the findings of the arbitrator; and to my mind it is perfectly clear that the arbitrator in this case found as a fact that the seaman in question was still in the service of the appellants at the time when he deserted. He says that after the man had been treated in hospital at Marseilles, and brought by one of the appellants' steamers to Liverpool, and thence by train to Glasgow, he "rejoined" the *Circassia*, and that while there, and while the appellants were in process of returning the respondent to the port of Bombay in terms of their contract (that is their contract of employment) and of the provisions of the Merchant Shipping Act 1906, "he left the said steamship *Circassia* without leave, and deserted his service." Those terms are perfectly appropriate in describing the conduct of a seaman, who, after a temporary absence in hospital, resumed his service on his former ship, did not like it, absented himself without leave, and committed the offence of desertion; they are absolutely inappropriate to describing what has been suggested at the Bar, that is to say, the position of a person whose contract of employment has terminated, who has been brought, without any great amount of acquiescence on his part, back to his ship, and has been invited to proceed in her as a passenger to Bombay, and has then said that he does not like it, and would prefer to remain even in Glasgow.

I wish to remind your Lordships that, if he deserted, as it is found that he did, he was not only liable for an offence punishable by summary conviction, but under sect. 222 of the Merchant Shipping Act 1894, the master and owners were entitled to the services of the police, and were also entitled to use their own force, in order to bring the man back to his ship and make him resume his service and proceed with the ship to sea. The sheriff-substitute misused language strangely if he said this man had "deserted," that is to say, had committed an offence of that kind, if all that he had really done was to decline to take his passage by the ship that was tendered to him. It was also plainly assumed in the judgments below that his service continued, and that he was deserting in the true sense of the word; and the point argued and decided there was whether, in spite of his having broken his contract of service and not having brought it to an end, he could claim at his own hand to apply sect. 7 (1) (*e*) of the Workmen's Compensation Act 1906 to his own advantage even although it conflicted with the corresponding section of the Merchant Shipping Act 1906.

I think probably the most important thing is to look at these two sections together. It is to be borne in mind that the two Acts of 1906 received the Royal Assent at the same time and on the same day, and that one was complementary to the other.

The Workmen's Compensation Act provided for the terms on which seamen should be brought within the benefit of the Workmen's Compensation Act; the Merchant Shipping Act provided among other things for limitations upon that benefit, which arose out of the special treatment systematically extended to seamen under all the Merchant Shipping Acts. Now here is a man whose services has not been brought to an end in the manner provided by the Merchant Shipping Acts with the formalities strictly prescribed under them. He has never received his discharge; he was not in fact left at Marseilles under circumstances that terminated his employment, or, at any rate, it is not so found, and on the contrary it is found in my view that he was still in the employment of the ship. Under these circumstances he has sustained an accident. Now the weekly payment which in respect of that accident may be payable "shall not be payable in respect of the period during the owner of the ship is, under the Merchant Shipping Act, 1894 as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice," Considering that those two pieces of legislation are absolutely co-terminous, it seems to me that the natural construction is to treat the reference to the Merchant Shipping Act, as amended, as being a short way of inserting in the Workmen's Compensation Act the relevant provision, namely, sect. 34, sub-sect. (1) of the Merchant Shipping Act 1906; for I will assume (as it has been assumed throughout) that it is sect. 34, sub-sect. (1), and not sect. 34, sub-sect. (2) which governs this case. I think the natural mode of reading that is to say that the weekly payment shall not be payable in respect of the period during which the owner of a ship, under the Merchant Shipping Act, when ever a seaman receives any hurt or injury in the service of the ship, is liable to defray the expense of attendance and medicine and the expenses of maintenance until he has returned to a proper return port, without any deduction on that account from his wages. Although in the case of *McDermott* v. *Owners of the Steamship Tintoretto* your Lordships' House was dealing with another question, I would quote the language of Lord Loreburn (11 Asp. Mar. Law Cas. at p. 516; 103 L. T. Rep. at p. 770; (1911) A. C. 35, at p. 39) as expressing what I take to be the construction of these two sections read together: "Before 1906 the seaman was not within the Act. In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends." On that ground I think that this question does not depend upon what, in particular circumstances, a seaman might be able to sue for, or what might constitute a defence to a shipowner, if he chose to set it up, when sued. The reference to the Merchant Shipping Act is a mode of reading the two sections together. In view of the fact that the man was still in the service of the ship, in view of the fact that being in the service of the ship he was bound to render such service as he could in return for his wages, in view of the fact that the finding is that he was partially incapacitated, and, as anybody can see who knows the sea, there were many things he might have been employed to do, I think it is plain that, on the one hand, the owner was to pay wages and to defray all these various expenses, but, on the other hand, the seaman was bound to render services suitable to his state and capacity so far as he could. That being so, the Workmen's Compensation Act period had not begun because the Merchant Shipping Act period had not terminated.

Suppose the right way to look at it is as your Lordships are minded to do, and to say that the word "liable" means liable in the particular circumstances of the case, I regret to see—doubtless it must be my inadvertence—that in more than one passage in the judgment in the court below it has been assumed that it is possible for a seaman, by breaking his contract and deserting his service, to bring the contract to an end at his own hand, either in whole or in part. I do not understand it to have been contended before your Lordships that that doctrine is really true. I understand the two propositions presented here to be, first of all, that the benefit, whether it arose under the contract or arose under the statute, the contract having terminated, was a benefit of a unilateral character which the seaman could waive at any time that he chose, or, secondly, that the word "liable" in the Workmen's Compensation Act may have the effect of meaning that in this particular case the statute enacted that one party to a contract can, at his own hand, terminate reciprocal obligations in the contract without the assent of the other party. I cannot believe that such an invasion of the law of contract was intended by the Workmen's Compensation Act 1906; and, as to the other point, I think it is quite clear that, under the circumstances, the benefit of maintenance did not constitute a purely unilateral advantage which it was simply competent to the seaman to waive. Under the contract, as regulated by this statute, the shipowner has an interest in his obligation to maintain the seaman—that is one way of putting it—or he has a right, dependent upon the continuance of the period of maintenance which is of advantage to him, namely, to postpone in his favour the Workmen's Compensation Act period until the termination of the Merchant Shipping Act period. It follows that to say that by deserting the workman got rid of any obligation as to his maintenance, for he discharged it, is to overlook the circumstances that the existence of that obligation was a thing beneficial to the shipowner, and, being a thing which arose out of the contract, could only be discharged either by mutual consent, which was not given, or by a repudiation of the obligations of the contract on the one hand, assented to expressly, or by implication, on the other. Neither of these things is found to have occurred. Surely it is not a fair statement of the argument for the appellant to say, as I think the learned judges below did say, that the shipowner claims the right to repatriate a seaman, or to declare that his return to Bombay is a condition precedent to any obligation on his part under the Workmen's Compensation Act. The real point—at least, I should have thought so—is that to permit a workman, by refusing to proceed and be maintained on the voyage, and to perform such services for his wages as he is fit to perform and to receive his ultimate discharge in due statutory form, when he is returned to Bombay, to say that he, being under those obligations, is entitled to declare by committing the crime of desertion that he will not perform them any longer, and thereupon entitles himself to bring into operation, for his own advantage and for the disadvantage of the shipowner, the Workmen's

Compensation Act earlier than it would otherwise come into operation, is to deprive the shipowner of his rights under the contract, namely, to hold the man to his service, to require that, being only partially incapacitated, he shall render any services that he can of a seamanlike character, and, above all, by maintaining in force the obligations of the service and of the Merchant Shipping Act to postpone the application of the Workmen's Compensation Act. It appears to me to be quite clear that, even if you read the words "liable to defray" as meaning "liable under the particular circumstances to defray," or "*de facto* liable to defray," or "possessed of no defence that he could plead to an action for not defraying"—even if you read the words in that sense—you cannot do so without affirming that this contract has been made by this harmless-looking sub-section, different from all other contracts, and is a contract which one party can break and thereupon dissolve to his own advantage without the consent of the other party. That, as I have already said, I do not think the statute provides. I, therefore, should have thought that the appeal should have been allowed.

Appeal dismissed.

Solicitors for the appellants, *John Kennedy* and *Co.*, W. S., for *J. W. Macalister* and *Dundas*, solicitors, Glasgow; and *Macpherson* and *Mackay*, W. S., Edinburgh.

Solicitor for the respondent, *D. Graham Pole*, for *W. G. Letchman* and *Co.*, solicitors, Glasgow and Edinburgh.

Judicial Committee of the Privy Council.

Nov. 7, 8, *and Dec.* 6, 1921.

(Present: Lords SUMNER and WRENBURY, and Sir ARTHUR CHANNELL.)

THE NEW SWEDEN. (*a*)

ON APPEAL FROM THE PRIZE COURT.

Prize—Mails of a neutral state—Seizure—Transmission of mails by rail for examination— Damage by fire during transmission—Liability of captor—Duty to insure—Order in Council of the 11*th March* 1915.

Certain parcels of goods of enemy origin and enemy property were consigned per the Swedish parcel mails to the claimants, who were domiciled in New York. The postal bags containing these packages were seized at the port of K. under the provision of the Order in Council of the 11*th March* 1915. *Eventually the bags came into the hands of the post office authorities at K., who sent them by rail to the censor of parcel post in London, there being no facilities for the examination of the postals bag at K. On the railway journey some of the goods were destroyed or injured by fire. Those packages which were delivered in London were seized and sold in due course, the net proceeds being subsequently paid to the claimants. The claimants sought to recover from the Procurator-General the loss of that part of the consignment which had been affected by the fire, contending that the captors had failed to exercise due care in the control of the goods; in sending them to London they had caused a deviation in the voyage which avoided the existing insurances upon them, and they had failed to hand them over to the Marshal, as provided by the Order in Council of the* 11*th March* 1915, *by whom they would have been insured.*

Held, that for unreasonable action for negligence and for wilful wrong doing the captors were liable from the time of seizure to the time when the res *was placed in the custody of the Prize Court. There was neither principle nor authority for placing the responsibility of those who exercised a lawful right of search or who acted in accordance with the terms of a reprisals order any higher than that of actual captors. As far as the Marshal was concerned the question of insurance did not arise as the loss occurred before the bags were placed in his custody at all.*

Held, further, that as the Order in Council provided for detention and for sale of the chattels detained, it was the net cash proceeds which were to be restored. If the court made an order just in itself, with regard to the disposal of such net proceeds as the Marshal had in his hands, so as to discharge him in accordance with its ordinary principles and refused to hold liable either its own officers or the officials who detained, forwarded and searched the parcels mail prior to the seizure in prize of the goods in question, no default having been proved against them, it was strictly adhering to the terms and sense of the Order in Council, and if neutral rights of property suffered, that result could be justified under the terms of the Order of the 11*th March* 1915.

Decision of Sir Henry Duke, P. (*reported* 15 *Asp. Mar. Law Cas.* 351; 126 *L. T. Rep.* 31; (1921) *P.* 473) *affirmed.*

APPEAL from a decision of the Prize Court, reported 15 Asp. Mar. Law Cas. 351; 126 L. T. Rep. 31; (1921) P. 473.

The facts, which are sufficiently summarised in the headnote, are fully stated in their Lordships' judgment.

Sir Henry Duke, P. held that the decision in the *United States No.* 2 (15 Asp. Mar. Law Cas. 344; 125 L. T. Rep. 446; (1920) P. 430) did not imply an obligation to insure in the duty of the captors to take reasonable care. The captors did not fail in their duty to take care of the goods in their custody when they forwarded the mail bags to London, as there were no facilities for examining mails at Kirkwall. The Order in Council of the 11th March 1915 did not require that seized goods should be placed in the custody of the Marshal as soon as they were brought into port, nor at any particular time. In the present case it could not have been known until after examination whether the goods were subject to seizure or not. In so far as the Order in Council was concerned, it was doubtful whether any breach of duty on the part of public officers as between themselves and the Crown, concerning a matter of administrative instruction, would give a cause of action to foreign owners of goods. Accordingly he came to the conclusion that the demand for damages failed and must be dismissed.

The claimants appealed.

Raeburn, K.C. and *Wilfrid Price* for the appellants.

Sir *Gordon Hewart* (A.-G.) and *Geoffrey Lawrence* for the respondent.

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

The considered opinion of their Lordships was delivered by

Lord SUMNER.—On the 16th May 1916, the steamship *New Sweden*, a Swedish vessel outward bound from Christiania to Newport News, put into Kirkwall by her owners' orders and delivered to the surveyor of customs there 157 bags containing postal packages. This was done in pursuance of the Reprisals Order in Council of the 11th March 1915. According to the practice in force, these bags were placed in the hands of the postal authorities in the same condition in which they were received and were despatched by rail to London, in order that they might be searched there for goods which were of enemy origin or were otherwise liable to be detained under the order. Such a search at Kirkwall would have been impracticable.

By some accident, unexplained and probably inexplicable, the van containing these bags took fire while the train was passing through Perthshire. Ninety-five bags were destroyed altogether and only sixty-two reached London intact, but seven more were salved in a damaged condition. The mail bags had contained 301 parcels of leather gloves of German manufacture, which belonged to neutral owners, the appellants, but only 113 reached London. Upon examination of the bags there these parcels were discovered and were formally seized on the 9th June 1916 by the Surveyor of Customs, who placed them in the custody of the Marshal of the Prize Court. By decree, dated the 12th Nov. 1917, they were pronounced to be of enemy origin and ordered to be sold. The net proceeds—1073*l.* 17*s.* 3*d.* were ordered to be released to the appellants' solicitors by consent of the Procurator-General on the 6th May 1921, and thereafter the appellants moved for an order that the Procurator-General should pay them damages for the gloves lost. The President dismissed this motion and the present appeal was then brought.

Persons who claim the release of goods in prize or of money lodged in court to represent them, may charge the Procurator-General, in virtue of his office as the person liable to answer for the shortcomings either of officials, who have dealt with the goods before they were placed in the custody of the marshal, or of the marshal himself. It is plain that it was no part of the duty of those who brought the *New Sweden* in or received what she discharged, to place goods in the custody of the Prize Court which were neither enemy goods nor goods of enemy origin. Equally little was it the function of the Marshal, to take charge of such goods. Before any delivery could be made to him examination and discrimination were indispensable, and the case must therefore be considered both in regard to events happening before the seizure and in regard to those happening after it. As no actual neglect or default is alleged in connection with the way in which the goods were dealt with, the appellants' contention is either that some or all of these officials stand towards the owners of the goods in the position of insurers and are answerable for their safety and ultimate return in all events, or that they were under some obligation towards the appellants to effect policies of insurance for their benefit.

There has been from time to time some difference of opinion as to the exact degree of care which is required of captors, but their obligation has always been recognised as being one of care and prudence It has never been placed so high as that of insuring or answering in all events for the safety of the prize, whether by protecting it from all hazard or providing through policies of insurance a fund to make good its loss. The law is now well settled that it is for unreasonable action, for negligence and for wilful wrongdoing, that captors are liable from the time of seizure to the time when the *res* is placed in the custody of the Prize Court. If the obligation went beyond that of reasonable care and abstention from wilful wrong, most of the discussions and decisions on this subject would have been wholly beside the mark. There is neither principle nor authority for placing the responsibility of those who exercise a lawful right of search, or who act in accordance with the terms of a Reprisals Order, any higher than that of actual captors. On the other hand, insurance of the owners' interest is clearly a matter for the owners themselves. In this particular case the length of time elapsing between the Order in Council and the shipment in question raises the presumption that the owners were fully alive to the possibility and even the probability that the *New Sweden* would put into Kirkwall and that the goods, after being removed from the ship, would be despatched to London. It may be that they actually insured against the risks thereby incurred; it certainly does not appear that such an insurance was impracticable.

Their Lordships have already declared their opinion 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 Südmark* (No. 2), 14 Asp. Mar. Law Cas. 201; 118 L. T. Rep. 383; (1918) A. C. at p. 484; *The Cairnsmore and The Gunda*, 15 Asp. Mar. Law Cas. 162; 124 L. T. Rep. 553; (1921) 1 A. C., at p. 441), though in general the Marshal does insure goods in his custody. As against claimants, to whom goods which might have been condemned are in fact released, the premiums are not charged on them in ordinary circumstances. Where, however, the goods are detained only and cannot be condemned, it has been held (*The United States* (No. 2), 15 Asp. Mar. Law Cas. 344; 125 L. T. Rep. 446; (1920) P. 430) that the premiums constitute an expense, which the goods must bear. On this principle a small sum was deducted for insurance in the present case in arriving at the net proceeds. Their Lordships do not understand this deduction to be challenged, but only to be used as an argument that the goods should have been insured at an earlier stage—namely, during the railway journey, when, as it proved, they ran some risk. As far as the Marshal is concerned, however, the point does not arise, for the fire took place before the bags were formally seized or were placed in his custody at all, and he could not be bound to insure goods which had not been seized, or liable for more than the goods which were delivered to him or their proceeds. The appellants' attempt to find some duty in the officers, who bring in and examine the goods, to accelerate the date of their delivery to the Marshal, in order that any policy kept afoot by him might attach and protect them at the earliest possible moment, is one not supported by any authority. It is true, that as their Lordships were informed, the President stated that he had it on high authority, apparently that of the Marshal himself, that the Surveyor of Customs at Kirkwall was one of his deputies, but not only is there no

evidence that in taking possession of the bags and forwarding them that official was acting as such deputy, but the facts that he was then acting only in furtherance of a right of examination and search and that the delivery to the Marshal's custody is stated to have taken place in London after the fire, are conclusive that he was not. The loss therefore occurred before the functions of the Marshal had begun.

The appellants finally rested their case on the terms expressed in, or to be implied from, the Order in Council itself. Its validity has already been the subject of decision by their Lordships, and it was not suggested that transmission of the mail-bags to London for examination inflicted unreasonable or unnecessary risk or loss upon neutrals. In fact, examination in London is probably as much in favour of the security of the owners as it is of the efficiency of the examination in the interests of the belligerent. It is argued that the whole scheme of the Order is to provide for temporary detention only, which implies final restoration, and that the Order, being in itself an interference with neutral property, not warranted by ordinary rights of capture but dependent on abnormal circumstances which gave rise to a right of reprisal, nothing can be held to be authorised to the prejudice of the neutral beyond that which the order expressly sanctions. This is applied in two ways. The Marshal's duty, it is said, is to be in a position, *quacunque viâ*, to restore when detention ends, and to restore in value, if not in specie; and the duty of those who act before his custody begins is to put him in a position to discharge this duty—that is, to deliver to him, at all events, all the goods brought in, so that he may thereafter be in a position to detain and to restore them. Both duties must be derived from the Order in Council.

It is true that the Order in Council provides for detention, and that in no event is condemnation in question, though it is contemplated that the ownership in the goods may be divested, since this is the result of sale, but the terms of the order are precise and unambiguous, and no extension of them by implication is involved in the deductions which their Lordships propose to make from them. Detention no doubt implies ultimate restoration, but restoration of what? As the order expressly provides for sale of the chattels detained, the restoration is not necessarily or commonly restoration in specie. What is to be restored is the net cash proceeds. The Order requires that the goods in question "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 circumstances deem to be just." Since nothing further is directed, the court can but apply the same principles as it is accustomed and bound to apply in matters of prize, and there is a special provision that the ordinary practice and procedure of the Prize Court is to be followed, *mutatis mutandis*. This provision art. V, (2), is not exclusive of all other resort to the principles of prize law, but is inclusive of practice and procedure, such as they may be when the order is put into force. It follows that if the court makes an order, just in itself, with regard to the disposal of such net proceeds as the Marshal has in his hands, so as to discharge him in accordance with its ordinary principles and refuses to hold liable either its own officers or the officials who detain, forward and search the parcels mail prior to the seizure in prize of the goods in question, no default having been proved against them, it is strictly adhering to the terms and sense of the Order in Council, and if neutral rights of property suffer, that result can be justified under the terms of the order of the 11th March 1915. For these reasons their Lordships think that the order appealed from was right, and that the appeal ought to be dismissed with costs, and so they will humbly advise His Majesty.

Appeal dismissed.

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

Solicitor for the respondent, *Treasury Solicitor.*

Oct. 27 and Dec. 13, 1921.

(Present: Lords SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE ANICHAB AND OTHER VESSELS. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize — 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.

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 the captures of property made inland by military forces did not subject such property to condemnation as maritime prize, and it was immaterial that the property thus seized might subsequently be used under conditions which would subject it, if so used, to condemnation as maritime prize.

Judgment of Lord Sterndale, P. (*reported* 14 *Asp. Mar. Law Cas.* 538; 122 *L. T. Rep.* 249; (1919) *P.* 323) *affirmed.*

APPEAL from a judgment of Lord Sterndale, P. (reported 14 Asp. Mar. Law Cas. 538; 122 L. T. Rep. 249); (1919) P. 329).

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 Lüderitzbucht were occupied. These ports

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

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 Lüderitzbucht 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 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.

The President held that all the captures made in the ports, either afloat or beached above or below high-water mark, was 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.

The Procurator-General appealed.

Wylie (Sir *Gordon Hewart* (A.-G.) with him) for the appellant, *ex parte*.

The considered judgment of their Lordships was delivered by

Lord PARMOOR.—This is an appeal against the decree of the Prize Court releasing certain craft, namely, sixteen lighters, and one launch and certain rope fenders, the property of the respondents, captured at Otavi and Omaruru, then in German South-West Africa, by His Majesty's military forces. No case was presented on behalf of the respondents, and the appeal of His Majesty's Procurator-General was heard *ex parte*.

The question to be decided on the appeal is whether at the time of their capture the said craft had ceased to be the subject of maritime prize, and were private property seized on land by His Majesty's military forces. His Majesty's military forces, operating under the Government of the Union of South Africa, in German South-West Africa, occupied Lüderitzbucht (Lüderitz Bay) on the 19th Sept. 1914 and Swakopmund on the 14th Jan. 1915. A number of vessels, craft, and accessories seized at Lüderitzbucht and Swakopmund were condemned by the learned President as good and lawful prize, and against this decision there is no appeal. The learned President has found in accordance with the evidence of Sir Oswyn Murray that the craft in question in this appeal were found and seized, partly at Omaruru, 148 miles inland, when Omaruru was occupied on the 20th June 1915, and partly at Otavi, 310 miles inland, when Otavi was occupied on the 1st July 1915. There are no rivers in South-West Africa on which the said craft could have been or were intended to be used, and they had been dispatched up the railway line at the request of the respondents, under the authority of a German officer, in order to prevent them falling into the hands of the British forces. It is not disputed that they were property the subject of maritime prize at the declaration of the war, and at that time liable to seizure. The craft were first taken on rail to Richtofen, 12½ miles inland, during August and September, 1914, and were then taken by rail to Usakos, 94 miles inland, during Oct. 1914, where they remained till March 1915. They were forwarded to Omaruru and Otavi during April 1915, and were left standing on rail near the railway stations. There is no doubt but that they were intended to be returned to the coast for naval use.

Sir Oswyn Murray, Secretary to the Admiralty, states in his affidavit that His Majesty's forces, operating under the Government of the Union of South Africa, in German South-West Africa, occupied Lüderitzbucht and Swakopmund at the dates above mentioned, and that in the course of their operations the said forces occupied the northern section of the railway lines from Swakopmund to Otavi, and found and seized the lighters and craft in question at the dates mentioned. The learned President has found that there was no evidence before him that the forces in South Africa were "getting on as fast as they could after these craft to try and get them," and that it is just as consistent on the evidence before him that the first operations might have ceased for a time, and a new operation have begun. He states: "All I know is, that after the first taking possession of the ports, there was an interval of about six months before these craft were taken at places respectively 150 and 300 miles up the country and were taken on land by military forces. It does not seem to me, in those circumstances, that they are the subject of maritime prize."

Their Lordships see no reason for not accepting the findings of fact on which the learned President based his decision, but two points were raised on behalf of the appellant. In the first place it was argued that the craft had not ceased to be liable to capture as maritime prize, when they had only been removed inland in order to escape pursuit at the time when other craft of a similar character were seized at Lüderitzbucht and Swakopmund. It is no doubt accurate to say that property, the subject of maritime prize at the outbreak of war, may be lawfully seized as maritime prize in certain circumstances, although the actual seizure takes place on land. It was held by their Lordships in the case of *The Roumanian* (13 Asp. Mar. Law Cas. 8; 114 L. T. Rep. 3; (1916) 1 A. C. 124) that the test of ashore or afloat was no infallible test as to whether goods could or could not be seized as maritime prize, and that it was perfectly clear that enemy goods, for instance, seized on enemy territory by the naval forces of the Crown, might lawfully be condemned as prize. It was held that petroleum on board *The Roumanian* (*ubi sup.*) having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable, merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Limited, for safe

custody, and that its seizure there as prize was lawful. The fact, therefore, that in the present case the craft were not captured until after they had been carried inland is not conclusive against the case of the appellant; but the learned President has found that there was no evidence before him that after the enemy had succeeded "in getting ashore and running away with his property," the belligerent who was trying to capture it did pursue and take the craft in the course of such pursuit, and that in this respect the facts of the present case did not come within the principle accepted by their Lordships in *The Roumanian* (*ubi sup.*). The learned President further held that the capture should be regarded as a capture of property on land by the military forces of the Crown. The capture of property on land by military forces under these conditions would not subject such property to condemnation as maritime prize, and, as already stated, their Lordships see no reason for differing from the learned President in his conclusion of fact.

In the second place the appellant argued that the craft were the subject of maritime prize, on the ground that when they came into possession of their lawful owners they would be applied again to naval purposes. If the property is to be regarded as property on land, seized by the military forces of the Crown, it is not material that it might subsequently be used under conditions, which would subject it, if so used, to condemnation as maritime prize. It is not necessary, in the opinion of their Lordships, to refer to art. 53 of the 4th Convention of The Hague 1907, or to go further than to say that, in their opinion, the learned President was right in his decision that the craft were not subject to condemnation as maritime prize.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared, there will be no order as to costs.

Solicitor for the appellant, *Treasury Solicitor.*

Nov. 4, 7, *and Dec.* 13, 1921.

(Present: Lords SUMNER and PARMOOR, and Sir ARTHUR CHANNELL.)

G. LARUE AND CO. *v.* HIS MAJESTY'S PROCURATOR-GENERAL; THE ANNIE JOHNSON. (*a*)

Preliminary question—Res Judicata—*Production of record—Rights of neutral trader.*

The plea of res judicata *cannot be entertained unless the record of the act of the court on which it was founded is forthcoming, or some valid reason is given why it cannot be produced.*

Decision of Sir Henry Duke, P. affirmed.

APPEAL from a decision of Sir Henry Duke, P., sitting in the Prize Court who had condemned certain shipments of sole leather and dry hides which had by proclamation of the 11th March 1915 been declared to be absolute contraband as good and lawful prize on the ground that the goods had an enemy destination.

The facts of the case are fully set forth in their Lordships' judgment.

Sir *M. Macnaghten*, K.C. and *H. Hull* for the appellants raised the preliminary question whether the action should not be dismissed either on the ground that there was a concluded agreement or on the plea of *res judicata*. Further they contended that as regards the shipment of the goods the appellants had discharged the onus of proof incumbent on them.

T. Mathew (Sir *Gordon Hewart*, A.-G. with him) for the respondent.

The considered judgment of their Lordships was delivered by

Lord PARMOOR.—These appeals relate to four shipments of hides and leather, viz.:—

(*a*) Sixty-eight rollers sole leather shipped at Rio de Janeiro by the appellants on the 20th Sept. 1915, on board the Swedish steamer *Annie Johnson* consigned to the Svenska Aktiebolaget, Stockholm, Sweden (hereinafter called the Svenska), and seized on the 30th Oct. 1915.

(*b*) 600 dry hides and 300 rollers sole leather shipped by the appellants at Rio de Janeiro on board the Swedish steamer *Kronprinsessan Margareta* on the 22nd Oct. 1915, and consigned to the Svenska, and seized the 6th Dec. 1915.

(*c*) 300 rollers sole leather shipped by the appellants at Rio de Janeiro on the 9th May, 1916, on board the Swedish steamer *Kronprins Gustav Adolf*, consigned to the Malmo Laderfabrik, Malmo, Sweden, and seized the 9th June, 1916.

(*d*) 3,660 dry hides shipped by the appellants at Rio de Janeiro on board the Swedish steamer, *Kronprinsessan Margareta* on the 6th May 1916, consigned to the Malmo Laderfabrik, and seized on the 16th June 1916.

At all material times hides and leather were absolute contraband, having been so declared by proclamation of the 11th March 1915. The appellants are G. Larue and Co., of Rio de Janeiro, Brazil, a firm consisting of two partners, Georges Larue and Ernest Durisch. The main question in the appeal is whether the learned President was right in holding that the goods had an enemy destination. There was, however, a preliminary question, raised at the hearing, whether the suit ought not to be dismissed, either on the ground that there was a concluded agreement, upon which the claimants could rely as a bar to the claim for condemnation, or on the plea of *res judicata*. It appears to have been admitted in the proceedings of the Prize Court that there was no agreement in this case under which the claim of the respondent could be barred. Assuming, however, the point is one which the appellants are entitled to raise, their Lordships can find no evidence of any estoppel, such as would be necessary to bar a claim. On the plea of *res judicata* it is said that on the 16th Sept. 1916, a letter was sent from the Procurator-General to E. G. Svanstrom, the managing director of the Import Department of the Transmarina Kompaniet Aktiebolag of Stockholm, to which, on the 1st July 1916, the trade of the Svenska with South America had been transferred, informing him that consent had been given to an order being made for the release of the goods to him, upon presentation of the bill of lading in respect of each consignment to the collector of customs, and on payment of any expenditure incurred in connection with the detention of the goods. It was also stated that it would be necessary for him to obtain a licence from the War Trade Department to export goods to Archangel, and that that Department is being notified of the release. The necessary licences were obtained, but E. G. Svanstrom was unable to obtain shipping space for shipment of the goods to Archangel. The delivery

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

of the goods was not in fact taken by the said E. G. Svanstrom, and on the 12th Sept 1918, a letter was written from the Procurator-General informing E. G. Svanstrom that, on consideration, he was not prepared to consent to an order for release of goods, and that the case must therefore proceed in the Prize Court. Their Lordships do not doubt that the plea of *res judicata* is available in prize, if the necessary conditions exist, but there has been no act of the court in this instance which takes away its jurisdiction to deal with goods still in custody of the marshal. The rules contained in the Prize Court procedure, relating to release, do not appear to have been followed, and no application has been made on behalf of the appellants to ascertain whether an order for release has ever been made judicially. The counsel for the appellants argued that the procedure in this case was the procedure ordinarily followed in a great number of cases. Their Lordships do not know whether this is the case or not, but the plea of *res judicata* cannot be entertained unless the record of the act of the court on which it was founded is forthcoming, or some valid reason is given why it cannot be produced. The appellants therefore fail on the preliminary question.

The appellants were a firm of merchants dealing in hides, leather, horns, timber and cereals, who had for many years prior to the outbreak of war exported their goods to Havre, mainly for sale in Eastern Europe. It was not possible to carry on the trade of the appellants through Havre after the outbreak of the war. The appellants, therefore, sought a new outlet for their trade, and in the early part of 1915 made arrangements with Holmberg, Bech, and Co., of Rio de Janeiro, to ship goods to be sold on their behalf in Sweden by the Svenska, for whom Holmberg, Bech, and Co. acted as agents in Rio de Janeiro. At the date of all the shipments in question in the appeal, hides had been declared absolute contraband, and consequently, to escape liability to seizure, it was necessary to take such precautions as would be effective to reasonably insure that their destination, or the destination of such products made from them, as military boots, was not an enemy country. The appellants accordingly before shipping any hides did obtain a guarantee that these hides would be used in Sweden, although not obtaining an assurance that manufactured products, if in themselves contraband, such as military boots, would not be exported after being manufactured. The export of hides and leather from Sweden had been prohibited since the 19th Nov. 1914, but the Swedish Government, as they were fully entitled, had refused to prohibit the export of products manufactured from hides and leather. On the 12th Oct. 1915, the Svenska did make a declaration in the following terms, p. 68 :—

"We, the undersigned, who are consignees of sixty-eight rolls of sole leather (about 1000 half-hides) shipped by the Brazilian firm G. Larue and Co., of Rio, in steamship *Annie Johnson*, from Rio de Janeiro to Gothenburg, hereby certify and bind ourselves that no part of said parcel shall by us or by other person be re-exported in their present condition, nor in any future state or form be exported to countries at war with Great Britain. The goods, which are still unsold, will be sold by us on arrival only against similar guarantees of the buyers, as our above, *i.e.*, that no part of the goods shall either directly by them or by any other person be re-exported in their present condition, nor be exported to countries at war with Great Britain in any future state or form."

Except in this declaration no guarantee was brought to the notice of their Lordships which covered the manufactured products as well as the raw material. The sixty-eight rollers shipped on the *Annie Johnson*, according to the evidence of Mr. Rooke, who was appointed as a chartered accountant to inspect the books of the Transmarina Company, Stockholm, had been sold prior to seizure to the Stockholm Skofabrik. There may be some doubt whether this sale took place before or after seizure, but the actual date is not of great importance. There is no doubt that the Skofabrik Stockholm did manufacture for export to enemy destination a large number of military boots, and that the rollers in question were suitable raw material for use in such manufacture. There is no evidence that the Svenska required from them any guarantee except against the export of the hides and leather. The question therefore which arises is whether, at the date of seizure, it was probable that military boots made out of the hides and leather seized would, but for such seizure, have had an enemy destination. It cannot be doubted that there was such a probability as would throw on the appellants the burden of proving affirmatively that the destination of any boots manufactured from the hides and leather was in itself innocent. It is said that it is difficult for a neutral trader to discharge the onus thus placed upon him. It would be competent for him to show that the raw material, if it had not been seized, would either have gone to manufacturers who did not export military boots from Sweden; or, if it had gone to manufacturers making military boots for export, to prove that the hides and leathers sold by them had been exclusively used in the manufacture of boots for home use. In the opinion of their Lordships the appellants have not adduced any sufficient evidence to discharge the onus placed upon them. The principles involved are to be found in *The Louisiana and other ships* (14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461), but this case has been so often followed that further reference to it is not necessary.

According to the evidence of Mr. Rooke, no part of the goods of any other of the above ships had been sold either by the appellants to the Svenska, or at all at the date of seizure. The goods shipped by the *Kronprins Gustav Adolf* and the *Kronprinsessan Margareta* (second voyage) were consigned to the Malmo Laderfabrik, a Swedish firm which is stated in the affidavit of Mr. Rooke to have carried on business at Malmo as manufacturers of boots, and to have manufactured during the war military boots for the Austrian Government. There does not appear, however, to be any corroboration of this statemant, and Mr. Svanstrom states that the firm was chosen because it was one of the biggest tanneries, financially sound, and there was reason to believe that its standing with the British authorities was good. The arrangement made was that the Malmo Laderfabrik should be consignees, on the understanding that they were to have the right to buy the lots after arrival and inspection. It is said, on behalf of the appellants, that the Transmarina obtained a guarantee from the Malmo Laderfabrik, including not only the hides and leather, but also the goods manufac-

tured from them. No doubt this form of extensive guarantee was mentioned in a letter from Stockholm of the 13th May 1916. The declarations of the Malmo Laderfabrik contained in the evidence do not, however, cover the manufactured products, but only the imported merchandise, and are in the following form:

"We, the undersigned, hereby declare that 300 rollers sole leather shipped about the 10th May 1916 from Rio de Janeiro on the motor ship *Kronprins Adolf* to Malmo, and consigned to us, are exclusively intended for consumption in Sweden, and that the said merchandise will not be re-exported."

Mr. Svanstrom, in his evidence, states that for all sales made by the Svenska or Transmarina Company guarantees were obtained, saying that goods were exclusively intended for consumption in Sweden. If the guarantees given by the Malmo Laderfabrik had extended to goods manufactured from the imported hides and leather, such guarantees would not in themselves have discharged the burden placed upon the appellants without some evidence that the guarantees, so given, had in fact been complied with. But the conclusion is that the guarantees were limited to imported merchandise. If the guarantees had been intended to cover the manufactured products they would not have been enforceable in Sweden, seeing that the Swedish Government, within its undoubted rights of sovereignty, had refused to prohibit exportation of manufactured products. The result is that the appellants have not in the case of any shipment discharged the onus of proof incumbent on them.

During the hearing in the Prize Court allegations were made affecting the conduct and good faith of the appellants and the Svenska. Sir Malcolm Macnaghten referred at length to the evidence, the letters, and other documents, on which these allegations were founded. In the opinion of their Lordships, it is not necessary for the purpose of determining whether, at the time of seizure, the appellants had discharged the burden of proving that the destination of the goods or of manufactured products made from them was not an enemy country, to determine whether the neutral traders mentioned had rendered themselves liable to the allegations of bad conduct and bad faith made against them. A neutral trader has the right to carry on his trade with an enemy, or to consign his goods to an enemy destination, subject always to the risks and liabilities which international law may impose. In the present case the appellants transferred all control over the goods to be exported to Sweden to the consignees or their representatives, taking guarantees which, whatever they may have thought as to their adequacy, were in their operation not effective. It is fair, however, to say that, in the opinion of their Lordships, the counsel for the respondent exercised a proper discretion in stating that he did not rely on the allegations made against the appellants as any part of his case, and that he did not propose to challenge the explanations given by Sir Malcolm Macnaghten as to the conduct and good faith of the appellants.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors: for the appellants, *Armitage, Chapple, and Co.*; for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Dec. 6, 1921.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.).

GRAHAM JOINT STOCK SHIPPING COMPANY LIMITED *v.* MOTOR UNION INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Loss of ship—Discovery of documents — Ship's papers—Action on policy by mortgagee—Duty to disclose documents and to obtain documents for disclosure—Affidavits by owner and other persons interested.

The mortgagees of a ship sued on a policy insuring the ship against war risks. The ship was alleged to have been lost at sea off the east coast of Spain in Feb. 1921 *by striking a mine. She was insured against war risks to an amount greatly exceeding the amount of the mortgages. The defence was that the ship had been wilfully lost by her master and crew with the connivance of her owner.*

Held, that the action should be stayed until the plaintiffs should make a proper affidavit of ship's papers, and should procure an affidavit from persons interested, and especially from the owner; or should satisfy the court that they had employed all possible means to procure such affidavits.

In an action upon a policy of marine insurance, a plaintiff must disclose every material document in his possession and in the possession of other persons interested; or else he must show that he has made every effort to obtain these documents and failed. He must also account on oath for the disappearance of any material documents which have been in the possession of himself or of other persons interested. Otherwise the action will be stayed.

Fraser *v.* Burrows (1877, 2 *Q. B. Div.* 624) *overruled.*

APPEAL by the defendants from an order of Greer, J., in chambers dismissing an application by the defendants.

(1) That the plaintiffs should file a further and better affidavit of ship's papers;

(2) That an affidavit of ship's papers should be filed by one Elie Angelis and J. and C. Harrison (London) Limited and any other persons, firms, or corporations having an interest in the proceedings;

(3) That pending compliance with pars. (1) and (2) the action should be stayed.

The plaintiffs, who were mortgagees, on the 19th April 1921, brought an action to recover for the total loss of the steamship *Ioanna* upon a policy of insurance against war risks effected with the defendants on the 30th Nov. 1920. They claimed under two mortgages. The first was dated the 28th July 1920, and made between Elie Angelis, of Athens, the owner of the ship, and the plaintiffs, and it declared that the plaintiffs had lent, on the 21st May 1920, to Angelis the sum of 145,000*l.* upon the security of a first mortgage on the whole of the shares in the ship. The loan was effected by bills drawn by

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

Angelis on the plaintiffs at three months to be discounted in London by the plaintiffs, and Angelis agreed to pay the cost of bills, stamps, and expenses of preparing and enforcing the mortgage and a commission on the bills. The loan was to be repaid in instalments extending over five years. J. A. Mango, shipowner, of London, was thereby appointed by Angelis to act as his attorney during the currency of the mortgage. The ship was to be insured at the expense of the owner against all risks, especially risks resulting from the war, and the policies of insurance were to be indorsed to the plaintiffs, who were empowered to enforce the mortgage to the fullest extent in the British courts. The costs and discount charges and commission on bills mentioned above amounting in all to 12,000*l.* were the subject of the second mortgage dated the 1st Sept. 1920.

On the 28th April 1921, an order was made that the action should be transferred to the commercial list and "that an affidavit as to ship's papers be given by the plaintiffs and parties interested. Stay unless given in twenty-one days."

On the 22nd June 1921, an affidavit of ship's papers was filed by the chairman of the board of directors of the plaintiff company, who deposed that the plaintiff company was only partly interested in the proceedings or in the insurance the subject thereof, and he stated: "To the best of my knowledge information and belief the plaintiff company has not now and never had in its possession custody or power or in the possession custody or power of its brokers solicitors or agents" any of the documents specified in Form 19 in Appendix K to the Rules of the Supreme Court "save and except the documents mentioned in the schedule hereto . . ."

The schedule contained a list of nineteen policies of insurance amounting in all to 399,500*l.* against war risks, including the policy sued upon; originals or copies of seventeen documents, and copies of fourteen letters.

On the 6th July 1921, an order was made in chambers on the plaintiffs' application fixing the 8th Dec. 1921, for the trial of the action.

On receiving the affidavit of the 22nd June 1921, the defendants' solicitors wrote to the plaintiffs' solicitors on the 25th July 1921, to say that it was insufficient, and they specified the following omissions among others:

(1) Marine risk policies.

(2) Slips for marine and war risk policies.

(4) Debit notes for premiums and receipts therefor.

(5) Builders' specifications and plans for hull and machinery of the vessel.

(8) Marconi operator's log.

(9) Copies of all Marconi messages sent to the vessel on the voyage from Newport News on which she was lost.

(13) Correspondence between Messrs. Simpson, Spence, and Young (the agents for the owners of the *Ioanna* in New York), and Mr. Papadakis the captain.

(14) Correspondence between Mango and Angelis.

(15) Correspondence between the captain and Mango or Angelis after the loss.

(16) Correspondence between Angelis or Mango and the plaintiffs relating to the mortgage, payment of interest thereon, chartering and loss of the steamer.

(17) The ship's register and crew list.

On the 29th July 1921, the plaintiffs' solicitors wrote:

We will deal seriatim with the various documents of which in your letter you demand production:—

(1) We will obtain these documents.

(2) The slips have never been in the plaintiffs' possession. Presumably they are held by the brokers, but we will endeavour to obtain them. . . .

(4) These are quite irrelevant and their production obviously unnecessary.

(5) Is it seriously suggested that production of the builders' specification for hull and machinery will in any way assist your clients in their defence? . . .

(8) The Marconi operator states that he saved nothing.

(9) We are ascertaining if any copies of Marconi messages exist. . . .

(13) and (14) We are asking our clients to make further inquiries as to whether any such correspondence exists. It is obviously not in their possession.

(15) We are instructed that no further correspondence exists other than that already produced.

(16) We are again inquiring of our clients whether any such correspondence exists.

(17) We will endeavour to obtain this. . . .

[The letter concluded:] When we have ascertained from our clients whether the further correspondence and documents to which you refer exist we will consider whether we can comply with your request for a further affidavit of ship's papers.

The defendants' solicitors wrote on the 4th Oct. 1921, that the order for ship's papers had not yet been properly complied with; that of the seventeen heads mentioned in their letter of the 25th July the further documents produced since then appeared to dispose of Nos. 3, 10, 11 and 12, and partially of Nos. 4, 14, and 15, but that none of the other heads had been dealt with at all, nor had any explanation been given of the failure to produce these documents; and that in addition to these they noticed references to the following documents which should be produced:

(A) A telegram from Angelis to Mango referred to in a letter from the former of the 24th Jan. 1921.

(B) telegram from Angelis to Captain Papadakis referred to in the same letter;

(C) earlier telegram of the 25th Jan. 1921, from Angelis to Mango referred to in later telegram of same date;

(D) "my previous letters" referred to by Angelis in a letter to Mango of the 28th June 1921;

(E) two letters from Captain Papadakis to Angelis referred to in this same letter;

(F) Correspondence between the plaintiffs and Messrs J. and C. Harrison (1920), Limited, with reference to the mortgage and charter of the vessel.

(H) The writ, orders and pleadings in an action commenced for the plaintiffs by Messrs. Crump against Messrs. Barber and D'Ambrumenil and Mr. Angelis, and any correspondence which has passed between the plaintiffs and Messrs. Crump, and Messrs. Crump and the defendants or their solicitors in connection therewith. The letter continued:—

In view of the issues which are raised in this action we must insist that all documents produced should be produced upon oath, and we must therefore ask for a further and better affidavit covering both the documents produced since the first affidavit was filed and also the further documents referred to in this letter and in our letter of the 25th July last.

On the 17th Oct. 1921, the plaintiffs' solicitors replied that the items (A), (B) and (C) were altogether irrelevant; that the letters included under (D) and (E) were written after action brought,

and that there was nothing to show that these letters related to the loss; and that the documents under (F) and (H) were irrelevant and outside the scope of the order for ship's papers.

On the 28th Oct. 1921, on the defendants' application, an order was made in chambers that the plaintiffs should file a further and better affidavit of ship's papers.

On the 12th Nov. 1921, the chairman of the plaintiff company made a further affidavit of ship's papers in which he deposed that on the date of making his affidavit of the 22nd June he had disclosed all the documents which were in possession of the plaintiff company as mortgagees, but upon written requests being made by the defendants' solicitors the plaintiff company had obtained further documents which were set out in the schedule, and that apart from the last mentioned documents and those set out in the former affidavit, the plaintiff company to the best of his knowledge information and belief had not then and never had in its possession, custody or power or in the possession, custody or power of its brokers, solicitors, or agents any insurance slips, policies, letters of instruction, &c. (continuing in the terms of Form 19, in appendix K to the Rules of the Supreme Court), save and except the documents set out in the schedule. The affidavit continued thus:

4. I have read the letter from the defendants' solicitors to the plaintiffs' solicitors dated the 25th July, and with regard to the various items mentioned therein and numbered (1) to (17) I say as follows:—

(1) The marine risk policies are set out in the schedule to this affidavit and have been produced.

(2) The slips for marine and war risks insurances have never been in the plaintiff company's possession and presumably they are in the hands of the brokers who acted on behalf of the owner in effecting the insurances.

(4) Such of these as the plaintiff company have been able to obtain have been produced and they are set out in the schedule to this affidavit.

(5) Such plans of the S.S. *Ioanna* as the plaintiffs have been able to obtain have been produced, but the builders' specification for hull and machinery is not in the plaintiffs' possession, and, it is submitted is not material. . . .

(8) The Marconi operator states that he saved nothing and the plaintiff company is informed that there is no log of his in existence.

(9) So far as the plaintiff company is aware there are no copies of Marconi messages sent to the vessel on her voyage from Newport on which she was lost in existence. . . .

(13 and 14) This correspondence was not in the plaintiff company's possession at the time of making my former affidavit, but such of it as the plaintiff company has since been able to obtain has been produced to the defendant company's solicitors.

(15) There is no correspondence in the plaintiff company's possession other than that already produced and to the best of the plaintiff company's information knowledge and belief there is no other such correspondence in existence.

(16) So far as the plaintiff company is aware there is no correspondence in existence other than that which has been produced.

(17) The plaintiff company has been informed that the ship's register and crew list which were saved by the captain were lost by him during his journey back to Greece.

The affidavit then stated as to (A) (B) and (C) (see above):

The plaintiff company has been unable to obtain the telegrams referred to or copies thereof, but it is obvious from the letters in which they are referred to that they are irrelevant.

(D) and (E). The letters referred to were written after the action was brought. They are not in the plaintiff company's possession and there is nothing to show that they relate to the loss of the *Ioanna*.

(F) and (H). The correspondence and documents referred to are irrelevant. . . .

The first part of the schedule specified various policies of insurance against marine risks amounting in all to about 399,000*l*., and about 150 documents, including certificates, telegrams, letters, and copies of letters and telegrams, and others.

The statement of claim in the action was delivered on the 17th Nov. 1921. It alleged that on the 19th Feb. 1921 the *Ioanna* struck a mine off the east coast of Spain and thereafter was totally lost. The defence, delivered on the 30th Nov. 1921 alleged that the loss was not caused by war perils, but was caused by the wilful casting away of the steamer by her master or officers and crew or by the fraud of the owner, Elie Angelis, or his agents in procuring or conniving at the wilful casting away of the steamer.

On the 24th Nov. 1921 application was made for a further and better affidavit of ship's papers as aforesaid to Greer, J., who refused the application. The Court of Appeal gave leave to appeal. On the hearing of the appeal an affidavit by D. T. Garrett, a member of the firm of solicitors representing the defendants, was read, which, after setting out (*inter alia*) the grounds for suspecting that the ship had been wilfully lost by the master and crew, concluded by submitting "having regard to the circumstances of this loss and to the fact that the plaintiffs are suing as mortgagees only, in which capacity many of the most important documents bearing upon the case would not be in their possession or power, it is essential to the proper investigation of this case by the court and to the preparation of the underwriters' defence that an affidavit of ship's papers should be sworn by the said Elie Angelis and by all other parties interested in the subject matter of the action. . . ."

Raeburn, K.C. and *Beazley* for the appellants, the defendants.

Hogg, K.C. and *Jowitt* for the respondents, the plaintiffs.

Bankes, L.J.—This is an appeal from a decision of Greer, J. which raises the question whether there should be a further and better affidavit of ship's papers in this action. The order was made on the 28th April upon an order for directions: "That an affidavit as to ship's papers be given by the plaintiffs and parties interested. Stay unless given in twenty-one days." I am not sure whether any formal order was drawn up for ship's papers or not. After the discussion that we have heard I cannot help thinking that either some form should be adopted in the Commercial Court to follow such a general order as the one I have just read, or that the parties should draw up an order in each case. There is a formal order given in the Appendix to the Rules of the Supreme Court, Form No. 19 in Appendix K. There is a note appended to that form by the editors of the Annual Practice that the form of order omits certain words which were held in the *China Transpacific Steamship Company* v. *Commercial Union Assurance Company* (45 L. T. Rep. 647; 8 Q. B. Div. 142) to be words that might be, or ought

to be, included in the order, and it further appears that there is a Law Stationers' form of order in use which is apparently in proper form including the words which are omitted from the official order, and which fills up the blanks in the official order with proper language. The only observation that I have to make about the Law Stationers' form is that there may be cases in which, in addition to the order, "the plaintiffs and all persons interested in these proceedings and in the insurance, the subject matter of the action do produce," and so forth, the name of some party interested from whom an affidavit is required should be specifically inserted.

This action is brought by the mortgagees of a ship called the *Ioanna* owned by a Greek subject claiming against war risk underwriters an amount which the plaintiffs say is due to them upon their mortgage, the ship having been sunk through coming into collision with a mine. Among other defences the defence is raised that "the loss, if any, was caused by the wilful casting away of the steamer by her master or officers and crew." It is obvious, therefore, that a very serious issue is raised and a very large amount of money is involved. The order, as I have said, was made in that general form, and an affidavit was made by Mr. Graham on behalf of the plaintiffs. The first affidavit that he made was clearly insufficient. A second affidavit was asked for and an order was made for a further and better affidavit, and it is said that the second affidavit is also wholly insufficient. The matter came before Greer, J., on an application for a further and better affidavit, and we are told by counsel for the plaintiffs that certain offers were made by the plaintiffs of an affidavit which they were prepared to have sworn by the agent in this country of the Greek owner. Apparently the learned judge thought that having regard to the date fixed for the trial and the offers which were made by the plaintiffs in reference to this further affidavit, and probably also some explanations that may have been given by counsel for the plaintiffs, he ought not to make any order.

I do not agree with that view. I think this case is one in which the court ought to say that the defendants are entitled to a strict observance of the practice with regard to ship's papers. It now appears at a very late stage that the Greek owner is very largely interested in the policies on this vessel, which the defendants allege was cast away. One of the documents for which the defendants were pressing was the current account between the plaintiffs, the mortgagees, and the Greek owner. This was not disclosed either in the first or second affidavit of ship's papers; because, it is said, the materiality of it was not recognised. That means that sufficient attention was not paid to the real issues in this case; but whatever was the reason, the fact of the non-disclosure is in itself a ground for saying that in this case the defendants are entitled to have the practice strictly followed.

The plaintiffs' affidavits are defective in several respects: first, there is no affidavit by the Greek owner, who, it now appears, is a person deeply interested, and no reason is given for its absence. Documents which have been in the possession of the owner or the plaintiffs, and which are not forthcoming, are not accounted for. The affidavits are insufficient on these points and on the other points referred to in Mr. Garrett's affidavit. We are told that in the court below considerable reliance was placed upon the case of *Fraser* v. *Burrows* (2 Q. B. Div. 624), and the respondents still rely upon it. That case was decided by a court which consisted of Kelly, C.B. and Field, J. The facts there were that the plaintiffs were insurance brokers who had effected a policy on a cargo of oats on board the *Speedwell* on a voyage from Prince Edward's Island to the United Kingdom. The plaintiffs acted as agents for Hindman, the owner of the vessel and her cargo. The defendant underwrote a policy for 100*l*. After the policy was effected the cargo was sold to Hurrell, the real plaintiff in the action. Hindman was still in Prince Edward's Island, and it would appear upon those facts that he had ceased to have any interest at all in the cargo. Cleasby, B., who had great knowledge and experience in matters of marine insurance, made an order staying proceedings until the plaintiffs should produce an affidavit by Hindman of ship's papers and other documents in Hindman's possession. There was an appeal from that order. It is not necessary to say whether or not the court might, in its discretion, have allowed the appeal having regard to the fact that Hindman had ceased to have an interest in the cargo, and there is no evidence that the defendant was setting up that there had been any concealment on Hurrell's part; it is not necessary to consider that. But it is necessary to consider whether the decision of the court was based on grounds consistent with the practice then established or subsequently recognised. Kelly, C.B. said (2 Q. B. Div., at p. 625): "It does not appear that there has been any fraud on the part of either the nominal plaintiffs or the real plaintiff." Of course that at once distinguishes that case from this, where fraud is alleged. "The order stays the action until they shall have done something which it is in effect impossible for them to do. This order could not have been maintained before the Judicature Acts, and sect. 21 of the Supreme Court of Judicature Act 1875 shows that it was intended to preserve existing procedure, so far as it was not inconsistent with the new procedure." Field, J. came to the same conclusion. In my opinion, the statement by Kelly, C.B. that this order could not have been maintained before the Judicature Acts is not in accordance with the practice, and I do not think that this case ought to be regarded as an authority so far as the grounds upon which the order was made are concerned. I think that it is apparent from what is said in one or two other cases to which I will refer.

The next case is *West of England and South Wales District Bank* v. *Canton Insurance Company* (1877, 2 Ex. Div. 472). That was decided in May of the same year and by a court consisting of Kelly, C.B., who had been a member of the court in *Fraser* v. *Burrows* (1877, 2 Q. B. Div. 624) in the preceding March, and Cleasby, B., who had made the order then appealed against. The order in the later case was that all parties interested in addition to the parties to the action should make an affidavit. Kelly, C.B. said (2 Ex. Div., at p. 474): "I regret that the notice of motion prays for an order in this peculiar and unsatisfactory form—namely, that the action shall be stayed—not till the plaintiffs shall have satisfied the court that they have resorted to all reasonable, lawful, and practicable means in their power to produce, or cause to be produced, the ship's papers—but that the action shall be

stayed till they have caused or procured affidavits to be made by a number of other persons over whom they may possess no control. I regret that the form is in those terms; but as it appears to be the form in which in actions of this kind orders have been made at chambers for a very long time, I think we shall be doing no injustice by making this order absolute." It seems to me that the Chief Baron directly went back from what he had said in *Fraser* v. *Burrows* (*sup.*) and recognised that he had been wrong in there saying that the order could not be maintained before the Judicature Acts. He went on to point out that "If the plaintiffs on another occasion apply to us showing that there is an absolute impossibility on their part in complying with the order, we may then consider what it is our duty to do." In the later case of *China Transpacific Steamship Company* v. *Commercial Union Assurance Company*, Brett, L.J., who also had great experience in these matters, said (45 L. T. Rep. 647, 8 Q. B. Div., p. 145): "Long before the Judicature Acts, the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, expecially at the time of the loss, is entirely unknown to the underwriters. The practice, therefore, arose of making the order on all parties interested, without an affidavit. Then after the Judicature Acts, the question arose whether this practice had been altered, and it was held in *West of England and South Wales District Bank* v. *Canton Insurance Company* (*sup.*) for the reasons there given, that it had not. As for the hardship on the plaintiffs, Cleasby, B., who was beyond all others conversant with this head of the law, points out in the same case that a plaintiff must show that he has used every effort to discover, and that if he has *bonâ fide* done all he can he will not be prejudiced." I think Brett, L.J., there, although he does not say so in terms, is expressly disapproving of what Kelly, C.B. said in *Fraser* v. *Burrows* (*sup.*). The practice, therefore, being what it is, in my opinion this affidavit is wholly insufficient and an order must be made for a further and better affidavit, and in that order I think the provision should be inserted that one of the parties to make an affidavit shall be the Greek owner. It will then lie upon the plaintiffs either to procure an affidavit from the Greek owner or to satisfy the court that they have used all possible means of getting him to make an affidavit and that he has refused. I think they must also in the further and better affidavit deal with those points which I have already referred to and upon which the affidavit appears to me to be quite insufficient.

The appeal must be allowed, and the further affidavit ordered, and the trial must be adjourned until the order has been sufficiently complied with.

Scrutton, L.J.—I agree. This is an appeal against an order refusing to order a further affidavit of ship's papers to be made and refusing to postpone the trial. The subject-matter of the case, on which I express no opinion, as I have no materials for forming one, is the alleged total loss of a Greek ship, insured for between £300,000 and £400,000, by a mine some very considerable time after mines ceased to be used on the seas. The underwriters allege, whether correctly or not I do not know, that just about this time, when insured values were much above the market values of shipping, an extraordinary epidemic of disasters fell upon Greek ships, including this one, by which mines attacked them in places where fortunately no loss of life occurred to the crew and where incidentally the loss of the ship was a gain to her owner. Such a case is obviously one in which the underwriters are entitled to the fullest investigation.

One of their means of investigating is the affidavit of ship's papers, which strikes anyone not accustomed to marine insurance as an odd proceeding until its history and the reasons for it are explained. An order for ship's papers is strictly limited to marine insurance, which is a contract of the greatest good faith. When a loss occurs the underwriters know nothing about the circumstances, and the owner and persons interested may know everything. When the contract of insurance is made it is the duty of the owner to make the fullest disclosure of every material fact to the underwriters; not merely to abstain from active misrepresentation, but to tell the underwriters all the material facts he knows; and consequently for centuries it has been the practice in actions on polices of marine insurance to order the assured as soon as the writ is issued to make by himself and procure other persons interested to make an affidavit of ship's papers which should disclose not only every document in his possession but every document in the possession of those interested, though they are not known to himself, or else he must show that he has made every endeavour to obtain those papers and has been unable to obtain them; and his action is stayed until he has complied with the order. It is of the greatest importance to marine insurance and to the existence of underwriters that this security of theirs should be preserved. In this case it seems to me quite clear that the plaintiffs, against whom no charge whatever is made, and their advisers, have not understood what is meant by an affidavit of ship's papers. It does not mean that the assured may wait until he is asked by the underwriters to disclose a document, which appears to be one of the untenable positions taken up by the plaintiffs in this case; it does not mean that the assured may withhold material documents merely because he thinks they are not material. He must make the fullest disclosure of documents that he has in his possession, and if the documents are in the possession of other persons interested he must do his utmost to get them and explain on affidavit, if he has not been able to get them, what he has done to get them, and why he has not been able to get them; and he must account on oath for the disappearance of documents which have been but are no longer in the possession of himself or persons interested. This last remark is peculiarly relevant in this case, because it is alleged that the disaster which sent this ship to the bottom sent with her all her logs and all the documents connected with her voyage. If so, the affidavit of ship's papers must deal with the matter. The writ in this action was issued on a policy of 20,000*l*. The plaintiffs are mortgagees. Their actual interest under their mortgage is said to be

about £140,000. It appears the ship was insured for between 300,000*l.* and 400,000*l.*, and at a very early stage, as is very proper and right in this action, a consolidation agreement was made by which the underwriters on the whole 300,000*l.* or 400,000*l.* were bound by the result of the action. The person interested in the balance over and above 140,000*l.* is the owner. It is, therefore, a case in which it is essential that the owner should be concerned in the affidavit of ship's papers. I am quite satisfied that so far the plaintiffs have not complied with the order for an affidavit of ship's papers. They have not shown the efforts that they have made to obtain the papers in the possession of other persons interested, or the results of those efforts. They have not shown on oath that the documents in the possession of the persons interested have now ceased to be in the possession of those persons, and they seem to me to have completely misunderstood the materiality of the current account. It is perfectly true that there is a mortgage with a sum indorsed on it for £145,000. That sum may not be right. It may have been paid off. The current account is, therefore, a most material document, and I cannot conceive why it was not mentioned in the first affidavit of ship's papers.

Therefore, there are abundant grounds for making the order for a further and better affidavit of ship's papers against the plaintiffs; but further the owner on the facts stated is interested to a very large extent, and he also should be ordered to make an affidavit of ship's papers, and the action should be stayed until that has happened. The learned judge below, I understand, refused to make the order on the owner relying on the decision of *Fraser* v. *Burrows* (2 Q. B. Div. 624) decided in 1877. When the Judicature Acts came into force there was for some time a question in this as well as in other matters of their effect on the preceding practice, and one of the questions was whether an order for discovery had superseded the marine insurance practice as to ship's papers. In *Fraser* v. *Burrows* (*sup.*) Cleasby, B., to whose knowledge of marine matters I need add nothing to the testimonial given by Lord Esher, made the ordinary order under the old form for an affidavit by the owner of ship's papers. It was objected that the Judicature Acts did not allow such an order; that the owner was out of the jurisdiction of the court, and ought not to be ordered to make such an affidavit. Kelly, C.B., and Field, J., relying on the procedure of the Judicature Acts, declined to make such an order. Two months later a similar case, an action by a mortgagee, came before Kelly, C.B. Again it was argued that the only order for discovery that should be made on the mortgagee was an order to produce documents in his possession. Of course, the ship's papers in his possession were practically none. On that occasion Cleasby, B. was sitting with Kelly, C.B., and was able to inform him of the old practice. In the result the Chief Baron went back on his former decision, and adopted the old practice as explained to him by Cleasby, B. In 1881, four years later, the matter came before the Court of Appeal, including Jessel, M.R., who had been the chairman of the committee which drafted the Judicature Rules, and Lord Esher, then Brett, L.J., whose familiarity with marine insurance matters needs no testimonial from me, and they adopted the view taken in the second case that the procedure in marine insurance was not affected by the provisions of the Judicature Acts. In my view *Fraser* v. *Burrows* (*sup.*) was wrongly decided, and should no longer be followed.

This is peculiarly a case where the plaintiffs and all persons interested should be ordered to make an affidavit of ship's papers and the order should be enforced on the owner who is largely interested in these policies. The plaintiffs must make a further affidavit; an affidavit must also be made by the owner as a person interested: documents which were, but are no longer, in the possession of the persons interested must be accounted for; the plaintiffs must show on oath what steps they have taken to obtain documents from those interested, and the result of their efforts, and there must be a stay until the order is complied with. I am not deciding what will happen or under what circumstances that stay can be removed; it may be that if no affidavit can be obtained from the owner the plaintiffs may be allowed to go on. Speaking for myself I should require to be very thoroughly satisfied that the owner could not be induced to make the affidavit before I allowed this action to go on; a merely formal statement of request and refusal would certainly not satisfy me.

Atkin, L.J.—I agree with both the judgments which have been delivered, and it seems unnecessary to repeat what has already been said. I merely desire to call attention to two points. First of all, I think attention should be directed to the form of order to be used in the Commercial Court when an order for ship's papers is made. Form 19 in Appendix K to the rules does not seem to me to be a satisfactory form at the present time.

I would only add my agreement with the other members of the court that *Fraser* v. *Burrows* (2 Q. B. Div. 624) must now be taken to be overruled.

Appeal allowed.

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

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

Nov. 9, 10, *and Dec.* 9, 1921.

(Before Bankes, Scrutton, and Atkin, L.JJ.)

Ariadne Steamship Company *v.* James McKelvie and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Signature by charterers — "As agents"—Effect of signature—Liability of charterers.

A charter-party stated as follows: "It is this day agreed between Thomas H. Seed and Co. Limited, agents for the owners of the steamship Ariadne Irene, *and James McKelvie and Co. Newcastle-on-Tyne, charterers." It was signed "By authority of owners, for Thomas H. Seed and Co. Limited, A. D. Cadogan, as agents" and "For and on behalf of James McKelvie and Co., as agents, J. A. McKelvie." The plaintiffs as owners sued the defendants as charterers for demurrage which by the charter-party was to be paid by the charterers.*

Held (Scrutton, L.J. dissenting) that upon the true construction of the charter-party the defendants by their signature had deliberately expressed their intention to exclude any personal liability.

Judgment of Bailhache, J. reversed.

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

APPEAL by the defendants from the judgment of Bailache, J.

The facts which are sufficiently summarised in the headnote are fully set out in the judgments. The defendants contended that they were not liable as they were only agents without personal liability.

Bailhache J. held on the authority of *Lennard* v. *Robinson* (5 E. & B. 125) that the defendants were personally liable.

The defendants appealed.

R. A. Wright, K.C. and *S. L. Porter* for the appellants.

D. C. Leck, K.C. and *E. A. Digby* for the respondents.

Dec. 9, 1921.—The following judgments were read:

BANKES, L.J.—This appeal raises the much-discussed question as to whether an agent has, by the form of language used in a particular document, sufficiently protected himself against personal liability. The question must always resolve itself into a question of construction of the document in question. Decided cases, therefore, except where the language of the two documents is practically identical, can serve only as guides, and not as authorities. In dealing with any particular case it seems to me material to determine first of all whether the words relied on as relieving an agent of personal liability are merely words of description, or whether they are words of qualification. If the former, then no effect can be given to them. If the latter, then the document must be read as a whole for the purpose of ascertaining whether the qualification is sufficiently expressed to govern the document. In dealing with this last point, I think that the form in which the signature to a document is expressed should have great weight attached to it, because it is by the signature that the party expresses his consent to the terms of the document. If the consent is expressed with the qualification that it is given only as agent, I think that it must require very strong and plain language in the body of the document to get rid of that qualification and to establish that the agent really intended to make himself personally liable on the document in spite of the form in which the signature is expressed. In some of the decided cases no special attention appears to have been paid to the question of whether the words of qualification were annexed to the signature or appear in the body of the document. My own view is that it is a sound rule of construction applicable to cases like the present, that where the signature is unqualified the presumption is that the agent is personally liable, but that where sufficient words of qualification are annexed to the signature to indicate that the person signing signs as agent, the presumption is the other way. No doubt the presumption in either case may be rebutted, and it must always be a question of construction merely whether, taking the document as a whole, the presumption is or is not rebutted.

This view is, I think, quite in accordance with the decided cases, some of which are decisions in reference to charter-parties and some in reference to contracts in writing other than charter-parties. The case of *Tanner* v. *Christian* (14 E. & B. 591) was decided in the year 1855. In that case the contract was signed by the agent in his own name, and the court, consisting of Lord Campbell, C.J., Wightman and Crompton, JJ., found nothing in the body of the document to displace the presumption of personal liability, although the agent was described as a party "for and on behalf of" a named person. In giving judgment in that case, Wightman, J. said that one test for ascertaining whether a person acting for and on behalf of another has contracted so as to bind himself personally is to see who by the provisions of the contract is to act in the performance of it. The Court in that case did place reliance on certain provisions in the contract as indicating an intention that the agent should be personally bound. But both Lord Campbell, C.J. and Crompton, J. lay special stress upon the fact that the agent signed in his own name without qualification. *Lennard* v. *Robinson* also decided in 1855, by a court consisting of Lord Campbell, C.J., Coleridge and Erle, JJ. (5 E. & B. 125) was a charter-party case. It was upon the decision in this case that Bailhache, J. founded his judgment. The charter-party in that case commenced thus: "It is this day mutually agreed between Mr. John M. Lennard, owner," &c. "and Messrs. Robinson and Fleming, of London, merchants," and it was signed "By authority of, and as agents for, Mr. A. H. Schwedersky, of Memel, pro Robinson and Fleming; Wm. F. Malcolm, John M. Lennard." In his argument the counsel for the plaintiff laid great stress upon the special form in which the document was signed. He interpreted it as meaning only that the principal authorised Messrs. Robinson and Fleming to make the contract in the form in which it was made; that is as between the plaintiff and the defendants on their own behalf. Lord Campbell, C.J. appears to have accepted this argument. He says at p. 130: "Looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract they are contracting parties, and they may well become so "by authority of, and as agents for," their employer; that is, he may be made liable to them. That, however, does not alter the effect of the instrument by which they become contracting parties as between themselves and the plaintiff." Coleridge and Erle, JJ. give no grounds for their decision, though the former attaches importance to the fact that the alleged principal was a foreigner. I cannot regard this as a decision in reference to a contract signed by a person "as agent" without more. It appears to me to be a decision in reference to the special language of the particular document. *Parker* v. *Winlow*, decided in 1857 (7 E. & B. 942) was also a charter-party case, where the charter-party, though expressed to be made between Parker and Winlow, agent for E. Winlow and Son, was signed by Winlow without restriction. The judgments of Erle, and Crompton, JJ. appear to me to strongly support the view I have ventured to express. The former says, at p. 948: "I agree that the defendant has bound himself. He says that he is agent for E. Winlow and Sons, but that is not enough to rebut the inference of personal liability arising from the rest of the contract." The latter at p. 949: "Mere words of description attached to the name of a contractor, such as are used here, saying he is agent for another, cannot limit his liability as contractor. A man, though agent, may very well intend to bind himself; and he does bind himself

if he contracts without restrictive words to show that he does not do so personally. It is important that mercantile men should understand that, if they mean to exclude personal recourse against themselves on contracts which they sign, they must use restrictive words as if they sign per procuration, or use some other words to express that they are not to be personally liable." *Deslandes* v. *Gregory* decided in 1860 (2 E. & E. 602) is another charter-party case. There the contract was expressed to be between the plaintiff and the defendants "as agents to Samuel Ferguson," and was signed by the defendants "as agents." All three judgments in that case support the view I am taking, but the judgment of Hill, J. in the court below and of Williams, J. in the Exchequer Chamber are so much in point that I read them. Hill, J. says, at p. 610: "The point seems to me to be determined by the form of the signature to the charter-party, which is in effect the signature of Ferguson, by Gregory, Brothers, as his agents, not the signature of Gregory, Brothers binding them personally. The description of the defendants in the introductory part of the charter-party, as Ferguson's agents, is ambiguous, and might not, taken alone, have been sufficient to exclude the defendant's personal liability, but the signature clearly shows that the intention of the parties was that Ferguson should be the party to the contract: hence the signature of the defendants imposes no further obligation upon them than that implied by law, namely, that they had authority, as agents, to bind Ferguson." Williams, J. says at p. 611: "We are all of opinion that the judgment of the Court of Queen's Bench was right. The form of the charter-party and the mode of signature, taken together, are decisive to show that the defendants did not bind themselves by the contract as principals. They sign 'For Samuel Ferguson, Esq., of Anamaboe, Gregory, Brothers, as agents.' It would require extremely plain words in the body of the contract to control the effect of that mode of signature, and no such words are to be found there, the contract purporting to be made by 'Messrs. Gregory, Brothers, as agents to Samuel Ferguson, of Anamaboe, merchants and charterers.'

The only argument that can be relied upon by the appellant is that the words "merchants" and "charterers" are in the plural; but this evidently happened by mistake, and the words occur, moreover, in the printed part of the charter-party. It must be noted that a very strong court found no difficulty in that case in reading the clauses in the charter-party dealing with the obligations of the charterer as applicable to the defendants' principal, even though he was, according to the report, "a black man resident and trading on the coast of Africa." The charter-party in that case provided for notice of the vessels being ready to load or to discharge being given to the charterers or their agents. I see no difficulty, in a case where an agent attempts to exclude any personal liability by signing, as agent, in reading those clauses in the charter-party which impose a personal liability upon the charterer as referring to the agent's principal and those clauses which refer to the giving of notices as referring to the principal or his agent. I do not find any charter-party case where an agent signed "as agent" merely in which the court has held that the references in the body of the charter-party to obligations undertaken by the charterers are sufficient to negative the contention that the agent was not personally liable. *Gadd* v. *Houghton*, decided in 1876 (35 L. T. Rep. 222; 1 Ex. Div. 357) was not a charter-party case, but it is a decision which has been very generally approved of and which contains very strong expressions of judicial opinion with regard to the qualification of a signature. In that case the qualification relied on was in the body of the document, and the signature was without qualification. The court held that the words in the body of the document were sufficient to exclude the personal liability of the agent, but in reference to the expression "as agents" and to the importance of the form of the signature several of the members of the court expressed a strong opinion. James, L.J. at p. 359, referring to *Paice* v. *Walker* (L. Rep. 5 Ex. 173) says this: "As to *Paice* v. *Walker* (*sup.*), I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea." Quain, J. says at p. 360: "It seems extraordinary that there should be any doubt whether this binds the principal or the agent. It is said that in order to relieve the agent from liability, he must sign 'as agent' or 'on account of' Morand and Co." I cannot see the necessity for adding those words to the signature if you can gather from the contract that he makes it on account of Morand and Co. And Archibald, J. says at p. 361: "The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent." The decision in *Gadd* v. *Houghton* (*sup.*) must, I think, be treated as containing the rule of construction to be applied where an agent signs a contract such as the one in that case "as agent."

In the present case the document under consideration is a charter-party. The agent is described in the body of the document as the charterer, but he signs as agent. If it is correct to consider that a signature "as agent" controls the entire document, unless a clearly expressed intention to the contrary appears, I do not find anything in the charter-party under consideration which is, in my opinion, a sufficient expression of such an intention. I do not think that the authorities dealing with the cases of charter-parties to which I have referred, are opposed to this view, and I think that it is to the interest of the commercial community generally that a signature "as agent" should have a generally accepted meaning as a deliberate expression of intention to exclude any personal liability of the signatory, and that in reference to the meaning to be attributed to such a signature, a distinction should not be drawn between classes of contracts, nor should it be considered necessary to search each clause in a possibly long and complicated printed document in order to discover some ambiguous expression on which to found an argument that the parties intended that the agent should be personally liable. I differ on such a matter from so very experienced a judge as Bailhache, J. with considerable hesitation, but I do not feel the difficulty he felt in relation to the provision for giving notice to the charterer which would, as it seems to me, be complied with by giving notice to the person whom the principal appointed as his agent with authority to describe himself as charterer, though at the same time limiting his personal liability; nor for the reasons which I have endeavoured to explain do I share the learned judge's view in drawing the distinction which he

suggests may well be drawn between charter-parties and contracts made by brokers. There are, of course, certain classes of documents, such as cheques, bills and promissory notes to which the considerations as to signing "as agent" do not apply. I only mention this fact in order to make it clear that nothing that I have said in this judgment applies to such documents as these. For the reasons I have given I think that the appeal succeeds, and the judgment must be set aside, and entered for the defendants with costs here and below.

SCRUTTON, L.J., read the following judgment: The charter-party in this case began: "It is this day agreed between Thomas H. Seed and Co. Ltd., agents for the owners of the steamship *Ariadne Irene* and James McKelvie and Co., Newcastle-on-Tyne, charterers." It was signed "'By authority of owners, for Thomas H. Seed and Co., Ltd. A. D. Cadogan, as agents,' and 'For and on behalf of James McKelvie and Co., as agent or agents'—the writing is not clear—'J. A. McKelvie.'" The owners of the steamer, the Ariadne Steamship Company Limited then sued James McKelvie and Co., as charterers, for demurrage which by the charter, was to be paid by "charterers." The defendants contended they were not liable, as they were only agents without personal liability. Bailhache, J. decided against them on the authority of *Lennard* v. *Robinson* (*sup.*) which is very similar in its facts..

The defendants appeal, contending amongst other things, that *Lennard* v. *Robinson* (*sup.*) was wrongly decided. The argument before us let loose the bewildering number of authorities with which all who have experience of this branch of the law are acquainted. After hearing them Parker, J. in *Chapman* v. *Smith* (96 L. T. Rep. 662); (1907) 2 Ch. 97) was driven to say (p. 103), that he need not consider them as the question was in each case a question of construction, having regard to the surrounding circumstances. This of course, makes any one case of very little use as a guide how the court will decide another case, but is a tempting conclusion when one considers the conflicting character of the decisions reported. If it is possible to find any principles that should guide future controversies, the attempt should be made. *Primâ facie* the persons liable on a written contract, the parties to it, should be discovered from the writing itself. It is possible, however, to add by oral evidence the liability of a party to that of the party named in the instrument, as where evidence is given to bind an undisclosed principal of the named party but in such a case the named party remains liable even if the other party knew he was an agent. Both undisclosed principal and his agent described as a party may be liable, see the well-known case of *Higgins* v. *Senior* (8 M. & W. 834). It is possible also, according to *Wake* v. *Harrop* (6 H. & N. 768) to discharge a person stated as a party in an instrument by evidence that it was orally agreed between the parties that he should not be liable but his principal should, though the members of the court did not agree whether it was a good defence in law, or only in equity.

Wilde, B., following *Lennard* v. *Robinson* (*sup.*), p. 777, thought it was a bad plea in law. Bramwell, B., who thought it was a good plea in law, distinguished *Lennard* v. *Robinson* (*sup.*), inasmuch as in that case there was only knowledge of agency, and this was consistent with the agent's taking a personal liability; no agreement that he should not be liable was alleged. The House of Lords in *Fred. Drughorn Limited* v. *Rederi Aktiebolaget Transatlantic* (14 Asp. Mar. Law Cas. 400; 120 L. T. Rep. 70; (1919) A. C. 203) allowed evidence to be given to add the liability and rights to sue of an undisclosed principal of a person described as "charterer" on the ground that a person described as "charterer" might yet be an agent; but Lord Sumner expressly states that the person described as "charterer," though he proved an undisclosed principal, "was personally liable to perform the obligations which the contract imposed on the charterers." The old form of cesser clause expressly provided that as the charterer entered into the charter on behalf of another his liability as charterer ceased on the happening of certain events, recognising that many shippers of cargo appeared as charterers on the terms that they should cease to be liable when they had shipped the cargo. On principle it seems to me that there are two places in the contract of special importance in ascertaining who is personally liable on it. The first is the description of the parties to the contract; the second is the form in which they assent to the contract by affixing their signature. Where in both cases they describe themselves as agents, it is almost impossible they should be held liable, except in the case of deeds. Where in neither case do they qualify their liability, it is almost impossible they should escape liability. What is to happen where they assume personal liability in the one place and describe themselves as agents in the other? It appears to me, to use the words of Archibald, J. in *Gadd* v. *Houghton* (*sup.*), you must be able to gather that they contract only as agents—that is, that they undertake no personal liability, but merely as agents effect a contract on which their principal is the only contracting party. Mellish, L.J. in *Gadd* v. *Houghton* (*sup.*) treated unqualified signature as *primâ facie* implying liability, and requiring "something very strong on the face of the instrument" to displace it. The same view was stated by the majority of the Court of Appeal in *H. O. Brandt and Co.* v. *H. N. Morris and Co. Limited* (117 L. T. Rep. 196; (1917) 2 K. B. 784). The facts which displaced the strong *primâ facie* presumption in *Gadd* v. *Houghton* (*sup.*) were that the purchaser told a broker in Liverpool to "telegraph out" (to Spain) "an order on my account for . . . oranges of the brand James Morand and Co. . . . f.o.b." The broker telegraphed out the order to James Morand and Co. and received an acceptance. So far the transaction was clearly between the buyer and James Morand and Co. The broker then sent a sold note to the buyer: "We have this day sold to you on account of James Morand and Co.' and signed without qualification.

The court held that the transaction so effected displaced the presumption, and the first letter of the buyer seemed to exclude any idea of a contract with the broker. It appears to me that unqualified description as a party to the contract is at least equally strong as importing personal liability as unqualified signature, unless negatived by very strong language in the rest of the contract, and that a later description as agent does not necessarily exclude personal liability, particularly when the person described as a party is himself going to perform some of the duties of a charterer. It is

true that the signature assenting to the terms of the contract is affixed "as agent," but it assents to the terms of a contract in which the writer is described as a party to the contract. The person supplying and loading the cargo and to whom telegraphic advice of readiness to load is addressed is frequently the person described as charterer; and it was for his benefit that the cesser clause in its original form was inserted to free him from his original liability when he had completed the shipping of the cargo, a lien on which would provide security for the performance of the rest of the obligations. This position of shippers undertaking the first obligations of charterers has been recognised in numerous cases which I gather we are invited to overrule. In *Cooke* v. *Wilson* (1 C. B. (N.S.) 153), in 1856, the charter was made between Wilson and Cooke on behalf of the Geelong and Melbourne Railway Company to ship goods in England and deliver them to Geelong in Australia, and signed in Cooke's name without qualification. Cooke was held a party and liable, as there were things in the charter he was to do, and the description did not exclude his personal liability. *Lennard* v. *Robinson* (*sup.*) was decided by the Queen's Bench in 1855. Robinson and Fleming, merchants, were one of the named parties to the contract and signed by authority of and as agents for Mr. A. H. Schwedersky of Memel. The charter contained a number of terms that "merchants" should perform, and again the description as a party to the contract was held sufficient in spite of the signature. In *Parker* v. *Winlow* (*sup.*) in 1857, the charter was between Parker and G. W. Winlow, agent for E. Winlow and Son, and was signed G. W. Winlow in his own name. Martin, B. and the Court of Queen's Bench held G. W. Winlow liable, Lord Campbell saying that a man might pledge his personal liability, though he was agent, as both agent and personally liable. These cases were decided on the lines on which Bailhache, J. decided the present case. He also refers to the terms of the charter in this case which the defendants would be concerned with, shipment and sailing telegram, and he follows *Lennard* v. *Robinson* (*sup.*). He adds a remark with which I entirely agree: "I may perhaps add that in my opinion it requires clearer words of intention to exonerate a merchant who allows himself to be described in a charter-party as charterer from personal liability than are necessary in contracts made by brokers who may be presumed from the very fact of their calling to be acting as agents merely and not as principals." I also think that when the facts of *Gadd* v. *Houghton* (*sup.*), a case of broker's liability, are appreciated, it is quite unnecessary to conclude that the Court of Appeal meant to lay down a principle which would overrule at least three decisions on a different form of business which had then stood for twenty years without question. For these reasons I concur in the judgment of Bailhache, J. and think the appeal should be dismissed with costs.

Atkin, L.J. read the following judgment.—This case raises anew the question as to the effect to be given to the words "as agents" qualifying the signature to a written agreement. In the present case the dispute arises over a charter-party, but a charter-party differs not from any other contract in respect of the principle applying to its formation and construction, and I apprehend the dispute must be determined on principles common to contracts as a whole. A contract in writing appears to be a term capable of more than one meaning. The parties may agree verbally, and subsequently may reduce the terms of their agreement into writing. If such is their intention the terms can only be ascertained by the construction of the writing; the assent of the parties to those terms, if they have not signed the document, may be proved by parol evidence. If the parties have signed it, or if the document itself constitutes the contract, *i.e.*, if the parties only arrive at a *consensus ad idem* by assenting to the written terms by adding their signature as part of the document, their assent is conclusively proved by the signature. The terms of the contract to which they have assented will be ascertained from the body of the document. One of the material terms is the identity of the parties between whom it is made and this term may be only apparent from the signature. "We mutually agree, &c., signed A. and B.," shows that the parties to the agreement are the two signatories. But when the assent of the party sought to be charged is proved it matters not what the terms of the contract expressed in the body of the document may be. Signature unconditionally appended is proof of unconditional assent to the terms recorded in the body of the contract. If the body of the contract records that the signer is a party or leaves the name of the party to be inferred from the signature, the signature will be proof that the signer has assented to a contract made with him. The contract may, however, record that the contract is made between A. and B. acting by his agent C., and may be signed by C., in which case C. has assented to a contract between A. and not C., but C.'s principal B. But the assent signified by the signature may be qualified so as to show that the signer is not assenting unconditionally to the contract, but is assenting in a representative capacity on behalf of a principal. "B. by C. his attorney," written by C. is plainly an assent only by B. "C. on behalf of B." is, I think, equally plain an assent of C. to the contract not so as to bind himself but to bind B. If the assent to the contract clearly appears from the form of the signature to be qualified it appears to me to be impossible to charge the signer on the footing that there is an unqualified assent by him. Thus in the two instances given above, "B. by C. his attorney," or "C. on behalf of B.," it would seem irrelevant that the body of the contract expressed the contract to be made between A. and C. C. has not assented to such a contract. On the other hand, the party signing may append words to his signature which leave it doubtful whether he intends an unqualified assent, *e.g.*, he may sign "C., broker," or "C., agent." In such a case you must look to the body of the contract to see whether C. was intended to be a party or not. If the contract does not purport to be made with him, but with someone else, or uses words that make it plain that the only contracting party is C.'s principal, disclosed or undisclosed, C. will not be chargeable. Some confusion, I think, has been introduced into the cases by not sufficiently distinguishing between cases of construction of the body of the contract and cases turning on the proof of assent to the signature. There can be little doubt that the law on the matter has not been uniformly stated, and that it has required some time to settle it. What words in the body of the contract are sufficient to negative personal liability and what words

qualifying signature sufficient to negative assent as principal were up to 1876 in doubt. But since June 1876, when the case of *Gadd* v. *Houghton* (*sup.*) was decided in the Court of Appeal by James, Mellish, and Baggallay, L.JJ. and Quain and Archibald, JJ., I have always understood the law to be that the words "on account of" and the words "as agents" are conclusive when qualifying the signature to negative liability as principal, and that whether the actual principal is disclosed or not. If there is a principal, the principal is bound, if not, the agent may be liable for breach of warranty of authority, but not otherwise. If used in the body of the document they are very strong to negative liability, but as you must read the document as a whole you may possibly find other words and clauses so plainly indicating personal liability that they outweigh the words in question. As qualifying signature, however, they may have been used for thirty-five years in business transactions as negativing personal liability, and since 1876 there has been, so far as I can discover, no decision to the contrary. As is plain from cases prior to *Gadd* v. *Houghton* (*sup.*) and from Archibald, J.'s judgment in that case, the qualification of the signature "as agents" had been usual before 1876 to negative personal liability. That decision merely gave it final authority. To my mind, it is irrelevant to consider whether the qualifying words occur more than once in the document on the principle that what I say three times is true, but what I say once is doubtful. If the words qualify the signature they qualify the assent and nothing more matters. It follows from what I have said that in my opinion the case of *Leonard* v. *Robinson* (*sup.*), decided in the year 1855, while the law was still unsettled, was wrongly decided and should no longer be treated as an authority. In so deciding I am fortified by the view expressed by the learned editors of Smith's Leading Cases, of whom the late Lord Collins was one, in the edition published next after the decision in *Gadd* v. *Houghton* (*sup.*) that *Lennard* v. *Robinson* (*sup.*) must be considered of doubtful authority. I think, therefore, that the defendants in this case who were conceded below to have signed as agents and whose signature, on looking at the original, I consider to be in that form plural and not singular, were not personally liable on the contract. But if the distinction between the signature as recording assent and the body of the contract as recording the terms were not well founded, I agree entirely with the judgment of Bankes, L.J., in holding that on the construction of the document as a whole the same result is arrived at. In *Deslandes* v. *Gregory* (*sup.*) in 1860, where the signature to a charter-party was "For Samuel Ferguson, Esq., of Anamabo, Gregory, Brothers, as agents," Williams, J., delivering the judgment of the Exchequer Chamber, said: "It would require extremely plain words in the body of the contract to control the effect of that mode of signature." As I have said, I think that now no words in the body could control it, but if they could, there are no such plain words here. The words relied on in the body as to notice to the charterers of readiness to load and so on, are words which would appear in the printed clause though the charter which is expressed to be a Mediterranean coal charter, had been expressly made with a named foreign charterer. They would obviously be complied with by notice to the known charterer's agent in this country. If the question arose I should find it difficult to distinguish between the position of Messrs. Seed and Co., Limited, agents for undisclosed owners and the defendants, agents for undisclosed charterers. No one, I think, would construe the charter-party as one where Messrs. Seed and Co., Limited were contracting as owners, and, in my opinion, no one should hold the defendants are contracting as charterers. I think that the appeal should be allowed and judgment entered for the defendants with costs here and below. *Appeal allowed.*

Solicitors: for the appellants, *Thomas Cooper & Co.*; for the respondents, *Downing, Middleton* and *Lewis.*

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

June 22 *and July* 1, 1921.

(Before MCCARDIE, J.)

DIAMOND ALKALI EXPORT CORPORATION *v.* H. BOURGEOIS. (*a*)

Contract—Sale of soda ash on c.i.f. terms—Validity of shipping documents tendered as bill of lading and policy of insurance respectively—Buyer's right to reject — Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 21, 22, 50 (*sub-s.* 3), 90.

A contract provided for the sale of goods to be shipped from American seaboard c.i.f. Gothenburg. Under the contract the sellers tendered, with the invoice for the goods, two documents purporting to be a bill of lading and a policy of insurance respectively. The material part of the bill of lading was as follows: "Received in apparent good order and condition from . . . to be transported by the steamship Anglia, *now lying in . . . or failing shipment by said steamer in and upon a following steamer,* 280 *bags dense soda." The policy of insurance was represented by a certificate of insurance issued by an American insurance corporation, which, as declared by the certificate, "represents and takes the place of the policy and conveys all the rights of the original policy holder . . . as fully as if the properly was covered by a special policy direct to the holder of this certificate."*

Held, that the buyers were entitled to reject the goods under the contract on the ground that proper documents had not been tendered by the sellers. The bill of lading did not contain an acknowledgment that the goods had been shipped and was therefore not a good bill of lading under a c.i.f. contract; no document of insurance is good tender in England under a c.i.f. contract unless there is an actual policy which complies with the provisions of the Marine Insurance Act 1906.

SPECIAL case stated by arbitrators for the opinion of the court.

By a contract in writing, dated the 7th Aug. 1920, the Diamond Alkali Export Corporation (hereinafter called "the sellers" agreed to sell to H. Bourgeois (hereinafter called "the buyer") 50 tons soda ash for September-October shipment from American seaboard at $4.70 per 100 lb. c.i.f. Gothenburg to be paid by cash against documents under confirmed

(*a*) Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.

banker's credit at London. The said contract contained (*inter alia*) the following condtions:

Seller not liable for failures or delays in delivery due to strikes, lockouts, fire, accident, embargoes, stoppage of navigation, lack of transportation, war restrictions or seizures by any governmental agency or any contingencies whatever beyond sellers' control. In case any deliveries are delayed owing to any such contingency the delayed shipments shall be made as soon as possible after such contingency has been removed, or such shipments may be cancelled at sellers' option. Date of bill of lading is to be considered date of shipment.

Disputes as to the meaning of the said contract arose between the parties, who ultimately agreed to refer the same to arbitration. Before the arbitrators the sellers alleged that the buyers had committed a breach of the said contract by refusing or neglecting to accept and pay for the goods sold thereunder in accordance with the terms and conditions thereof.

The buyer denied his alleged breach of contract on the following grounds:

(*a*) That the goods tendered or delivered by sellers were not tendered or delivered in accordance with the terms and conditions of the said contract, not having been shipped until the 8th or 9th Nov. 1920.

(*b*) That sellers did not present to buyer the contractual document against which he was required to pay for the said goods, namely, a bill of lading in proper form and an appropriate policy of insurance together with the invoice for the said goods.

The sellers further contended that they were excused from shipping the said goods within the time specified in the said contract by reason of accident, embargo, stoppage of navigation, lack of transportaion, war restrictions, or seizure by governmental agency or other contingency beyond their control within the meaning of the contract, and that the contractual documents had been duly presented to the buyer, and were in proper form, and sufficient, according to mercantile usage or custom and law.

The arbitrators, after hearing the parties, published their award in the form of a special case for the opinion of the court as follows:

SPECIAL CASE.

The transport of goods for export is regulated in America by the general operating committee, and no railroad company in America is permitted by law to accept car-load quantities of goods intended for export unless the exporter presents a permit from the traffic control manager (New York) of the American Railway Association which specifies the port from which the shipment is to be made and is obtainable only after the exporter has produced evidence that he has definitely arranged for the shipment to be made by a particular steamer to sail at a specified date from that port. After accepting such goods for shipment the railroad company is bound to ship same *viâ* the route and port specified in such permit, and neither the railway company nor the exporter can divert the shipment from the route or the port specified therein. In pursuance of the requirements of American law, sellers arranged shortly after the said contract was made for the goods which they had agreed to sell to buyers as aforesaid to be carried in the Swedish steamship *Anglia*, which was originally scheduled to sail from Philadelphia for Gothenburg on the 13th Oct. 1920, and obtained from the traffic control manager (New York) a permit which enabled them to despatch the said goods for shipment accordingly. The said goods were only delivered to the Baltimore and Ohio Railroad, and arrived on the 11th Oct. 1920 at Philadelphia where they were unloaded on the dock on the 13th Oct. 1920 for shipment by the steamship *Anglia*. The said steamship *Anglia* did not sail from Philadelphia on the 13th Oct. 1920 as originally intended and advised. She did not arrive at Baltimore until the 15th Oct. 1920, and did not arrive at Philadelphia until after the 4th Nov. 1920, on which date she left Baltimore for that port. The said steamship's date of sailing from Philadelphia was first postponed from the 13th to the 28th Oct. 1920, and then to the 30th of that month on account of the steamer being kept by her owners at Baltimore awaiting cargo there. Thereafter she was delayed by her owners for the same reason from day to day, and did not actually clear from Philadelphia until the 9th Nov. 1920, when she sailed for Gothenburg with the said goods on board. Sellers' consent was not asked for or given to any postponement of the sailing date of the said steamship, and such delay was at all times beyond sellers' control. The bill of lading the date of which according to the said contract is to be considered as the date of shipment is dated the 8th Nov. 1920.

No vessel carrying general cargo for Gothenburg other than the steamship *Anglia* sailed from Philadelphia between the 13th Oct. 1920 and 9th Nov. 1920, but there were and normally are more frequent sailings of such vessels from either New York or Baltimore. Sellers might have selected either of the latter ports in the first instance, or alternatively it was to have been possible to transport the said goods from Philadelphia to New York or Baltimore, and ship them by a vessel sailing from one of the latter ports before the 31st Oct. 1920, if a fresh permit had been obtained from the traffic control manager (New York), and the said goods had arrived in time for such shipment. It was not suggested that in the circumstances the sellers would have had any difficulty in obtaining a fresh permit, but it would have taken two or three days to obtain, and by the time the sellers knew definitely that the steamship *Anglia* would not sail until after the 31st Oct. 1920, it was too late to obtain such a permit and transport the said goods from Philadelphia so as to ensure their being carried on a vessel sailing from another port on or before that date.

A true copy of the bill of lading given by or on behalf of the owners of the said steamship *Anglia* is annexed hereto, and is to be taken as part of this case.

It was objected by or on behalf of the buyer that it was not in the usual and proper form by reason of the said goods being described therein as having been "Received in apparent good order and condition to be transported by the steamship *Anglia* instead of as 'shipped' per steamship *Anglia*."

A true copy of the certificate of insurance effected upon the said goods is annexed hereto, and is to be taken as part of this case.

It was objected by or on behalf of the buyer that he was entitled to a policy of insurance and not obliged to accept a certificate of insurance in that form. The original bill of lading and certificate of insurance were presented with an invoice for the said goods to the buyer on or about the 24th Nov. 1920, for payment against the said documents of the price of the said goods in accordance with the terms and conditions of the said contract, but payment was deferred by or on behalf of the buyer.

The questions for the opinion of the court are the following:

(1) Whether upon the true construction of the said contracts the failure to ship the goods until after the 31st Oct. 1920, was in the circumstances hereinbefore stated due to an accident, embargo, stoppage

of navigation, war restrictions or seizures by any governmental agency or any contingency whatever beyond sellers' control within the meaning of the condition stated in paragraph 2 of this case.

(2) Whether according to the true construction of the said contract or the usage or custom of merchants and the law of England, the documents presented by the sellers, namely the said bill of lading and certificate of insurance were together with the invoice for the said goods (which was admitted by or on behalf of the buyer) valid and sufficient to entitle the sellers to payment of the price of the said goods.

Patrick Hastings, K.C. and *Lord Tiverton* for the sellers.

J. Compston, K.C., *Simner*, and *Kenelm Preedy* for the buyers.

July 1.—McCARDIE, J. (after stating the facts) read the following judgment.—By a written contract of Aug. 1920 the Diamond Alkali Export Corporation of New York sold to H. Bourgeois of London fifty tons of soda ash. Shipment was to be September-October from American sea board. Terms of payment were cash against documents under confirmed bankers credit at London. Price was c.i.f. Gothenburg. The contract contained (*inter alia*) this condition: "Seller not liable for failures or delays in delivery due to strikes, lockouts, fire, accident, embargoes, stoppage of navigation, lack of transportation, war restrictions or seizures by any governmental agency or any contingencies whatever beyond sellers' control. In case any deliveries are delayed owing to any such contingency, the delayed shipments shall be made as soon as possible after such contingency has been removed or such shipments may be cancelled at sellers' option. Date of bill of lading is to be considered date of shipment." The buyers rejected the documents when tendered in London upon several grounds, namely (1) That the sellers had not shipped the goods until the 8th and 9th Nov. 1920; (2) that a proper bill of lading was not presented; (3) that a proper policy of insurance was not presented. The sellers assert that their non-shipment of the goods in Sept.-Oct. 1920 is met by the strike clause. They also assert that the documents tendered to the buyers complied with the contract. It is admitted, and the award states, that the points are to be decided by English law. I shall not narrate the circumstances whereby (as is admitted) the goods were not shipped on board till the 8th and 9th Nov. 1920. The facts found fall, I think, within the strike, &c., clause. The arbitrators state that the delay was at all times beyond the sellers' control. The strike clause is very broadly worded. It is not confined to prevention. It refers to delay also. The words "or any contingencies whatever" seem to exclude the operation of the *ejusdem generis* rule. See, for example, *Larsen* v. *Sylvester* (11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 395), and *Travers* v. *Cooper* (111 L. T. Rep. 1088; (1915) 1 K. B. 73).

That being so, the next question is whether the effect of the strike clause was merely to save the sellers from liability, or whether it operated also to debar the buyers from insisting that the goods had not been shipped in the months specified in the contract. Upon the whole I think that the effect of the clause was to enable the seller (if facts within the strike clause prevented shipment in September-October) to ship at a later date. I am not aware of any direct authority on the point. The case of *Brown* v. *Turner, Brightman and Co.* (12 Asp. Mar. Law Cas. 79; 105 L. T. Rep. 562; (1912) A. C. 12) and the like decisions do not really touch the point. The decision in *Brooke Tool Co.*, v. *Hydraulic Co.* (122 L. T. Rep. 126) turned upon different considerations. The clause must be read in a fair business sense. It effects two things, I think. It firstly saves the vendor from liability for delay, etc., caused by circumstances within the clause; and, secondly, it enables the seller, as a matter of right, to ship as soon as possible after the cause of delay has ceased to operate. It gives power to the seller to cancel. It gives no like power to the buyer. In the case of *J. Aron and Co.* v. *Comptoir Wegimont* (1921, 3 K. B. 435), I stated my views on the meaning and contractual effects of a condition for shipment at a specified time. I do not repeat them. Here an express clause of the bargain enables the sellers as a matter of right to ship at a later date than that expressed in the earlier part of the contract of sale. I therefore find in favour of the sellers on the first objection of the buyers.

It thus becomes my duty to consider the serious and powerfully argued contention of the buyers that the documents tendered did not conform to the contract. I will deal with those documents separately. I take first what I will call for convenience the bill of lading. That document was issued by the Swedish America Mexico Line Limited of Gothenburg, Sweden. It is dated the 8th Nov. 1920. It contains many clauses. The arguments before me turned on the earlier words of the bill of lading, and those only I set out. They are these: "Received in apparent good order and condition from D. A. Horan to be transported by the steamship *Anglia* now lying in the port of Philadelphia and bound for Gothenburg, Sweden, with liberty to call at any port or ports in or out of the customary route, or failing shipment by said steamer in and upon a following steamer, 280 bags dense soda." Perhaps I should add that the first of the many clauses in the bill of lading is this; "It is mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th Feb. 1893 and entitled "an Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property." This Act of 1893 provides by sect. 4 "That it shall be the duty of the owner or owners, master or masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading or shipping document, stating, amongst other things, the marks necessary for identification, number of packages or quantity, stating whether it be the carriers' or shippers' weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described." I call attention to the words "bill of lading or shipping document." The Act recognises that there may be shipping documents fulfilling the requirements of the section and yet not bills of lading.

Now the buyers strongly contend that the document here tendered was not a bill of lading at all, and that in any event it was not such a bill of lading as was required by the contract. They call

attention to the fact that the document does not acknowledge the goods to have been actually placed on board. It merely says that the goods have been received "to be transported by the steamship *Anglia*." They further call attention to the words "or failing shipment by said steamer in and upon a following steamer." I need scarcely say that I appreciate the vital nature of the buyers' contention inasmuch as the form of document now before me is of frequent use at American ports. In order to test the matter it is necessary in the first place to consider the rights of a buyer under a c.i.f. contract. The strike clause here is a mere accident, and does not seem to affect the point at issue. For inasmuch as the duty of the vendors was to ship as soon as the contingency ceased to operate and inasmuch as they were able to ship on the 8th and 9th Nov. 1920, it follows that the time of shipment under the contract was that date.

What, then, are a seller's duties and buyer's rights under a c.i.f. contract? They were stated by Lord Blackburn in *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 H. L. 395, at p. 406), where he refers to a "bill of lading." So, too, in the well-known judgment of Hamilton, J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (12 Asp. Mar. Law Cas. 1; 103 L. T. Rep. 661; (1911) 1 K. B. 214, at p. 221), where he says: "It follows that against tender of those documents, the bill of lading, invoice, and policy of insurance which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." So per Kennedy, L.J. in the same volume at p. 956: "How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading accompanied, in case the goods have been lost in transit, by the policy of insurance. The bill of lading in law and fact represents the goods." See also Scrutton, J. in *Landauer* v. *Craven* (12 Asp. Mar. Law Cas. 182; 106 L. T. Rep. 298; (1912) 2 K. B. 94, at p. 107). The latest statement is the opinion of Lord Birkenhead in *Johnson* v. *Taylor Bros. and Co. Limited* (122 L. T. Rep. 130; (1920) A. C. 149), where he says in speaking of the duties of a vendor under a c.i.f. contract: "He is bound in the second place to tender to the purchaser within a reasonable time after shipment the shipping documents, for example, the bill of lading and a policy of insurance reasonably covering the value of the goods." I should mention also the notes to Scrutton and Mackinnon on Charter-parties, art. 59. If then a vendor under an ordinary c.i.f. contract is bound to tender a bill of lading, the question next arising is: What is meant by a bill of lading within such a contract? The contract decides the right of the buyer. The question I feel is not as to the meaning of the phrase in a particular Act of Parliament or as to the possible meaning under other forms of contract. Nor is it material that a buyer objects to the document for ulterior motives. See, for example, Lord Cairns in *Bowes* v. *Shand* (3 Asp. Mar. Law Cas. 461; 36 L. T. Rep. 857; 2 App. Cas. 455, at p. 465) and per Lord Hatherley in the same volume, at p. 476. A buyer, as those noble Lords pointed out, is entitled to insist on the letter of his rights. As Lord Hatherley said: "You must bring the buyer within the four corners of the contract." A buyer, moreover, may have obvious business reasons for so insisting as he may have to implement his own bargain with rigorous sub-vendees. Now I consider that the phrase "bill of lading," as used with respect to a c.i.f. contract, means a bill of lading in the sense established by a long line of legal decisions. Unless this meaning be given the matter is thrown into confusion. In art. 3 of Scrutton and Mackinnon on Charter-parties and Bills of Lading, 10th edit., is a definition which says, "A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship." This statement suggests at once an obvious and serious distinction between a receipt for goods actually shipped on board a particular ship and a receipt for goods which are at some future time to be shipped on board either a particular ship or an unnamed ship to follow her. This business distinction and varying results of the two seem to me to be plain. The legal distinction seems to me to be equally plain. From the earliest times a bill of lading was a document which acknowledged actual shipment on board a particular ship. In Bennett's History of the Bill of Lading (Cambridge Press 1914), at p. 8 is this passage: "Desjardins says that towards the close of the sixteenth century the use of the bill of lading was widespread. He quotes a definition from Le Guidon de la mer, a document of that epoch, which defines the bill of lading as "the acknowledgment which the master makes of the number and quality of the goods loaded on board": (see Desjardin's Traité de Droit Commercial Maritime, tome 4, art. 904. Paris, 1885). It is clear, I may add, that the bill of lading sprang from the ship's book of lading, which was a document of weight, showing the goods actually put on board. The famous case of *Lickbarrow* v. *Mason* (5 Term Rep. 683) was discussed. It decided that bills of lading were transferable by the custom of merchants. The finding of the jury as to the custom is set out at p. 685 as follows: "By the custom of merchants, bills of lading, expressing goods or merchandizes to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods . . . &c. . . . The word 'negotiable' in that special verdict means no more than the word 'transferable' or 'assignable.'" See Scrutton on Charter-parties, art. 56 (note 1). I am not aware of any decision which has modified the finding of the jury in *Lickbarrow* v. *Mason* as to the subject matter to which alone the custom of transferability applied. Apparently that custom and that custom only was operative when the Bills of Lading Act 1855 (18 & 19 Vict. c. 3) was passed. Now that Act expressly recites the custom found in *Lickbarrow* v. *Mason*, and then proceeds: "And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board." It thus seems plain that the Act was referring to documents acknowledging an actual shipment on board a specified ship. I need not refer to sects. 1 and 2 of the Act. But sect. 3 says: "Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing

the same . . . " &c. It seems clear that no assignee can invoke the benefits, for example, of sect. 3 unless the document actually asserts that the goods have been shipped on board. The whole point of the section seems to go if the document does not contain such an assertion. I will refer to this Act later.

In Blackburn on Sale, 3rd edit., p. 421, is this statement: "A bill of lading is a writing signed on behalf of the owner of the ship in which the goods are embarked acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of lading)." The common type of a bill of lading is given in Carver on Carriage by Sea, 6th edit., sect. 54. It is worthy of observation that in the U.S.A. case of *Rowley* v. *Bigelow* (12 Pick. 307 Mass.) Shaw, C.J. said: "The bill of lading acknowledges the goods to be on board and regularly the goods ought to be on board before the bill of lading is signed." See the note in Parsons on Shipping (Boston), vol. 1, p. 187, where the learned author somewhat pointedly says: "It is a fraud on the part of the master to sign the bills before the goods are on board." In Benjamin on Sale, 6th edit., p. 846, is this passage giving the result of the cases: "When delivery is to be made by a bill of lading the rule is that the seller makes a good delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading whereunder the buyer can obtain delivery duly indorsed, effectual to pass the property or the goods, made out in terms consistent with the contract of sale, and purporting to represent goods in accordance with the contract and which are in fact in accordance therewith." Apart from any authority to the contrary it seems to me that I must hold that the document here is not a bill of lading within the c.i.f. contract before me. It does not acknowledge the goods to be on board a specific ship, nor does it acknowledge a shipment on board at all. It leaves it uncertain as to whether the goods will come by the *Anglia* or some following ship. The word "following" is loose and ambiguous in itself. The document does not even say "immediately following," nor does it indicate that the "following ship" will belong to or be under the control of the person who issues the bill of lading. The document seems to me to be (in substance) a mere receipt for goods which at some future time and by some uncertain vessel are to be shipped. It is not even in the form of the New York Produce Exchange bill of lading set out in Carver, 6th edit., appendix A, p. 971. The buyer is left in doubt as to actual shipment and actual ship. The sellers, however, submit that I am bound by the opinion of the Privy Council in *The Marlborough Hill* (15 Asp. Mar. Law Cas. 163; 124 L. T. Rep. 645; (1921) 1 A. C. 444). The buyers, on the other hand, contend that that opinion is erroneous and that I ought not to follow it.

I need not scarcely state the deep diffidence and embarrassment I feel in discussing that weighty opinion. As Lord Phillimore himself, however, pointed out in *Dulieu* v. *White* (85 L. T. Rep. 126; (1901) 2 K.B. 669, at p. 683) a Privy Council advice is not binding on the King's Bench Division even as to the *res decisa*. I wish to point out first that the actual decision in that case was merely that the bill of lading there in question (which closely resembles the one now before me) fell within sect. 6 of the Admiralty Court 1865. It may be that the phrase "Bill of Lading" in that section permits of a broad interpretation.

I point out next that there is no express statement in the *Marlborough Hill*, that the document there in question actually fell within the Bills of Lading Act 1855. In the third place it seems to me to be clear that the Board did not consider the nature or effect of an ordinary c.i.f. contract, or the decisions thereon in relation to the question before them. The case of *Bowes* v. *Shand* (*sup.*) was not even cited to the board. Lord Phillimore in reading the advice of the Privy Council said (p. 451): "There can be no difference in principle between the owner, master, or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse, awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail." With the deepest respect I venture to think that there is a great difference between the two, both from a legal and business point of view. Those differences seem to me clear. I need not state them. If the view of the Privy Council is carried to its logical conclusion a mere receipt for goods at a dock warehouse for shipment might well be called a bill of lading. At p. 452 of the report the board say: "Then as regards the obligation to carry either by the named ship or by some other vessel, it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading, and if the contract begins when the goods are received on the wharf, substitution does not differ in principle from trans-shipment."

I do not pause to analyse these words. I only say that in my own humble view substitution and the right of trans-shipment are distinct things, and rest on different principles. The passage last cited can, I think, have no application at all to a c.i.f. contract which provides for a specific date of shipment. It will suffice if I say two things. First, that in my view the *Marlborough Hill* case does not apply to a c.i.f. contract such as that now before me. Secondly, the grounds for challenging the dicta of the Privy Council will be found in art. 22, and the notes and cases there cited, in Scrutton and Mackinnon (10th edit.) as to what are called "through" bills of lading, in the lucid article in the "Law Quarterly Review" of Oct. 1889, vol. 5, p. 424, by Mr. Bateson, K.C., and of July 1890, vol. 6, p. 289, by the late Mr. Carver, and in Carver on Carriage by Sea, notes to art. 107. I do not doubt that the document before me is a "shipping document" within the U.S.A. Harter Act 1893. I feel bound to hold, however, that it is not a bill of lading within the c.i.f. contract of sale made between the present parties.

I now consider the second document discussed before me. The buyers contend that the "Certificate of Insurance" tendered by the sellers was not a policy of insurance within the c.i.f. contract. It is headed "certificate of insurance." It is No. 767,922. It is issued by the Firemen's Fund Insurance Company of San Francisco, a well-known office. The substantive words are these: "This is to certify that on the 8th of Nov. 1920 this company insured under Policy No. 2319 for D. A. Horan, $5790 on 280 bags, 58 per cent. dense soda ash, N.Y. and L. Test

valued at sum insured, shipped on board of the steamship *Anglia* and/or other steamer or steamers, at and from Philadelphia to Gothenburg. And it is hereby understood and agreed that in case of loss such loss is payable to the order of the assured on surrender of this certificate. This certificate represents and takes the place of the policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums. Not valid unless countersigned by D. A. Horan. (Signed) F. H. and C. Robson, Managers. Countersigned D. A. Horan." Notice: "To conform with the revenue laws of Great Britain in order to collect a claim under this certificate it must be stamped within ten days after its receipt in the United Kingdom." On the front of the certificate are certain conditions of which the first is this: "This certificate is subject to the full terms of the policy in respect of being free from claim in respect of capture, seizure, detention, or the consequences of hostilities." At the back of the certificate, are other conditions which I need not detail. Is this certificate a proper policy of insurance within the c.i.f. contract here made? I have read, I believe, all the cases on the rights and obligations of buyer and seller under c.i.f. contracts from *Ireland* v. *Livingston* (27 L. T. Rep. 79) and *Hickox* v. *Adam* (3 Asp. Mar. Law Cas. 142; 34 L. T. Rep. 404), to *Johnson* v. *Taylor Bros. and Co. and others* (122 L. T. Rep. 130). Many decisions are cited in Benjamin on Sale (6th edit.), p. 850, and so on. In all the cases a "policy of insurance" is mentioned as an essential document. The law is settled and established. I may point out that in *Burstall* v. *Grimswade* (11 Com. Cas. 280) it was expressly provided by the contract that a certificate of insurance might be an alternative for an actual policy. I ventured in *Manbre Saccharine Company* v. *Corn Products Company* (120 L. T. Rep. 113; (1919) 1 K.B. 198) to discuss the relevant authorities, including the lucid judgment of Atkin, J. in *Groom Limited* v. *Barber* (12 Asp. Mar. Law Cas. 594; 112 L. T. Rep. 301; (1915) 1 K.B. 316)—a judgment which I have again most carefully read. It seems plain that a mere written statement by the sellers that they hold the buyers covered by insurance in respect of a specified policy of insurance, is not a policy of insurance within a c.i.f. contract: (see the *Manbre* case (*sup.*) It seems plain also that a broker's cover note or an ordinary certificate of insurance are not adequate agreements within such a contract: (see Bailhache, J., in *Wilson, Holgate and Co.* v. *Belgian Grain and Produce Company* (14 Asp. Mar. Law Cas. 566; 122 L. T. Rep. 524; (1920) 2 K. B. 1). Does the present document fulfil the sellers' contractual duty? In the *Wilson Holgate* case, p. 7 of L. Rep., Bailhache, J. said: "It must be borne in mind that in dealing with certificates of insurance I am not referring to American certificates of insurance which stand on a different footing and are equivalent to policies, being accepted in this country as policies."

It will be observed that Bailhache, J. used the word "accepted" and not the words "bound to accept." The sellers here rely on that passage and also on the notes to Scrutton and Mackinnon on Charter-parties, 10th edit., p. 185, where it is said: "A certificate of insurance issued by an insurance company under a floating policy upon which document the company can be sued would suffice in any case." The buyer strongly challenges that view, and his counsel require me to express an independent opinion on the point.

I do so with the greatest diffidence and reluctance in view of the weight carried by even the dicta of such experienced and distinguished judges as Scrutton, L.J. and Bailhache, J., I feel bound to express my view not upon a question of business convenience, but upon the strict law of the matter. I assume that this document (which is not stamped) was given under a floating policy issued by the insurance company to D. A. Horan. Now the certificate is not a policy. It does not purport to be a policy. This is conceded by Mr. Hastings in his able argument for the sellers. It is a certificate that a policy was issued to D. A. Horan, and it incorporates the terms of that policy. Those terms I do not know, nor is there anything before me to indicate that the buyers knew them. The certificate does not show whether that policy was in a recognised or usual form or not. The certificate, therefore, does not contain all the terms of the insurance. Those terms have to be sought for in two documents—namely, the original policy and the certificate. But even if this document is not a policy yet the sellers say it is "equivalent to a policy." In connection with that phrase it is well to quote from another part of the judgment of Bailhache, J. in the *Wilson Holgate* case. He says at p. 9 of the report: "He, the buyer, cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take or at least one which does not differ from it in any material respect." This leads me to ask whether the document before me differs in any material respect from a policy of insurance. The latter is a well-known document with clearly defined features. It comes within definite, established, and statutory legal rights. A certificate, however, is an ambiguous thing; it is unclassified and undefined by law. It is not even mentioned in Arnould. No rules have been laid down upon it. Would the buyer sue upon the certificate, or upon the original policy plus the certificate? If he sued simply on the certificate, he could put in a part only of the contract, for the other terms of the contract, namely, the conditions of the actual policy, would be contained in a document not in his control, and to the possession of which he is not entitled. In the third place I point out that before the buyer could sue at all, he would have to show that he was the assignee of the certificate. See Arnould, 9th edit., sects. 175-177. In what way can he become the assignee? It is vital to remember the provisions of the Marine Insurance Act 1906. Now the relevant statutory provision is sect. 50 (3) which says: "A marine policy may be assigned by endorsement thereon or in any other customary manner." This sub-section, however, only applies so far as I can see, to that which is an actual marine policy. Sect. 90, the interpretation clause, says: "In this Act unless the context or subject matter otherwise requires," policy means "a marine policy." The Act contains no reference, express or implied, to a certificate of insurance. Sect. 22 says: "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." If, as is admitted, this document be a certificate only, and not a policy, it therefore seems not even to be admissible in evidence before me. If the certificate does not fall within the Marine Insurance Act it appears to be only assignable by writing in accordance with the provisions of the Judicature Act 1873, s. 25 (6). The certificate may have less legal effect than a slip, as to which see Arnould par. 34, and sect. 21 of the Marine Insurance Act.

I mention these considerations briefly. Time does not permit to discuss them further or to develop their significance or to emphasise the points arising under sects. 91 to 95 of the Stamp Act 1891. In my view the Act of 1906 deals with marine policies only. It does not, I think, cover other documents, although they may be said to be the "business equivalent" of policies. I do not think that the Act of 1906 covers the document now before me. In my humble view a document of insurance is not a good tender in England under an ordinary c.i.f. contract unless it be an actual policy, and unless it falls within the provisions of the Marine Insurance Act 1906. As to assignment and otherwise I must, therefore, hold that the buyers were entitled to reject the documents upon the ground that no proper bill of lading and no proper policy of insurance were tendered by the sellers in conformity with the c.i.f. contract. I abstain from amplifying this judgment by the citation of other authority or the mention of further reasons in support of the conclusions I have deemed it my duty to state. It may well be that this decision is disturbing to business men. It is my duty, however, to state my view of the law without regard to mere questions of convenience. I desire to add four remarks: (1) That there is no finding or evidence before me of any course of dealing between the parties. (2) That there is no finding or evidence before me of any custom or general usage which modifies the long and clearly established legal rights of a buyer under a c.i.f. contract. If any such custom or usage be asserted then the point can be dealt with in some future action in the Commercial Court. Whether such an assertion can be proved may well be a question of doubt in view of the matters appearing in the *Manbre* case. See, too, the *Wilson Holgate* case, where Bailhache, J. said: "I am not satisfied that since *Ireland* v. *Livingstone* was decided any custom has arisen which obviates the necessity for a tender by the seller of a policy of insurance if the buyer requires it." (3) It may well be that legislation is needed to enlarge the operation of the Bills of Lading Act 1855 and the Marine Insurance Act 1906. (4) That the difficulties indicated in this judgment can be easily, promptly, and effectively met by the insertion of appropriate clauses in c.i.f. contracts.

For the reasons given I find in favour of the buyers with the results stated in the award. The sellers must pay the costs of the proceedings before me.

Solicitors for sellers, *Cosmo Cran* and *Co.*; for buyers, *Swepstone, Stone, Barber.* and *Ellis.*

Judicial Committee of the Privy Council.

Oct. 28, 31, *and Nov.* 1, 1921, *and Feb.* 10, 1922.

(Present: Lords Sumner and Parmoor, and Sir Arthur Channell.)

The Blonde and other ships. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Ships owned by Danzig corporation—Seizure in British port on outbreak of war—Requisition—Owners' right to release—Applicability of Hague Convention—Delinquencies of German forces—Hague Convention, No. VI., arts. 1, 2, 6—*Treaty of Versailles, Part VIII., annex. III., art.* 1, *Part X., art.* 297.

Three merchant ships, each of which was under 1600 *tons gross, the property of a German corporation which had its head office in Danzig, were in British ports at the commencement of hostilities, and were accordingly detained there. Under Order XXIX. of the Prize Court Rules* 1914 *they were then requisitioned for the service of His Majesty. While thus requisitioned one of the ships was lost by stranding, and another was sunk by enemy action. By a decree of Sir Henry Duke, P. the three vessels had been condemned. The owners appealed.*

Held, that the Sixth Hague Convention having been recognised as binding upon Great Britain, it was not possible in regard to the general delinquencies of the German forces during the war, to find juridical grounds for releasing His Majesty's Government from their obligations under the convention when once they had attached, and the provisions under art. II. against the confiscation of enemy merchant ships coming under the convention were therefore obligatory. Further, there was no evidence of any conduct on the part of the German Government down to the Armistice which put it out of her power to return ships which had been detained.

Where a requisitioned ship had been lost the owners were entitled to the appraised value of the ship, even although she had been sunk by German forces. As regards the Treaty of Versailles, while part VIII., annex III., art. 1 *operated to transfer the property in all ships of* 1600 *tons gross and upwards, it made no such transfer in the case of ships of less tonnage, at least until they had been selected for surrender as part of those which under the Treaty were to be handed over.*

By Part X., art. 297, *the Treaty did not modify or annul the obligation which arose under the Hague Convention. Under any order of release the* res *should not be removed out of British territory for a reasonable time, lest otherwise the Treaty right might be defeated.*

In the result, therefore, the appeal succeeded; and an order was advised that the appraised value of the two lost ships, and the ship remaining in specie be released to the custodian of enemy property to be delivered up to the owners if after the lapse of six months no proceedings had been begun for an order for delivery up to the Crown.

Decision of Sir Henry Duke, P. reversed (1921) *P.* 155).

Further advised on the petitions that the ships, all of which were over 1600 *tons gross, and in respect of*

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

which orders for detention had been made, should be released to the Crown.

APPEAL from the decision of Sir Henry Duke, P., reported (1921) P. 155; also petitions and cross-petitions for the release or condemnation of enemy ships.

The action was brought by the Procurator-General on behalf of the Crown for the condemnation of the merchant steamships, *Blonde*, *Hercules*, and *Prosper*, as enemy property. The ships were in British ports at the outbreak of hostilities in 1914, and having been seized were ordered by the Prize Court to be detained until the conclusion of peace or further order. The three ships, each of which was under 1600 tons gross, were requisitioned for the service of His Majesty by orders made by the Prize Court under Order XXIX. of the Prize Court Rules 1914. At the time of seizure the vessels were the property of a German corporation, which had its business seat in the port of Danzig, and they were registered in the port of Danzig. The *Blonde* was lost by stranding, the *Hercules* was sunk by enemy action while under requisition, and the *Prosper* was still afloat. After the conclusion of peace the Danzig owners filed claims asking for restoration of the *Prosper* with compensation for her use and compensation in respect of the loss of the other two ships. On behalf of the owners it was contended that as a result of diplomatic correspondence between Great Britain and Germany in the autumn of 1914, there was an agreement whereby German ships which were then in British ports and were being detained were to be restored at the end of the war and compensation was to be paid; and that even if that agreement, so far as German nationals were concerned, was not binding on Great Britain because of Germany's breaches of international law, the citizens of Danzig stood in a different position, because under sect. 11 of the Treaty of Versailles 1919, they were no longer German nationals. Sir Henry Duke, P. held that the Treaty left the citizens of Danzig in the same position, so far as their property, rights, and interests were concerned, as if they had remained German subjects; that certain negotiations between Great Britain and Germany in Aug., Sept. 1914, as to the ultimate treatment of detained enemy vessels did not constitute a binding agreement, and that as in the absence of agreement to the contrary merchant ships of a belligerent found in an enemy port at the outbreak of hostilities were subject to condemnation, the ships must be condemned. The owners appealed.

There were also before the Privy Council petitions and cross-petitions relating to the *Gutenfels*, *Rabenfels*, *Werdenfels*, *Lauterfels*, *Anna Rickmers*, *Barenfels*, *Prinz Adalbert*, and *Kronprinzessin Cäcilie*. In each of these cases the Prize Court had made similar orders for detention until further orders. The petitions and cross-petitions were on the part of the respective owners for the release of the ships, and on the part of the Crown for their condemnation. Each of these vessels was over 1600 tons.

The arguments in all these cases were heard together, and the judgment deals also with the petitions and cross-petitions.

The Hague Convention No. VI. of 1907 provides:

Art. 1. Where a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Art. 2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

Art. 6. The provisions of the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.

The Treaty of Versailles provides in annex III. of part VIII.:

1. Germany recognises the right of the allied and associated powers to the replacement, ton for ton [gross tonnage] and class for class, of all merchant ships and fishing boats lost or damaged owing to the war.

Nevertheless, and in spite of the fact that the tonnage of German shipping at present in existence is much less than that lost by the allied and associated powers in consequence of the German aggression the right thus recognised will be enforced on German ships and boats under the following conditions: The German Government, on behalf of themselves and so as to bind all other persons interested, cede to the allied and associated governments the property in all the German merchant ships which are of 1600 tons gross and upwards; in one half, reckoned in tonnage, of the ships which are between 1000 tons and 1600 tons gross, in one quarter, reckoned in tonnage, of the steam trawlers; and in one quarter, reckoned in tonnage, of the other fishing boats.

8. Germany waives all claims of any description against the allied and associated governments and their nationals in respect of the detention, employment, loss or damage of any German ships or boats, exception being made of payments due in respect of the employment of ships in conformity with the Armistice Agreement of the 13th Jan. 1919, and subsequent Agreements.

Part X., sect. IV.:

Art. 297. The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the annex hereto: (*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the allied and associated powers reserve the right to retain and liquidate all property, rights and interests belonging, at the date of the coming into force of the present Treaty, to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the allied or associated state concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

By Part III., sect. XI., arts. 100 to 108 inclusive, Danzig together with all property situated within its territory was created a Free City:

Art. 105. On the coming into force of the present Treaty German nationals ordinarily resident in the territory described in art. 100 will, *ipso facto*, lose

their German nationality in order to become nationals of the Free City of Danzig.

Part XV.:

Art. 440. Germany accepts and recognises as valid and binding all decrees and orders concerning German ships and goods and all orders relating to the payment of costs made by any Prize Court of any of the allied or association powers.

The further facts and the arguments appear sufficiently from their Lordship's judgment.

Sir *John Simon*, K.C. and *Inskip*, K.C. (*Balloch* with them) appeared for the appellants.

Sir *Ernest Pollock* (S.-G.) Sir *Gordon Hewart* (A.-G.) and *Wylie* with him) appeared for the Procurator-General.

Upon the petitions and cross-petitions:

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), *Darby*, *Wylie*, *Trehern*, *Pearce Higgins*, and *H. L. Murphy* for the Crown.

Sir *John Simon*, K.C., *Inskip*, K.C., and *Balloch* for the shipowners.

The following cases were referred to:

The Marie Leonhardt (1921) P. 1;
The Turul, 14 Asp. Mar. Law Cas. 423; 120 L. T. Rep. 393; (1919) A. C. 515;
The Nereide, 9 Cranch 388;
Lindo v. *Rodney*, 2 Dougl. 212 (2);
The Santa Cruz, 1 C. Rob. 49, 62;
The Gutenfels, *The Barenfels*, *The Derfflinger*, 13 Asp. Mar. Law Cas. 346; 114 L. T. Rep. 953; (1916) 2 A. C. 112;
His Majesty's Procurator in Egypt v. *Deutsche Kohlen Depot Gesellschaft*, 14 Asp. Mar. Law Cas. 384; 120 L. T. Rep. 102; (1919) A. C. 191;
The Mowe, 13 Asp. Mar. Law Cas. 17; 112 L. T. Rep. 261; (1915) P. 1.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—These are consolidated appeals from the President's judgment rejecting the claims of the appellant company for release with compensation and condemning the vessels in question, the *Blonde*, the *Prosper*, and the *Hercules*. They were small German steamers, two under 800 and one under 1100 tons gross, which at the outbreak of the war happened to be in London and Liverpool, and were seized and proceeded against in prize. Orders were in due course made for their detention in the form which was settled in *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 212), and followed in many cases during the war. Shortly afterwards they were requisitioned by order of the court for the use of His Majesty, and passed into the service of the Admiralty. Two have since been lost while under requisition—the *Blonde* by grounding off Flamborough Head, and the *Hercules* through being struck by an enemy torpedo. The *Prosper* still remained in the hands of the Crown under the requisition order at the time when the case was heard.

The appellants are a shipping company registered and carrying on business at Danzig, where the ships also were registered, and at the outbreak of war they owned a number of the shares in each vessel, though not all; but they have been throughout treated as the full owners for all present purposes. Danzig having become a Free City under the Treaty of Versailles, the appellants, as citizens of Danzig, claim to be in a better position in these proceedings than if they had still been subjects of the German Empire, and no point has been taken on behalf of His Majesty's Procurator-General that, as Danzig was not a party to the Hague Conventions, citizens of Danzig should not be allowed to claim the benefit of them. All that is said is that, in respect of Germany's actions during the war, the appellants, as they enjoyed the benefit, must also take the burden, although, as regards disabilities and liabilities imposed on Germany by the terms of the Treaty of Versailles, they may escape, having ceased to be Germans at the moment when the treaty first became operative. The principal point is one turning on the Hague Conventions of 1907, which, though not argued below owing to some misunderstanding as to the state of the authorities, must be dealt with on one or other of the present groups of appeals. The appellants claim the benefit of the sixth convention, or in the alternative of a supposed agreement to the like effect, arrived at *ad hoc* by Great Britain and Germany in the early months of the war. The Procurator-General denies that the sixth Hague Convention ever became applicable, firstly, for want of ratification by all the belligerents; and secondly, because art. 2. on which the appellants rest their claim, would only apply if Great Britain had put art. 1 in force, which never was done. As to the supposed agreement *ad hoc*, he says that the negotiations were entered into for other purposes and, further, broke down without any conclusion.

The history of the matter is this. Early in Aug. 1914, pursuant to an Order in Council of the 4th of the month, a proclamation was issued, which declared that German ships in British ports would be detained, but that His Majesty proposed ultimately to apply the sixth Hague Convention, provided that a Secretary of State certified, before midnight of the 7th Aug., that he was satisfied, from communications received, that Germany had expressed a similar intention. This period expired without the receipt of any sufficient communication, and the fact was duly intimated to the Admiralty. Thereupon, it is said, the sixth Hague Convention, so far as Great Britain and Germany were concerned, failed to come into operation, and accordingly the provisions of art. 2 had no effect in the late war.

In spite of this notice to the Admiralty, communications passed between the two Powers through the good offices of the diplomatic service of the United States. Letters and telegrams were exchanged, and sometimes they crossed one another. The German Government were concerned not merely as to the treatment of detained ships under the sixth convention, but also as to that of the crews under the eleventh. They asked whether His Majesty's Government intended to observe the provisions of these conventions, and in what sense they understood some of their obscurer terms. By the end of September or the beginning of October both parties had stated distinctly that the sixth convention would be observed, and had expressed their construction of it, in senses which were substantially identical. As to the eleventh, though not far apart, it does not appear on the documents which are forthcoming, that they were ever in absolute accord. Their Lordships were not informed that His Majesty's Government ever published this correspondence at the time as the formal record of a new agreement therein arrived at.

The learned president came to the conclusion that this correspondence, viewed as a negotiation for a final agreement, never passed beyond the stage of mere negotiation, the discussions as to the two conventions not being severable and no agreement having been arrived at as to the eleventh convention. The contrary was strenuously urged before their Lordships. Logically, however, there is a prior issue, namely, whether this correspondence was entered upon or was pursued as a negotiation intended to lead to a new international agreement at all. The treaties and conventions, which Courts of Prize are accustomed to construe and give effect to, are written instruments duly executed and ratified. It is a novelty to call on them to spell out such an agreement from a series of messages passing to and fro. Here there is not so much as a protocol, and although no doubt *consensus ad idem* is fundamentally necessary to an international agreement, as it would be to a private offer and acceptance under municipal law, it does not follow that in the intercourse of sovereign states every interchange of messages, some formal and some informal, should be deemed to result in a new and binding agreement as soon as the parties have reached the stage of affirming identical propositions. Each power was anxious to know the intentions of the other, and in their Lordships' opinion their object, and their sole object, was to ascertain whether and in what way effect would be given to the old agreement, namely, the sixth Hague Convention, and was not to enter into a new agreement, dealing with the same subject and tending to the same effect, but concluded under conditions as embarrassing and with a result as superfluous as could be imagined.

It is true that expressions are to be found on the German side, in the latter part of these communications as well as at the outset, which are not inappropriate to a negotiation for, and to the conclusion of, a new agreement. The German Government in August states its acceptance of a British proposition to release merchant ships, made in the Order in Council of the 4th Aug., and in October declares that "there now exists between the German Government and Great Britain an agreement as to the treatment of merchant ships." These expressions were not, however, adopted by His Majesty's Government. They throughout stated their intention to abide by the sixth Hague Convention, provided Germany would do the same, and there are dispatches from Germany at the end of August and in September which show that this which was the real aspect of the matter, was fully recognised by the German Government. The language of the communications, when carefully examined, does not support but displaces the theory that a new agreement was in negotiation between belligerents to effect what could have been better secured by reciprocal recognition of a convention, to which both parties had adhered while they were still at peace.

In the result His Majesty's Government became satisfied that there existed on the German Government's part such an intention to observe the convention reciprocally as justified them in proceeding publicly to observe the convention for their own part, and thenceforward orders were made in the Prize Court, at the instance of the Crown, which were always regarded as being framed to carry out the obligations of the sixth Hague Convention, while securing the interests of this country in the possible event of Germany's failing at the conclusion of the war to be of the same mind as to her obligations as that which had been manifested at the beginning, Their Lordships may further observe that, on balance of the importance of the German merchant ships detained by Great Britain against that of British merchant ships detained by Germany, the latter power had a strong material interest in continuing to execute the convention to the end, and was little likely to intend to abandon or to desire to forfeit the ultimate advantages, which observance of the convention would assure. It therefore becomes necessary to consider in what the obligations of that convention consist according to its terms.

The sixth article of the sixth convention of 1907 declares that "the provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention." The French text for the last part of this sentence reads: "et seulement si les belligérants sont tous parties à la convention," and there may be significance in the different positions in the sentence occupied by the respective words "all" and "tous." Of the powers belligerent in some theatre or other and against one combination of opponents or another during the late war, Serbia and Montenegro never ratified the convention in question. The United States were not parties to it at all. At the time when the ships now under discussion were first detained, Germany had not declared war on Serbia, nor had Serbia become formally the ally of Great Britain, and, so far as their Lordships are aware, actual hostile action by Germany against Serbia and actual military support to Serbia by Great Britain both belong to later stages in the war. A nice question arises, therefore, whether Serbia was a belligerent in such a sense that her failure to ratify the convention prevents its being applicable as between Germany and Great Britain in the matter of these ships? If the position of Serbia does not prevent the obligations of the convention from attaching, still less can this result from that of the United States, who were not one of the "contracting powers." To put the point otherwise, are the "belligerents," who are to be taken account of for the purposes of this article, the belligerents merely who detain or suffer detention, or are they all the powers who are simultaneously engaged in war, whether acting in alliance or in direct conflict with one another or not? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them together? Mutuality is of the essence of the convention. Is that mutuality complete if the detaining sovereign and the sovereign of the ships detained ratify and abide by the convention, or is it imperfect, so as to prevent the application of the convention, unless and until other powers, in no way concerned in the ships or their fortunes, but merely connected with one or both of those sovereigns in the general war, have likewise ratified and likewise abided by the convention, whether or no they have ships or harbours, and whether or no they make or suffer captures or are ever directly affected by maritime war at all?

It is very hard to credit that the operation of an agreement, so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents, or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them. Their Lordships, however, have not found it necessary to give a final answer to these questions. Whether in the circumstances of these cases the convention was applicable or whether it might be successfully objected that it had never become applicable, the result is the same, for the objection is clearly one that can be waived, and in their Lordships' opinion it was waived by His Majesty's Government, alike by the whole tenor of the above-mentioned correspondence and by the whole attitude of the Crown in matters of prize affecting such cases as these throughout the war. *De facto* as well as *de jure* the position of Serbia and the other powers, as regards both the convention and the conduct of the war, was well known to His Majesty's Government at all material times. Yet days of grace were in fact allowed to Austrian ships by proclamation dated the 15th Aug. 1914, as to which see *The Turul* (14 Asp. Mar. Law Cas. 423; 120 L. T. Rep. 393; (1919) A. C. 515). *The Chile* order was wholly inept if the convention had and could have no application, and the Crown should have applied to the court not for leave to requisition, but for decrees of condemnation. The fact that, in spite of the doubt expressed by Sir Samuel Evans, P. in *The Mowe* (13 Asp. Mar. Law Cas. 17; 112 L. T. Rep. 261; (1915) P., at p. 12), the Crown acquiesced in numerous orders in that form and never asked for condemnation of these detained ships so long as hostilities lasted, is conclusive to show that any right to rely on the non-fulfilment of art. 6 was waived. The arguments of the Attorney-General on behalf of the Crown in the case of *The Gutenfels*, *The Barenfels*, *The Derfflinger* (13 Asp. Mar. Law Cas. 346; 114 L. T. Rep. 953; (1916) 2 A. C. at p. 115, and *His Majesty's Procurator in Egypt* v. *Deutsche Kohlen Depot Gesellschaft* (14 Asp. Mar. Law Cas. 384; 120 L. T. Rep. 102; (1919) A. C. 291) are of special importance in this connection.

In construing such an international instrument as that now in question, it is profitable to bear in mind from the outset sundry considerations, which are not the less important for being doubtless somewhat obvious. It results from deliberations among the representatives of many powers, in which none can expect without some concession to insist upon his country's interests, its language or its law. It is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in the circumstances to expect of it either nicety of scholarship or exactitude of literary idiom. Neither the municipal law nor the technical terms of the negotiating countries can be expected to find a place in its provisions. Where interests conflict, much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the Powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions, which are expressed without much detail and sometimes only in outline.

On the other hand, it is specially necessary to discover and to give effect to all the beneficent intentions, which such instruments embody and which their general tenor indicates. It is impossible to suppose, whatever the imperfections of their phrasing, that the framers of such instruments should have intended any Power to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasising the absence of express words, where the sense to be implied from the purport of the convention is reasonably plain. Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument in any narrow sense, such as would reserve for them future loopholes of escape from its general scope.

Turning to arts. 1 and 2 of the sixth Hague Convention, it is important to remember that, before its date, and since its date whenever it is not in force, the law of nations permitted and entitled a belligerent to make prize of an enemy merchantman found within his ports at the outbreak of war (*Lindo* v. *Rodney*, 2 Doug. 612 *n*). It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognised by the law of nations should be mitigated or not. It is not surprising that the negotiators of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the Power entitled to capture, was a thing desirable indeed, but not obligatory.

Under these circumstances it is asked with much force: Why should Powers, who could not agree that days of grace should be given at all, find themselves able to concur in a more extensive modification of the law then existing and to agree that ships, unable to avail themselves of permission to depart, should not be made prize but should only be detained? The argument finds some support in the fact that the article dealing with days of grace precedes that limiting the right to such condemnation, and in the further fact that art. 2 certainly is closely allied with art. 1 and is so far dependent on it that, instead of stating the circumstances in which it applies, as a self-contained article might be expected to do, it finds their definition only in a reference to the first article and to those circumstances mentioned in it, which depend on the choice and the clemency of the capturing Power. Why, then, should Powers, which fail to agree to such a modification of belligerent right as is involved in the grant of days of grace, be deemed capable of the graver modification, which is involved in abandoning the right to capture and being content with a right to detain?

The true question, however, is not why they should have but whether they have done so, and it may be usefully met, if not completely answered, by asking another. The Powers, great and small, assembled at the Hague in 1907 in what was undoubtedly a great effort, involving mutual concessions and separate sacrifices, to regulate and to humanise the practices of maritime war. Is it consistent with their dignity or with the seriousness of the negotiations to read a part of their handiwork as meaning that a belligerent need not spare an enemy ship in his own port at all unless he chooses, but that if, from good nature or improvidence, he

waives his right to bar her exit absolutely, he is to be bound by convention to do more than he chooses to do by express grace, and may then only detain, when otherwise he could seize? To say that the compact expressed in art. 2 has been providently entered into in case two belligerents should reciprocally grant days of grace under art. 1, but that until that event happens it is a mere foretaste of things to come, is to attenuate this convention to the very verge of annulling it. It is all the more unworthy of such an occasion to place so narrow a meaning on the article because the length and character of the opportunity for departing in peace rests entirely with the grantor of it. In itself a concession requiring immediate departure differs only notionally from a belligerent act inhibiting departure altogether. Is the modification of belligerent right to take place only in the one case and not in the other? And, if so, on what show of reason can it be founded or to what inveterate prejudice or ingrained self-interest has so illogical an arrangement been conceded?

Arts. 3 and 4, however, which are strictly *in pari materia*, seem to place the matter beyond doubt. Art. 3 contains no reference to arts. 1 and 2. It deals with a case to which days of grace and opportunities of departure have no application—that is, to ships that are found by their enemy at sea on the outbreak of war. The argument is unaffected by the fact, that as to this article Germany made reservations at the time when the convention was ratified, for the effect of the reservation is limited to the article with which it deals. A reservation as to a part of the convention is quite consistent with adoption of the rest of it. The article, clearly and independently of the others, requires that such ships, though by the law of nations good prize, may not be confiscated—that is, seized and brought before a court of prize for condemnation. They may only be detained—of course, under the order of such a court and upon conditions imposed by it. Further, when art. 4 comes to deal with cargo on board "vessels referred to in arts. 1 and 2," it prescribes the same measure of liability as that laid down in art. 3, and describes that prescription as being an identical principle. Their Lordships, therefore, think it clear that in effect this convention says: "Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned, if they are not allowed to leave or if they unavoidably overstay their days of grace, but it would be better that they should always be allowed to leave, with or without days of grace." In effect, while art. 1 is only optional, art. 2 is obligatory. They reject the construction, which makes the prohibition upon confiscation depend on a prior election to do what art. 1 desiderates but does not require.

Assuming that the sixth convention was binding on this country in the early stages of the war in such a sense as would prevent the condemnation of these vessels at the end of it, the Procurator-General further contends that during its progress Germany has by her conduct given this country the right to refuse to be bound any further by its terms so far as German ships are concerned. It appears that in 1915, though the fact did not become known to His Majesty's Government till afterwards, the German Foreign Office instructed the German diplomatic officials in Spain to inform the owners of these detained ships of the arrival of any of them in Spanish ports when navigating under requisition. The object of this instruction seems to have been to give the owners the opportunity of taking proceedings in Spanish courts, if so advised, for recovering possession of them in Spanish waters under judgments pronounced for the purpose. It does not appear whether any such proceedings were ever taken, or, if so, with what result. Furthermore, in correspondence with the Government of the King of Siam the German Foreign Office had advanced, as a ground for refusing to be bound by the eleventh Hague Convention, that it had never been ratified by all the then belligerent powers. Finally, it was contended that the many outrageous and indefensible measures adopted by Germany during the war, and especially her defiance of the Hague Conventions applicable, notably by the use of poisonous gas and of contact mines, by the destruction of hospital ships, the deportation and forced employment of civilians and the bombardment of open towns, amounted to an intimation that she intended to repudiate all obligations, and especially all conventional obligations, as to the conduct of war, and thus gave to Great Britain the right to treat herself as released from her correlative obligation under the sixth Hague Convention of 1907. There are two obvious flaws in this argument. First, so far as concerns the intentions of Germany she may have flagrantly disregarded obligations, which fettered her freedom of action to her disadvantage. It does not necessarily follow that she intended to repudiate a convention under which she stood to gain largely in the long run. There is, in fact, no evidence of any conduct on Germany's part down to the conclusion of the Armistice which put it out of her power to return detained ships in pursuance of art. 2. Secondly, so far as concerns the consequent rights of this country, even if the rules of English municipal law as to the discharge or dissolution of contracts be applicable to a case arising between sovereign powers, repudiation by Germany could do no more than give to this country the right to accept that repudiation and to treat the convention as no longer binding. There is no evidence whatever that this was ever done; indeed it is plain that His Majesty's Government continued, down to the conclusion of hostilities and even to the conclusion of peace, to treat this convention as binding. Most, if not all, of *The Chile* orders had been made by the end of 1916, since which date, as well as before it, most of the facts now relied upon were notorious, yet no step was taken to obtain a "further order" in any case, and it is to be observed that the reason for making provision for a "further order" was not doubt as to the declared intentions of Germany with regard to recognition of the convention, but uncertainty as to the continuance of that intention on her part. If so, in the language of the English cases, the contract was kept alive for the benefit of both parties, since one party cannot of his own choice put an end to it by disregarding its obligations, and so long as the contract subsists, each party can claim the fulfilment of the provisions which are in his favour, just as he remains bound to answer for his disregard of obligations which he ought to satisfy. Their Lordships, however, do not rest their conclusions on rules applicable to private contracts in English courts. The principle of ascertaining the intention of the parties to an agreement by giving due consideration to what they have said is no doubt valid in inter-

national matters, but there are many rules both as to the formation, the interpretation and the discharge of contracts, which cannot be transferred indiscriminately from municipal law to the law of nations. They prefer to rely on a wider ground. It is not the function of a Court of Prize, as such, to be a censor of the general conduct of a belligerent apart from his dealings in the particular matters which come before the court, or to sanction disregard of solemn obligations by one belligerent, because it reprehends the whole behaviour of the other. Reprisals afford a legitimate mode of challenging and restraining misconduct, to which, when confined within recognised limits and embodied in due form, a Court of Prize is bound to give effect. In a matter, however, which turns on the obligation of a single and severable compact, the court must inquire whether that very compact has been discharged, and ought not to be guided by considerations arising only out of the general conduct of war. Their Lordships are clearly of opinion that neither in regard to the instructions given to the German Embassy in Madrid, which were after all a domestic matter and were at most a threat never communicated by Germany to His Majesty's Government; nor to the answer given to the Government of the King of Siam, which not only was *res inter alios acta* but related to a separate convention and proved nothing as to the German Government's intention to observe convention VI.; nor in regard to the general delinquencies of the German forces during the war, is it possible to find juridical grounds for releasing His Majesty's Government from their obligations under the sixth Hague Convention, when once they had attached. It has not even been shown that on the termination of the war Germany was not willing to return such British ships as she had detained, in so far as they had not been previously released under the Armistice or otherwise.

It would follow from the foregoing considerations that the owners of the vessels in question would be entitled to orders of release, but now arises the difficulty, that of these vessels only one survives, and that all matters occurring during the war are, as between German claimants and the Procurator-General, now to be considered in the light of the Treaty of Versailles.

Art. 2 of the sixth convention, after prescribing that the belligerent's right is limited to detention of the ship "under an obligation of restoring it after the war without compensation," proceeds: "or he may requisition it on condition of paying compensation." What is this compensation, and when and in what events is it to be paid? The question is material, because during the period of requisitioning the *Blonde* was lost by perils of the sea, without fault on the part of any one responsible, and the *Hercules* cannot now be restored because the German combatant forces themselves destroyed her, purporting to do so as a legitimate act of war. The provision is that a detained vessel is simply to be restored without compensation. Nothing is said to impose on the belligerent any duty to provide for her safety or to effect repairs. If he restores her, he does so without compensation, and meantime she has been detained at her owners' risk. Next, the belligerent is given an express right to requisition, but on condition of paying compensation. Whether requisition has the same meaning in the convention that it has in Order XXIX., or whether, in addition to the right to use, it includes a right to appropriate, are questions not now material; for present purposes it is sufficient to assume that the meaning of the word in both instruments is the same. While on the one hand nothing is stipulated as to payment of freight or of compensation for the use of the ship while under requisition and nothing is expressed as to repairs, on the other hand, apart from circumstances, which discharge the requisitioning Government from all the obligations of the convention, the exercise of the right to requisition during detention involves that, if she is not restored at all, compensation takes her place, and for this purpose her money value, when requisitioned, is the obvious substitute for the ship herself in specie.

It is no doubt paradoxical that, the ship having been lawfully requisitioned by the Admiralty without any obligation to pay for using her or for the consequences of mere use, His Majesty's Government should be called on to compensate her German owners because the German forces have sunk her by an illegitimate act of war. The question, however, is one of construction of the article. It begins by substituting detention for confiscation, thus ensuring to the owner the right to get his ship back, so far as the detaining belligerent is concerned. On this is engrafted a proviso for the benefit of the belligerent, of which he may avail himself or not as he pleases, and this proviso imposes on him an unqualified condition—that of compensation. This must be read literally, and as nothing further is prescribed in favour of the detaining belligerent, he cannot have the benefit of exceptions by implication. The convention says that requisitioning is to be on condition of paying compensation: the condition would be frustrated, if, though the obligations of the convention had not been terminated, neither ship nor compensation were forthcoming.

The convention furthermore does not define the compensation, or the mode of calculating it, or the time of payment. These are matters which it leaves for subsequent determination, and it is reasonable to infer that at any rate the determination of the court of prize, before which the vessel in question has been duly brought, is within the purview of the convention. Accordingly, if the recognised procedure as to requisitioning has been followed, as was done in the present case, and if that procedure provides for the substitution of money for the ship, that money cannot be regarded as being other than the compensation to which the article applies. Under the Prize Rules and Orders the court can allow the ship, which is in the custody of its marshal, to be requisitioned by the Crown, and in the course of such requisitioning to be necessarily exposed to maritime and belligerent hazards. This involves the court's parting with the custody and with the immediate control. For the security of the owner the court may require the deposit or a binding undertaking for the deposit in court of the ship's appraised value, and although the court by no means parts with its control over the ship for all purposes, or precludes itself altogether from ordering her re-delivery, it treats the fund for all ordinary purposes as the subject on which subsequent decrees will operate. The advantage to the owner is obvious. This procedure substitutes for such a wasting asset as a ship, which in either event he cannot use, a money fund in court, which possesses a relative stability and suffers no wear and tear. Their Lordships' conclusion is that under the sixth convention the

subjects to be restored are the *Prosper*, being a ship which is *in specie*, and the appraised values of the *Blonde* and *Hercules*, which were lost. No question as to freight was raised before their Lordships.

A further point may be briefly disposed of. It was that in all cases where a ship is requisitioned otherwise than "temporarily" under rule 6 of Order XXIX., the substitution of the appraised value for the ship is definitive, and no order can thereafter be made to take the ship herself out of the possession of the Admiralty. There is no authority for this. It is not supported by the special provision for a temporary, as distinguished from a general and indeterminate, requisitioning, which was only introduced by amendment into Order XXIX., some considerable time after the beginning of the war, nor does the provision that such requisitioning may be without appraisement, preclude the power of ordering appraisement, when on the destruction of the vessel it becomes necessary that a fund should be determined which will represent her. It is opposed to the nature of requisitioning, which is for the use of His Majesty (including, no doubt, consumption in the case of goods whose normal use consists in using them up), and would confound a thing requisitioned for use with a thing acquired for the purpose of sale. Furthermore, in cases where release *in specie* is the right of a claimant, the court might prove to have disabled itself from making the due decree, if a mere order for leave to requisition were to operate as a final abandonment to the Crown. Apart from the Treaty of Versailles, their Lordships conclude that the *Prosper* must, as a matter of form, be restored by the Admiralty to the custody of the marshal, in order that she may be released to the owners *in specie*.

The provisions of the Treaty of Versailles, which are invoked to the contrary, are twofold. There can be no doubt that Germany was competent on behalf of those nationals who were German subjects within the operation of the treaty, to make cessions which would bind them and effect a transfer of their rights of property, as if the cession had been made personally by the owner concerned. By art. 1 of annex III. of Part VIII. of the Treaty Germany ceded to the Allied and Associated Powers all vessels of 1600 tons gross and upwards, and a part of those under 1600 tons, and by par. 8 she further "waived all claims of any description against the Allied and Associated Governments or their nationals in respect of the detention, employment, loss or damage of any German ships," with an exception not now material. By art. 440 Germany further recognised as valid and binding all decrees and orders concerning German ships and goods made by any Prize Court of any of the Allied and Associated Powers.

In their Lordships' opinion, while annex III. operates to transfer the property in all ships of 1600 tons gross and upwards, it makes no such transfer in the case of ships of less tonnage, at least until they have been selected for surrender as part of those, which under the treaty are to be handed over. It is not suggested that the vessels in question have been so selected, and accordingly in their case this provision of the treaty does not affect the owners' rights to restoration *in specie*. Had they been over 1600 tons the property and rights of the owners would have been transferred by the operation of the treaty, and they would have had no *locus standi* to appeal against any order dealing with them or with the money in court or to be brought into court after appraisement in substitution for them. Sect. 1 of the third annex to Part VIII., being a cession by the German Government, "so as to bind all other persons interested," not only binds the German shipowners as persons interested in appraised values brought into or to be brought into court, but also binds them in respect of their property in the ships, which, until duly divested by a decree having that effect, remains in them, even though it may be liable to be divested at any time; accordingly it would be an answer both in regard to detained ships still *in specie*, whether remaining in the custody of the court or under requisition, and to the funds, which represent them under the practice of the court.

Their Lordships further think that par. 8 does not affect the matter. It would be otherwise if the appraised value were regarded, not as a substitution for the requisitioned *res*, taking its place when lost, but as a payment in consideration of being allowed to requisition at all, for in that case there might be a claim, which par. 8 would bar. Their Lordships, however, reject this view. The owners of these detained ships have no claim against His Majesty's Government either for detaining or for using the vessels. Both were regular proceedings taken as of right under regular decrees, the validity of which Germany recognises by the Treaty of Peace. The loss of the vessels gave no claim, for the owners' rights arise not out of the loss, but out of the substitution of the appraised values of the ships, the release of which is the indemnity which the convention provides for. There is, therefore, in this case nothing to waive.

The Treaty of Versailles contains a further provision (art. 297), not specially applicable to shipping, by which the Allied and Associated Powers reserve the right to retain and liquidate all property within their territories belonging to German nationals or companies controlled by them at the date of the coming into force of the treaty, the liquidation to be carried out in accordance with the laws of the Allied or Associated State concerned. It has been urged on the one hand and denied on the other, that an answer can be found to the claim of the Danziger Rederei Aktien Gesellschaft for the release of these vessels in the application of this article to the ships and funds in question. Beyond observing that the contentions raised on both sides deserve full and careful consideration by the appropriate tribunal, their Lordships do not feel called upon to express any opinion about them, for they are satisfied that the Prize Court is not such a tribunal. Nor do the terms of the Armistice affect the matter. It is enough to say that art. 30, which was cited, does not purport to touch the obligations of the Crown under the sixth Hague Convention, when duly determined by a Court of Prize whether before or after the conclusion of hostilities. It merely put it out of the power of Germany, when delivering the ships demanded, to insist on an anticipation of the actual end of the war by delivery of the detained German ships forthwith.

As soon as the conclusion has been arrived at that under the treaty obligations of 1907 this country is bound to restore the *res*, whether now existing *in specie* or only in the form of a substituted fund, the duty of the Prize Court *prima facie* is to give effect to that obligation and thereby to

discharge itself and its officials from further custody of or control over it. The decision of course involves a duty to ascertain that the private party claiming is a party presently entitled, who has not, by his own act or by the public act of those who bind him, been divested of his rights of ownership or of possession. Where rights and claims arise out of the way in which the prize has been dealt with prior to the decree for its release and the execution of that decree, no doubt the Prize Court retains its jurisdiction over them, notwithstanding that the *res* no longer remains in its custody. Here, however, there is no such case. Whatever rights may have been reserved to His Majesty, as one of the Allied and Associated Powers, to liquidate these ships or their value, they have not, so far as their Lordships have been informed, been hitherto put in force. The right referred to is not the right, existing independently of and prior to the convention of 1907, to claim condemnation of these ships in prize in accordance with the law of nations, nor is the reservation of it equivalent to the discharge of the restrictions, which the sixth convention imposes. It is a right to liquidate in accordance with municipal law, that is to say a new right, which does not become effective unless and until it is exercised. If this were to be done hereafter, it would be a new act not arising out of dealings with the prize as prize, not modifying the rights of ownership as they now exist, and therefore it would be cognisable by some other tribunal. Their Lordships are clearly of opinion that the Treaty of Versailles, which neither names nor seems to consider the sixth Hague Convention, does not in this article modify or annul the obligations, which arise under it. So much they decide but no more: the rest is open and, apparently, in accordance with the terms of art. 297, is cognisable by the High Court of Justice. As this potential claim has been brought to their Lordships' attention they think that under any order of release the *res* should not be removed out of British territory for a reasonable time, lest otherwise the treaty right might be defeated; but they see no reason for delaying the grant of a decree for release, since no ground remains for continuing the responsibilities of the Prize Court or prolonging its possession. The right course will be to release the *res* physically to the Public Trustee as Custodian of Enemy Property, or to such other officer as may be discharging such duties, to be retained by him for a reasonable time free of expense to the claimants, say for six months, in order that the Crown may have the opportunity of commencing proceedings if so advised, and in that case further until the final determination of those proceedings, but in any other case to be thereafter forthwith delivered up to the claimants.

It is unnecessary to express any opinion as to the appellants' claim to a special position as a company registered in and under the laws of the Free City of Danzig except as to one point. It was urged that a Court of Prize can condemn only as against an enemy subject. Conceding that the power is exercisable after the conclusion of peace, it was said only to apply to those whose allegiance or citizenship is the same as it was before that time, though peace has converted enmity into amity; hence as against the subjects of a newly constituted state, though formerly they were German, the right to condemn has ceased. The contention was not rested on any authority, nor was it explained why proceedings which were regular from the beginning should be frustrated as against the captors by a stipulation in the treaty, which does not deal with their rights but is directed to another and a very different object. Their Lordships think the contention groundless.

In the result the appeals succeed with costs; the decrees of condemnation should be set aside; the matter should be remitted to the Prize Court to make such orders as may be necessary for the appraisement of the *Blonde* and the *Hercules*, and to make a decree releasing those appraised values and the *Prosper* in specie to the Custodian of Enemy Property to be delivered up to the claimants, if after the lapse of six months no proceedings have been begun for an order for delivery up to the Crown, but otherwise to abide the final determination of such proceedings. There is also an appeal by leave from the president's refusal of a rehearing, as to which nothing need be said beyond formally dismissing it.

Their Lordships will humbly advise His Majesty accordingly.

The *Rabenfels*, the *Werdenfels*, the *Lauterfels*, the *Aenne Rickmers*, the *Gutenfels*, the *Barenfels*, the *Prins Adalbert*, the *Kronprinsessin Cecilie*.

In these cases their Lordships, at various dates in the earlier part of the war, made orders on appeal that the ships should be detained until further order. All were over 1600 tons.

The owners in the first, second, third, fifth, and sixth now petition that orders be made for the release of such as remain and for payment of of the appraised values of such as are lost, while the Crown petitions in all that orders condemning both may be made.

The relevant considerations have been fully dealt with in the case of the *Blonde* and other ships. In the case of ships of this size the Treaty of Versailles operates as a transfer of the former owners' rights, nor have they any *locus standi* before the board to discuss how the Allied and Associated Powers may deal with them *inter se*. The petitions for release should be dismissed with costs.

As their Lordships understand that His Majesty's Government have come to arrangements with the Allied and Associated Powers with regard to the shipping surrendered and transferred under the treaty, and that no question now arises as between them in relation thereto, they think that the proper course is to discharge the orders for detention previously advised by their Lordships; and to release the vessels to the Crown as the present owner.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Botterell* and *Roche*.
Solicitor for the respondent, *Treasury Solicitor*.

Monday, Feb. 13, 1922.

(Before Lords SUMNER, PARMOOR, and WRENBURY, and Sir ARTHUR CHANNELL.)

THE PELLWORM AND OTHER SHIPS. (*a*)

Prize Court—Enemy vessels—Capture in neutral territorial waters—Test of capture—Requisition of captured ships by Admiralty—Requisitioned ships sunk by enemy submarines—Appraised value—Restitution—Rights of neutral government—Prize Court Rules 1914, *Order XXIX.—Treaty of Versilles, Part VIII., annex III., arts.* 1, 297, *and* 440.

Capture consists in compelling the vessel captured to conform to the captor's will. Hauling down the flag by an enemy merchant vessel, taken in conjunction with stopping the engines, is not an unequivocal act of submission.

Four German merchant ships were captured by British warships on the 16th July 1917, *the chase beginning outside and ending inside Dutch territorial waters. The ships were on the 31st July* 1917 *requisitioned for the use of the Crown upon the usual undertaking to pay the appraised values into the Prize Court. Two of the ships while under requisition were sunk by German submarines. By the Treaty of Versailles, Germany recognises the validity of the orders of the Prize Court, and made certain cessions of German ships in the territories of the Allied Powers. The Dutch Government claimed the restoration of the ships to Dutch waters, or their appraised values, and compensation for the use of them.*

Held, that the Dutch Government were entitled to have the two existing ships restored to Dutch waters, and to receive the appraised values of the two ships sunk, but not to compensation for the past use of them. The terms of the treaty, to which the Dutch Government was not a party, as regards the cession of German ships did not affect the rights of the Dutch Government in the British Prize Court.

A requisition order is not a judgment in rem, *and does not affect the property in a ship.*

The Dusseldorf (15 *Asp. Mar. Law Cas.* 84; 123 *L. T. Rep.* 732; (1920) *A. C.* 1034) *and* The Valeria (15 *Asp. Mar. Law Cas.* 218; 124 *L. T. Rep.* 806; (1921) *A. C.* 477) *applied.*

Judgments of the Prize Court (15 *Asp. Mar. Law Cas.* 101; 123 *L. T. Rep.* 685; (1920) *P.* 347) *varied.*

CONSOLIDATED appeal and cross-appeals from two decrees of the Admiralty Division (in Prize), dated the 30th July 1919 and the 21st April 1920.

On the 16th July 1917 four German merchant ships, namely, the *Pellworm*, *Breitzig*, *Marie Horn*, and *Heinz Blumberg* were captured off the coast of Holland by British destroyers, and were brought to England for adjudication before the Prize Court. Writs for condemnation as prize were issued on the 25th July 1917. On the 31st July 1917 orders were made by Sir Samuel Evans, P., giving liberty to the Procurator-General to requisition the four ships for the use of His Majesty, and they were accordingly requisitioned. Undertakings were given by the Procurator-General for payment into court on behalf of the Crown of the amounts fixed by the court, and the values were subsequently appraised. Subsequently the *Pellworm* and the *Marie Horn*, while under requisition, were sunk by German submarines.

In Feb. 1918 claims were filed by the Dutch Government, alleging that the four ships had been captured within the territorial waters of Holland.

The action was tried by Lord Sterndale, P., who found that the ships, though outside territorial waters when called upon to stop, were within them when the captures were effected; and that there had been no intentional violation of Dutch territorial waters. He refused to condemn the ships, rejected the claim for costs and damages, and adjourned the matter for further consideration.

The Dutch Government on the 18th March 1920 delivered particulars of their claim, namely, (1) that the ships should be restored within the territorial waters of Holland in the like condition as at the time of capture, or alternatively with compensation for any loss or depreciation; (2) compensation for the user of the ships under the requisition order; (3) if any of the ships had been lost during their use by His Majesty, or otherwise, they claimed the insurance effected thereon; or (if not fully insured) a sum representing its full value at the date of the loss.

The Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on the 28th June 1919 was ratified after the hearing before Lord Sterndale, P. It contained the following provisions material to this report. By part VIII., annex III., art. 1, Germany ceded to the Allied and Associated Powers the property in all German-owned merchant ships of 1600 tons gross and upwards, and an unascertained moiety of certain ships of less tonnage. By art. 297 the Allied and Associated Powers reserved the right to retain and liquidate all property and interests belonging at the date of the coming into force of the treaty to German nationals. By art. 440, Germany recognised the validity of decrees and orders made by the Prize Court.

Of the four ships the *Heinz Blumberg* only was of over 1600 tons gross.

Duke, P. held (15 Asp. Mar. Law Cas. 102; 123 L. T. Rep. 686; (1920) P. 347) that the capture had created no proprietary right in the Dutch Government, and that the claim was a claim for the use of the enemy owner; that the requisition by the Crown was effectual to vest the property in the vessels in the Crown; that the claim was therefore for restitution in value by the payment of sums of money, being the appraised amounts, to a neutral sovereign for the use of German owners; that such sums were within art. 297 of the treaty and must be retained to be dealt with pursuant thereto; and that the claim of the Dutch Government must be dismissed.

The Procurator-General and the Dutch Government both appealed.

Dunlop, K.C. (Sir *Ernest Pollock*, K.C., S.-G. and *Aspinall*, K.C. with him) for the Procurator-General.—The ships were captured outside the Dutch territorial waters. Being at the mercy of the destroyers, they hauled down their flags and stopped their engines outside the limit, and that constituted a surrender. Having surrendered outside, it is immaterial that the ships afterwards drifted inside the limit, where possession was taken. They referred to:

The Vrow Anna Catharina, 1803, 5 C. Rob. 15;
The Anna, 1805, 5 C. Rob. 373;

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

The Rebeckah, 1799, 1 C. Rob. 233;
The Esperanza, 1822, 1 Hag. Adm. 91.

R. A. Wright, K.C., *Bisschop*, and *A. T. Bucknill*, for the Dutch Government.—The hauling down of the flags is quite consistent with a continuing intention to escape, and was part of their method of attempting an escape. In any case possession was taken by the British inside Dutch waters, which was a violation of Dutch rights:

The Adela, 1867, 6 Wall, 266.

Secondly, the Dutch Government are entitled to have the two existing ships restored to Dutch waters, free of expense, and to the appraised value of the two ships sunk:

The Dusseldorf, 15 Asp. Mar. Law Cas. 84; 123 L. T. Rep. 732; (1920) A. C. 1034.

The requisition order did not transfer the property in the ships to the Crown. The rights of the Dutch Government are not affected by the Treaty of Versailles, to which they were not a party. Their rights having been violated they are entitled to a *restitutio in integrum*.

Sir *Ernest Pollock* (S.-G.) on the cross-appeals.—The Dutch Government are not entitled to compensation for the use of the ships: (*The Dusseldorf*, *sup.*) and as the violation of neutrality was unintentional, they are not entitled to costs or damages. They are entitled only to a decree that the capture was made in their waters, assuming that is the fact, but to nothing further. They have no property in the ships, and are not entitled to their appraised value:

The Valeria, 15 Asp. Mar. Law Cas. 218; 122 L. T. Rep. 751; (1920) P. 81.

Under the Treaty of Versailles the ships were ceded to Great Britain, and that being so, there is no reason for handing them over to the Dutch Government, to be restored to Germany. Two of the ships have been lost by enemy action, and it is impossible to restore them, and the Dutch Government is not entitled to their appraised value. If there is no obligation to restore the *res*, there is no obligation to pay the appraised value; and if the appraised value represents the *res*, the loss of the *res* by sinking is an answer to the claim for the appraised value thereof.

Wright, K.C. replied on the cross-appeals.

The judgment of the court was delivered by

Lord SUMNER.—These are consolidated cross-appeals from decisions of Lord Sterndale and of Sir Henry Duke. In the Prize Court (15 Asp. Mar. Law Cas. 101; 123 L. T. Rep. 685; (1920) P. 347), when the Procurator-General claimed the condemnation as good prize of four German steamers, the *Pellworm*, *Marie Horn*, *Breitzig*, amd *Heinz Blumberg*, seized on the 16th July 1917, Lord Sterndale found that they had been captured in Dutch territorial waters and refused condemnation, but at the same time he dismissed the claim for damages put forward by the Dutch Government and adjourned further consideration. This was in 1919. When the matter came on again, Sir Henry Duke dismissed the claim for delivery up of the ships or their appraised values, ordered that the latter be retained in court to be dealt with pursuant to the Treaty of Versailles, and directed that consideration of the claims to the cargoes should be reserved for further inquiry. Accordingly their Lordships are not concerned with the cargo claims and do not deal with them. The Procurator-General has appealed against the decision that the captures were made within the territorial waters of Holland and against the refusal to condemn the ships, and there is a cross appeal by the Dutch Government against the refusal to order their delivery or payment of their appraised values with damages and expenses.

The facts were that a flotilla of British destroyers was proceeding along the Dutch coast at no great distance outside the three-mile limit, on the look-out for a number of German vessels, which were also shaping their course as near as they could to that limit, obviously for the purpose of effecting a quick escape into neutral waters in case a British patrol should heave in sight. The destroyers did heave in sight, and closed. The German ships made for Dutch waters, but eventually were signalled to stop their engines and change course to the westward at a moment when they were within too short a range to make it safe to disobey. They hauled down their flags and stopped or appeared to stop their engines, but did not alter course to the westward. The wind and tide were then from the north-west, though of no great strength, and the steamers continued to keep their way and, aided by wind and tide, drew nearer to the shore. The destroyers then sent in their boats. Some of the German steamers were abandoned by their crews. When boarded, as they all eventually were, they had travelled a considerable distance towards the coast of Holland, but no resistance was made, and the prize crews took them out to sea and brought them into an English port.

The questions of fact arising in connection with this story are these: (1) Were any of the German steamers within the three-mile limit (*a*) when ordered to stop their engines; (*b*) when they hauled down their flags and purported to stop their engines; (*c*) when they were abandoned by their crews; (*d*) when they were boarded and taken possession of by the prize crews? (2) If any belligerent act was committed by the British forces within the territorial waters of Holland, was it done intentionally or in the belief that both the British and the German ships were still outside the territorial limit?

The learned President, Lord Sterndale, answered the first of these questions in the following words:—"The conclusion to which I come 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."

After carefully examining the evidence with the assistance of counsel, their Lordships have arrived at the same conclusions. It is unnecessary to recapitulate the particular facts deposed to, or to discuss them in detail, but their Lordships may observe generally, (1) that the German ships, when boarded, were far enough inshore to make it impossible that they should have been first brought to at any considerable distance from the territorial limit; (2) that the wind and tide and the way the ships were carrying were hardly sufficient in themselves to account for the distance, which they eventually covered towards the land, but their Lordships are not to be taken to assert (whatever they may suspect) that, after the order to stop, the engines were kept running, though with calcu-

lated unobtrusiveness; and (3) that, whatever may be the effect of it in law, the German steamers in fact disregarded the signal to alter their heading, in order to profit by the forces, natural or artificial, which were seen to be carrying them towards the land. No doubt the contingency of meeting English men-of-war had been carefully considered, for the German vessels, which were all following one another *en échelon*, all promptly acted in the same way and with the same results. It is true that in his evidence one of His Majesty's officers surmised that the signal to alter course to the westward was not readily understood, but no German captain says so, and their Lordships think that the surmise does less than justice to the vigilance and intelligence of the enemy.

The claimants' proof that possession was finally taken well within the territorial waters of Holland makes it incumbent on the captors to establish affirmatively, at least that capture was legally complete while both the captors and the captured were still outside of them. Whether or not, in these or any circumstances, a prize, duly captured outside the three-mile limit, but carried intentionally or by accident or inadvertence across the line before she can be boarded, may nevertheless be legitimately followed up and reduced into possession within the line is a question which need not now be decided. There are observations on the subject by Sir William Scott in *The Anna* (1805, 5 C. Rob., at p. 385 385 *d*, *e*), when discussing the dictum of Bynkershoek in his Quæstiones Juris Publici, p. 66; but, besides being unnecessary to the decision in that case, they do not apply to such a case as the present, where the neighbouring shore was inhabited and the actual field of operations was under observation by Dutch officials, stationed there for the very purpose. Such a case bears no analogy, at any rate, to salving a prize, which, after being duly captured, has broken adrift or has otherwise by marine perils come involuntarily within the three-mile limit, a contention advanced by the Procurator-General's counsel. Boarding the prizes within Dutch waters was a belligerent act in any view, and thereafter and in consequence of the boarding, the German ships were taken as captured prizes out of those waters to British ports. It was contended that this action could be justified, if what had already been done on the high seas did not amount to capture; but the case for the Crown was that a complete *deditio* had taken place outside the territorial limit.

When completed captures are made on the high seas, it can rarely matter by what steps they become complete or in what the conclusive *indicia* of capture consist. The question, however, becomes material when a series of naval movements take place in such a position that the invisible limit of territorial waters intersects them, for this at once creates the necessity for a logical analysis of them, in order to determine whether or not territorial rights have been violated. Singularly enough, the reported cases on claims of territory throw little or no light on this question. The Scottish Prize Cases, some of very early date, which are reported in Morison, generally turn on circumstances so special as to be of little assistance in solving modern problems. There is one case of a claim of territory by the King of Denmark, viz., *Hunter* v. *De Bothmer* (1764, Mor. Dict. 11,957), but there the whole capture was deliberately made within the waters of Norway. The cases before Sir William Scott are of limited application in any case, and do not touch this particular point, nor is it determined by any of the decisions of their Lordships' board in the recent war. In the unreported case of *The Loekken* (J. C. July 26, 1918) which alone approximates to the present case, it was shown upon the facts that, when in response to a signal to stop and another threatening to fire, if she did not stop, the *Loekken* stopped and reversed, both she and the captor were outside territorial waters, and she was thus captured on the high seas. It was further shown that, when the captors commenced to head her off from escaping into territorial waters, as she tried to do, they were themselves on the high seas, and if the two vessels afterwards drifted accidentally over the line, which was at best doubtful on the facts, this happened at a considerable interval after the completion of the capture.

In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done *deditio* is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action or by abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary (*The Esperanza*, 1822, 1 Hagg. at p. 91). A ship may be truly captured, though she is neither fired on nor boarded (*The Edward and Mary*, 1801, 3 C. Rob., 305), if, for example, she is constrained to lead the way for the capturing vessel under orders, or to follow her lead, or directs her course to a port or other destination, as commanded. If she has to be boarded, she is at any rate taken as prize when resistance has completely ceased. It was contended before their Lordships by counsel for the Crown that hauling down the flag was conclusive in the present case, or at least was conclusive when taken in conjunction with stopping the engines as ordered. It was said to be an unequivocal act of submission, as eloquent as the words "I surrender" could have been, an act which could not be qualified by any intention that did not find expression in action. This is to press *The Rebeckah* (1799, 1 C. Rob., 227) beyond what it will bear, for there the facts showed that after the act of formal submission by striking colours, there was no discontinuance of that submission either effectively or at all, whereas Sir William Scott intimates that, if any attempt had been made to defeat the surrender, he would not have treated the *deditio* as complete till possession was actually taken. It is true that by tradition, when ships are engaged in combat, striking the colours is an accepted sign of surrender, but to do so without also ceasing resistance is to invite and to justify further severe measures by the victorious combatant. In the case of a merchantman, where the traditions of commissioned men-of-war are not of equal application, the hauling down of the flag, like any other sign or act of submission, is to be tested by inquiring whether the prize has submitted to the captor's will. What a combatant seeks to intimate by acts signifying surrender is, first and foremost, that he ceases to fight and submits to be taken prisoner; what a merchantman

intimates is, that she means to do as she is told, and that the chattel property may be captured in prize though the seamen in charge of it are not made prisoners or placed under personal restraint. In the present case, according to evidence given for the Crown, the hauling down of their flags by the German steamers was accompanied by a change of course towards the land, and, as it preceded any British signal by flag or cannon shot, it was in the circumstances anything but a clear intimation of submission. On the contrary, it is obvious that the German ships continued to move towards and shortly crossed the three-mile limit, and that this was neither inadvertent nor was incapable of being prevented. They had not abandoned the intention to escape, nor had they arrested their movement towards the region of safety. They submitted just so far as to minimise the risk of being fired on; they disobeyed orders just so far as to ensure that the ships would of themselves glide or be carried over the line. They were already heading towards the territorial waters, and desired to obtain whatever advantage might be derivable from getting within them. This was why they did not obey the order to alter course to the westward. It is not shown that they could not have done so. Under these circumstances their Lordships see no reason to differ from Lord Sterndale's conclusion, that the vessels were not captured till they had entered Dutch waters, for up to that time they were endeavouring to escape and were resisting or evading submission to the captors' will.

Nor can they differ from his conclusion that the conduct of His Majesty's officers was neither reckless nor careless, and that their violation of Dutch neutrality was inadvertent, since they believed in all good faith that both captors and prizes, throughout and until capture was complete, remained outside the three-mile limit. He saw these officers and judged of their demeanour, and their evidence is quite consistent with his conclusion. It may well be that they were keen in pursuit and determined to make a capture, if it could legitimately be made, but their minds were alive to the question of the rights of Holland, and they are not shown to have allowed meritorious zeal to degenerate into determination to snatch success at all costs. Even if it be taken, that when the German vessels were actually boarded they, or some of them, were obviously within Dutch waters and should have been known to be so by the captors, their Lordships do not think that this alone is a ground for reversing Lord Sterndale's decision apart from the other features of the case, nor indeed were they really pressed by counsel to do so. They are not to be taken to mean that ignorance of the law would excuse improper action, where the facts were or ought to have been known, but it is one thing to say that capture, effected within Dutch waters, by boarding or otherwise, involves the restoration of the prize, and quite another to say, that to board within the territorial limits a prize honestly believed to have been captured outside them must necessarily justify a claim for damage by the neutral sovereign concerned. It is not shown that the act of shelling other ships, which went ashore in another part of the area of operations, was connected with the capture of the vessels in question, in any way that ought reasonably to affect the matter. The further contention that a promise to pay costs and expenses can be inferred from a suggestion made in the course of diplomatic correspondence, that the whole matter was one for the Prize Court, is really not worth examination. When, therefore, the case again came up to be dealt with by Sir Henry Duke on Lord Sterndale's findings, it followed that there could be no award of damages in favour of the Dutch Government, but *primâ facie* they were entitled to restoration of the ships, which had been wrongly captured within their territorial waters.

Here arise two classes of difficulty. After being brought before the Prize Court, all four ships were duly requisitioned for the use of His Majesty by Order, dated the 31st July 1917, but made before the Dutch Government had entered an appearance. As to the claim for profits and usufruct, it was not nor could it have been seriously contended, that they were entitled to the profits of or to payment for the use of the ships, but while requisitioned two of them—the *Pellworm* and the *Marie Horn*—were torpedoed and sunk by enemy action, and subsequently, under the Treaty of Versailles, Germany ceded to the Allied and Associated Powers all German ships of over 1600 tons gross, and undertook to cede an unascertained moiety of certain ships under 1600 tons. It was accordingly urged before Sir Henry Duke and again before their Lordships that, as the *Heinz Blumberg* at any rate is over 1600 tons gross, and both she and the *Breitzig* are ships in the hands of His Majesty's Government under an order of the Prize Court, which by art. 440 Germany undertakes to recognise as valid, the Treaty operated as if there had been a private cession of the property in the two vessels by the German owners to new proprietors; that under the Treaty the seizing Power had thus acquired an independent title, arising out of matters subsequent and not grounded in any wrongful act or involving the retention of any profit due to that wrong; that the former owners, having now no interest, could have no cause of complaint against the Dutch Government, and that the Dutch Government being immune from claims had neither occasion nor right to demand redelivery of the vessels. It was urged, on the other hand, on behalf of the Dutch Government, that not only were they entitled to redelivery of the ships which survive, but of the appraised values of those which have been lost; and that being strangers to the Treaty of Versailles, they were entitled to treat it as irrelevant and *res inter alios acta*.

Their Lordships have already stated in *The Dusseldorf* (15 Asp. Mar. Law Cas. 84; 123 L. T. Rep. 732; (1920) A. C. 1034) and *The Valeria* (15 Asp. Mar. Law Cas. 218; 124 L. T. Rep. 806; (1921) 1 A. C. 477), and need not now repeat, what is the general position of a sovereign claimant, whose territorial waters have been violated by a belligerent force. In their opinion it follows from that position that changes in the ownership of the vessel, which is the subject of the proceedings in prize, cannot defeat the claim of territory, which is independent of ownership, but that, on the other hand, where there has been no intentional misconduct or affront on the part of the captors, and the loss of the vessel in question, without default on the part of those in control of her, has made her return *in specie* impossible, the payment of damages to the claimant is a wholly inappropriate remedy. A separate and much more difficult question, however, arises where prizes have been requisitioned on the terms of bringing, or of undertaking to bring, the appraised values into court. It is this: Ought a claim to

those appraised values, advanced on behalf of the neutral sovereign, to be treated as a claim for a *solatium* in money or as a claim for the *res* itself, in the only form in which it can now be returned ?

In the first aspect the following arguments arise. Where, under orders regularly and lawfully made, money has been substituted for the *res*, which has been brought into prize, the substitution is ordered not only to secure the captors, but also for the benefit of such claimants as have a right of property in the *res*, and whose interest in it is therefore an interest in its value. A claim to the appraised value is a proprietary claim ; a claim by a sovereign in virtue of his violated rights is the antithesis of a proprietary claim, and finds its sole satisfaction in the return of the *res* to enable him to assert his rights as a sovereign and to discharge his duties as a neutral. The affronted Power had no property in or possession of the ship seized, and cannot assert a claim merely on behalf of or for the benefit of those who have the ownership or are entitled to the possession. The remedy for taking away the prize from neutral waters, without justification or permission, is the restoration of that which was seized to the waters, whence it was taken, as honourable amends for a belligerent act, which, when once it has been established, a friendly Power cannot seek to profit by or to defend. An offer of money, so far from constituting amends, would rather aggravate the affront ; a claim of money, in the absence of misconduct on the part of the captors, could only be a claim in the interest of private owners, which the aggrieved sovereign is not entitled to make. Money was not taken, therefore money has not to be returned. The State, whose officers have captured the prize in neutral waters, cannot retain it consistently with the satisfaction of its obligation to make amends ; but the State whose waters have been invaded cannot ask, nor can a Court of Prize grant, the imposition of a money penalty, where no international wrong was done, or decree the payment of money as the price of an invasion of sovereignty. In their Lordships' opinion these considerations, which are generally valid, fail to apply in the present case for the following reason. The ships were requisitioned by the Admiralty for the use of His Majesty, but *ex hypothesi* the requisition operated on something, which never should have been brought into the custody of the Prize Court at all. Had it not been for the requisitioning they would have been restored by decree of the court. It is true that there is no claim for compensation in respect of the loss, as such, but the requisitioning was ordered at the instance of the Crown and the court parted with the custody of them in accordance with the regular practice. Thereafter the ships were represented for all ordinary purposes by their appraised values. If a requisitioned ship is condemned, the undertaking to bring her appraised value into court fails, since the Crown is not bound to pay for her ; if she is not condemned, the money is brought into court and paid to the party entitled to a release of the ship. If the court were to refuse to release the appraised values in this case when it would have released the ships if they had remained in the Marshal's custody, the result would be that the Dutch Government's right to restoration would be defeated merely as a consequence of the British Government's exercise of the right to requisition, and the British Government's obligation to bring the appraised values into court would cease to be performable. As it is, though the ships are lost there is something to restore, viz., the money which represents them. In their Lordships' opinion this consideration must prevail. It is not a sufficient objection to say that the Dutch Government have no proprietary interest in money, or that they would recover money only as trustees for or for the benefit of ex-enemy owners. Trustees in strictness they are not, but, even if they were, this would in their Lordships' opinion be less incongruous with principle and more consistent with international amity than that the same law, which requires the return of a prize wrongly captured, should justify the retention of the sum, which is to be deemed to be in court as representing it. If the prospect of the return of the restored ships to their ex-enemy owners does not prevent their restoration to the neutral Government, no different result should follow from the prospect that the money, when restored, will be handed over likewise. It follows that His Majesty's Government ought to return to the waters of Holland the vessels which survive, let the present rights of property or possession be what they may ; and ought to do so free of expense to the Government of the Queen of the Netherlands, and that the like obligation to return applies to the appraised values, which otherwise would be a profit growing out of their own wrong.

Accordingly, in this appeal, their Lordships refrain from expressing any opinion as to the effect of the Treaty of Versailles on the ownership of the *Breitzig* and the *Heinz Blumberg*, or the title to the sums representing the appraised values of the *Pellworm* and of the *Marie Horn*.

It is true that the general practice has been to use the same form of order, viz., " decreed the same to be restored to the said claimant for the use of the owners and proprietors thereof," both in cases of claims of territory and in cases of claims made by and on behalf of private owners, but this has not been followed without exception ; for the order made in the case of *The Dusseldorf* was for release to solicitors, acting " on behalf of the said claimant," viz., the Norwegian Consul-General as representing his Government, and the owners were not mentioned. In either case, however, there is no precedent for an order seeking to fetter the possession of the State, whose claim has been successfully asserted, or to derogate from the full measure of the amends, which the Court of Prize has decided to be due. There appears to be no such settled practice as would affect the principle of the matter. On the other hand, it is necessary to correct the decree actually made by Lord Sterndale to this extent. The questions arising on the effect of the Treaty of Versailles had not at that time been mooted, and accordingly the decree, as drawn up declared in ordinary form, that the ships captured belonged to the enemies of the Crown. Now that these questions have arisen, their Lordships think that, to prevent any appearance of prejudging them, the words " at the time of capture " should be inserted after the word " belonged." If the right of His Majesty's Government to the property in and possession of those ships or sums by virtue of the Treaty of Versailles or otherwise is plain, their Lordships cannot doubt that the Government of the Netherlands will promptly recognise the right of a friendly sovereign and direct their return to this country. If it is susceptible of doubt, they make no question of the competence and freedom of the Courts of Holland to decide it in proceedings properly

commenced for that purpose, or of the willingness of the Dutch Government to abide by their decision, and, pending that decision, merely to retain possession of the ships and sums on behalf of whom it may ultimately prove to concern. It would be little consonant with the principle of honourable amends between friendly Powers, which is the foundation of claims of territory, to clog it with any distrust of the justice and regularity of the proceedings of the successful sovereign. They find nothing in the Treaty, or in the Statute and Order in Council framed to make it executory, to interfere with this view of the matter.

It has, however, been contended that there is something in the practice of Courts of Prize in this country with regard to requisitioning for the use of His Majesty of ships that are in the custody of the court pending their adjudication in prize, which is at variance with the principles above stated. Their Lordships think that the contention is fallacious. When a ship is placed in the custody of the Prize Court with a view to adjudication in prize, then and there it is either liable to condemnation or is not. Time is necessary in order that the evidence may be got together on both sides and may be considered in due course by the court; but if all the evidence were immediately forthcoming and the claimant had a proper opportunity of being fully heard, he would have no grievance if the adjudication were to take place forthwith. Furthermore, pending adjudication he has no benefit from the use of the ship, and she remains at his risk in the marshal's custody. Accordingly, under orders and rules validly made, a practice has been established, which is beneficial alike to the captors, to the court, and to the claimant. This is no mere matter of municipal law, which does not bind a foreign Government except in virtue of some submission to the jurisdiction; it is part of the practice of a court which administers the law of nations, none the less so that it is regulated by orders which are made in virtue of statutory authority. The ship, if requisitioned for the use of His Majesty, may be released to the Admiralty for an indefinite period, on the terms of substituting for the ship in the marshal's custody her appraised value, paid or payable into court, or for a short and definite period without any terms requiring appraisement. In the former case, at any rate, which is the case in question, the claimant is thus protected from depreciation and marine risks, and the court is relieved from the responsibility of her custody. If ultimately a decree is made in his favour, the claimant could desire nothing better than payment of the appraised value; if a decree for condemnation is made, all necessary effects are secured by the release of the Admiralty from the obligation to pay the value into court, and by the change of property as against all the world by a judgment *in rem*. An order for requisition in itself, however, is not a judgment *in rem*; it does not purport to change property; it authorises use and using up—that is, consumption—but it does not make the thing requisitioned a subject of sale. The orders and rules make separate provision for orders for sale, and their Lordships must not be taken to agree with the statement of Sir H. Duke, P. in the court below that an order for leave to requisition, though followed by delivery, in itself changes the property. In cases where the law of nations requires the return of a ship *in specie*, the court has no authority to defeat its duty in advance, and an order merely as to the use of the ship does not purport to do so; as Sir William Scott says in the *Vrouw Anna Katerina* (5 C. Rob., 1803, at p. 16), "the court is at all times very much disposed to pay attention to claims of this species, . . . when the fact is established it overrules every other consideration; the capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy." In fact the order made provides only for release and delivery to the Crown or for temporary delivery, as the case may be. Furthermore, the court's own rules condition the requisitioning of ships liable to condemnation quite differently from art. 2 of the sixth Hague Convention of 1907, which gives a contractual right to requisition detained ships subject to an express condition of paying compensation. They impose no liability to answer for accidental loss, but are fully satisfied by the deposit of the appraised values. Their Lordships can find nothing, either in the decisions or in the words of the orders and rules, to warrant the contention that for the purposes of a claim of territory, the appraised value of a ship, when once it has been requisitioned, must be treated in all circumstances as if it were the ship herself, lost or not lost; nor can they find anything to restrict the right of the Prize Court to require the return to its marshal, of a requisitioned ship, which is still *in specie*, in order that it may decree its release to the claimant Government. The order, giving leave to requisition, which the court itself made it is also competent in such a case to revoke. *The Dusseldorf* (*sup.*), for which an order of release was made, had herself been requisitioned, and this was not raised as an objection to her release. In the present case the importance of this point has been somewhat removed by the undertaking, given by the Solicitor-General, that, if their Lordships should be of opinion that the ships should be restored, the Admiralty would give them up accordingly.

It may be that if, by arrangement or otherwise, the two ships are returned to Dutch waters by the British Government, no expenditure in the matter will fall on the Government of the Queen of the Netherlands. If so, part of the order which their Lordships think is the right one will become inoperative. The case of such expenditure being incurred ought, however, to be provided for.

Their Lordships will humbly advise His Majesty that, subject to the above-mentioned addition to the decree of Lord Sterndale, the appeal of the Procurator-General should be dismissed with costs, and that the cross-appeal, so far as concerns damages should also be dismissed with costs; but that it should be allowed with costs and the order of Sir H. Duke, which is appealed against, should be set aside, so far as concerns the restoration of the *Breitzig* and *Heinz Blumberg* and the payment over by way of restoration of the appraised values of the *Pellworm* and the *Marie Horn*; that a decree should be entered for the claimants accordingly, and for payment of the expenses, if any, falling upon the claimants in connection with the return to Dutch territorial waters of the *Breitzig* and the *Heinz Blumberg*, and that the cause should be remitted to the Prize Court to make any order required for an inquiry into the fact and the amount of such expenses and for payment of them to the Dutch Government and also for the discharge of any undertaking given by the Admiralty in respect of the appraised value of the ships restored *in specie*.

Judgment varied.

Solicitors, *Treasury Solicitor ; Ince, Colt, Ince* and *Roscoe.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Jan. 17, 1922.

(Before Bankes, Scrutton, and Atkin, L.JJ.)

The Mogileff (No. 2). (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Practice—Interpleader—Summons issued to the Crown—Power to make the Crown a claimant in interpleader proceedings—Register of shipping—"Government ships"—Registered owner—"His Majesty represented by the Shipping Controller"—Evidence of ownership—Interpleader Act 1831 (1 *&* 2 *Will.* 4, *c.* 58)—*Judicature Act* 1873 (36 *&* 37 *Vict. c.* 36), *s.* 25 (11)—*Merchant Shipping Act* 1894 ((57 *&* 58 *Vict. c.* 60), *ss.* 1, 11, 64, 695, 741—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 80—*Order in Council, the* 29*th Sept,* 1917.

The Crown cannot be summoned to appear upon an interpleader summons or made a party to an interpleader issue.

Under a writ of fi. fa. *the sheriff seized in satisfaction of a judgment debt two vessels owned by a foreign corporation. The Crown then intimated that the vessels had been requisitioned and were the property of the Crown. The register showed that the registered owner of the vessels was : "His Majesty, represented by the Shipping Controller, London, sixty-four shares." There was no evidence that the ships were in the active service of the Crown, and they were in fact laid up. The judgment creditors disputed that the vessels were the property of the Crown, and the sheriff accordingly took out an interpleader summons calling upon the judgment creditors and the Crown to appear and state their claims.*

Hill, J. held that the vessels had been registered under sect. 80 (1) *of the Merchant Shipping Act* 1906, *and the Order in Council of the* 29*th Sept.* 1917 *made thereunder. They were not ships to which sect.* 741 *of the Merchant Shipping Act* 1894 *applied, and therefore sect.* 695 *of that Act was applicable to them. By sect.* 695 *the entry in the register was evidence of the facts stated therein. In this case the facts so stated indicated no more ownership in the Crown than was described by sect.* 80 (3) *of the Act of* 1906, *which might amount to no more than a holding "by the Shipping Controller on behalf of or for the benefit of the Crown." Having regard to the fact that foreign owned ships and ships detained by the Prize Court under the* Chile *form of order were registered under sect.* 80 *of the Act of* 1906 *no certain inference could be drawn from the register as to the Crown's ownership whether legal or otherwise.*

On the objection that the Crown cannot be summoned to answer an interpleader,

Hill, J. held that as the Crown did not consent to submit to the jurisdiction of the court the court had no power to order the Crown to do so. Interpleader proceedings, though they may not amount to maintaining an action against the Crown, come within the wider principle that the King cannot against his will be made to submit to the jurisdiction of the King's courts. Sect. 25 (11) *of the Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66) *does not make the old equity rule prevail, or apply to alter the rights of the Crown.*

The passage of Blackstone at vol. 1, *chap.* 7, *par.* 1 (*quoted and approved by Brett, L.J. in* The Parlement-Belge, 42 *L. T. Rep.* 273 ; 4 *Asp. Mar. Law Cas.* 234, 5 *Prob. Div.* 197) *applied and followed.*

The Court of Appeal upheld the decision of Mr. Justice Hill.

Interpleader.

This was an appeal from an order of the assistant registrar dismissing an interpleader summons taken out by the sheriff of Lincolnshire and directed to the Borneo Company who were plaintiffs in an action against the owners of the steamship *Mogileff*, the Russian Volunteer Fleet, seeking to levy execution of their judgment debt, and to His Majesty represented by the Shipping Controller.

The *Mogileff* had been sold by the Marshal in satisfaction of the judgment obtained against her *in rem* by the Borneo Company, but the proceeds failed to satisfy the judgment debt. The Borneo Company accordingly proceeded to levy execution in respect of the balance of the amount for which they had obtained judgment, and under a writ of *fi. fa.* the steamships *Krasnoiarsk* and *Vologda*, said to belong to the Russian Volunteer Fleet, were seized on behalf of the plaintiffs by the sheriff of Lincolnshire.

The Crown then gave notice that the *Krasnoiarsk* and the *Vologda* were the property of His Majesty. An interpleader summons was thereupon taken out by the sheriff directed to the Borneo Company, and the Crown calling on them to appear and state their claims. The assistant registrar dismissed this summons, ordering the sheriff to remain in possession pending the hearing of an appeal or to withdraw if no notice of appeal was given. The Borneo Company appealed.

At the trial it was stated that a petition of right had been presented by the Russian Volunteer Fleet asking for a declaration that the *Krasnoiarsk* and the *Vologda* were their property.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides :

Sect. 11. . . . The registrar shall enter in the register book the following particulars respecting the ship : . . . . (*d*) the name and description of her registered owner or owners, and if there are more owners than one the proportions in which they are interested in her.

Sect. 64. . . . . (2) The following documents shall be admissible in evidence in the manner provided by this Act, namely, (*a*) Any register book under any part of this Act. . . . (*b*) A certificate of registry under this Act. . . .

Sect. 695. (1) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act. . . .

Sect. 741. This Act shall not, except when specially provided, apply to ships belonging to Her Majesty.

(*a*) Reported by W. C. Sandford and Geoffrey Hutchinson, Esqrs., Barristers-at-Law.

The Merchant Shipping Act 1906 (6 Edw. 7, c. 48) provides:

Sect. 80. (1) His Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purposes of the Merchant Shipping Acts, and these Acts, subject to any exceptions or modifications which may be made by Order in Council, either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with these regulations as if they were registered in the manner provided by these Acts. . . . (3) In this section the expression "Government ships" means ships not forming part of His Majesty's Navy which belong to His Majesty or are held by any person on behalf of or for the benefit of the Crown, and for that reason cannot be registered under the principal Act.

The Order in Council of the 29th Sept. 1917 provides (*inter alia*):

1. An application for registry of a Government ship in the service of the Shipping Controller shall be made in writing. . . . Such application shall contain the following particulars: . . . (3) A statement of the nature of the title to the said ship whether of original construction by or for the Shipping Controller or by purchase, capture, condemnation or otherwise. . . .

2. The registrar upon receiving such application in respect of a Government ship in the service of the Shipping Controller shall (1) enter the ship in the register book as belonging to "His Majesty represented by the Shipping Controller. . . ."

10. Sect. 1 and sects. 8 to 12 of the Merchant Shipping Act 1894 shall not apply to Government ships in the service of the Shipping Controller registered in pursuance of this Order in Council. . . .

F. D. MacKinnon, K.C. and *G. P. Langton* for the appellants, the Borneo Company.—The registers show no ownership in the Crown. The practice of interpleader was introduced by the Interpleader Act 1831 (1 & 2 Will. 4, c. 58). now repealed, and continued in the Judicature Act 1873 (36 & 37 Vict. c. 66). Decisions under the earlier statute are still binding. There is authority that the Crown may be summoned in interpleader proceedings to appear and state a claim:

Creighton v. *Attorney-General*, 1731, Bunb. 303; *Reid* v. *Stearn*, 1 L. T. Rep. 539; 6 Jur. (N.S.) 237.

In the latter case Stuart, V.-C. rejected a submission that the Crown could not be made a party to interpleader proceedings. These cases are ruling authorities, and the doubt thrown upon them in text books (see Robertson's Civil Proceedings by and against the Crown, p. 610; Merlin's Practice of Interpleader; and a doubtful expression of opinion in Halsbury's Laws of England, vol. 17, p. 596) is not well founded. By sect. 25 (11) of the Judicature Act 1873 the equity rule under which *Reid* v. *Stearn* (*sup.*) was decided is continued. It is not now a ground for refusing relief that an order for costs might have to be made against the Crown, nor is it universally true that the Crown cannot be made party to proceedings other than by petition of right:

Anglo-Newfoundland Development Company v. *The King*, 122 L. T. Rep. 731; (1920) 2 K. B. 214.

Darby for the Crown.—There is no power to make the Crown party to proceedings except by petition of right (see Baker, p. 21). The Crown cannot be made to answer an interpleader summons:

Candy and Dean v. *Maugham*, 1843, 1 Dow. & L. 745.

Bunbury's report of *Creighton* v. *Attorney-General* (*sup.*) is inadequate. It may be that the Attorney-General may be made a party. The proper procedure is by petition of right:

Diplock v. *Hammond*, 2 Sur. & G. 141.

A petition of right is now proceeding for a declaration of title to these ships. The question ought to be decided then and not in these proceedings.

J. R. Ellis Cunliffe for the Sheriff of Lincolnshire.

Langton replied.

Cur. adv. vult.

Nov. 8, 1921.—HILL, J.—The plaintiffs, the Borneo Company Limited, in a necessaries action *in rem*, recovered a judgment against the owners of the *Mogileff*. The owners appeared, and judgment went against them as well as against the *Mogileff*. The owners were a Russian corporation, styled the Russian Volunteer Fleet, which at the date of the trial had its principal place of business at Constantinople. Under an order for sale the marshal sold the *Mogileff*, but the proceeds satisfied only a portion of the judgment. The plaintiffs are still judgment creditors of the Russian Volunteer Fleet in a large sum, stated to be about 46,000*l*.

Under a writ of *fi. fa.* directed to the sheriff of Lincolnshire, and taken out by the plaintiffs, the sheriff seized two ships, the *Krasnoarsk* and the *Vologda*, which the plaintiffs allege to be the property of the Russian Volunteer Fleet. The ships were lying at Immingham. They were there laid up. There is no suggestion that they were being presently employed in the active service of the Crown. The solicitor for the Board of Trade gave notice to the sheriff that the ships were the property of His Majesty, and requested him to withdraw. This was followed by a letter from the solicitor to the Board of Trade, dated the 5th Aug. 1921, and a certificate of the same date by Mr. Hipwood, assistant secretary of the Mercantile Marine Department of the Board of Trade, to which were attached what purported to be certified copies of the transcripts of registers of the ships—I say purported because, as we know now, they were not correct transcripts. In those transcripts the Shipping Controller was named as the representative of His Majesty.

The plaintiffs disputed the claim put forward by the Board of Trade. The sheriff on the 11th Aug. 1921 took out an interpleader summons directed to the plaintiffs and to His Majesty represented by the Shipping Controller as claimant, calling upon the plaintiffs and the claimant to appear and state the nature and particulars of their respective claims to the ships, and maintain or relinquish the same and abide by such order as might be made therein. The assistant registrar dismissed the application, and ordered the plaintiffs to pay the costs of it. He ordered the sheriff to remain in possession for five days, or, if notice of appeal were given, then, pending appeal, or until further orders, otherwise he ordered the sheriff to withdraw. From that order the plaintiffs appeal, and ask that an issue be directed.

Two questions arise (1) whether the Crown can be summoned to appear upon an interpleader summons, and made a party to an interpleader

issue; (2) whether the court ought to order the sheriff to withdraw.

I have come to the conclusion on the first question in favour of the Crown, and on the second question in favour of the plaintiffs. I decide the first question in the Crown's favour, not because there is not an issue to be tried—I think there is—but because the court has no power to compel the Crown to answer the sheriff's summons or to submit that issue to the court.

I decide the second issue in the plaintiffs' favour because I think there is a serious issue to be determined before it can be held that the ships belong to the Crown and not to the Russian Volunteer Fleet; and until that issue has in some way been determined against the plaintiffs, I am not prepared, and have no right, to deprive the plaintiffs of the benefit of the execution.

I think there is a serious issue to be determined because I have not before me any sufficient evidence putting it beyond doubt that the ships belong to the Crown and not to the Russian Volunteer Fleet. No one appeared for the Russian Volunteer Fleet to say that the ships do not belong to that corporation; and for the Crown counsel was not able to say more than appears in the documents, and the documents, in my judgment, do not show that the ships are the property of the Crown.

The solicitor for the Board of Trade says in the letter of the 9th Aug. 1921: "I am forwarding herewith a certificate signed by the assistant secretary of the Mercantile Marine Department of the Board of Trade, certifying that the vessels above named have been the property of the Crown since 1918, and annexing to such certificate transcript of the registers of the vessels in question." But the certificate of the assistant secretary does not certify that the vessels are or ever were the property of the Crown. It certifies "that the *Krasnoiarsk* was registered in London in the name of His Majesty represented by the Shipping Controller on the 21st June 1918, and the *Vologda* was registered in London in the name of His Majesty represented by the Shipping Controller on the 26th June 1918," and adds: "Appended to this certificate are certified copies of the transcript of register for the vessels in question." In this certificate Mr. Hipwood, than whom no one knows better what he is saying in matters of merchant shipping, does not say that His Majesty is the owner of the ships, or that the ships are the property of the Crown. He only says that they were on the dates named registered in the name of His Majesty. Do the registers show anything more? The certified copies appended to Mr. Hipwood's certificate, if correct transcripts, would show that His Majesty was registered not as owner, but as "registered owner." The transcripts were, however, incorrect. The registers have been produced before me. They agree with the blue transcripts certified by the registrar-general, which were also produced before me. In each register the ship is described as "formerly under the Russian Flag," and in the space headed in print, "Names, Residences, and Description of Owners, and the number of 64th Shares held by each" are the words "His Majesty represented by the Shipping Controller, London, 64 shares."

The registers also show that the *Krasnoiarsk* was on the 22nd April 1918 registered at Halifax, Nova Scotia, in the name of "His Excellency the Governor-General of Canada," and that this register was closed on the 24th July 1918, and that the *Vologda* was on the 29th April 1918 registered at St. John's, New Brunswick, in the name of the "Governor-General of the Dominion of Canada for the time being, Ottawa," and that this register was closed on the 23rd Jan. 1919. The *Vologda* register states that this Canadian registration was by order of the Marine and Fisheries Department Order in Council, dated the 17th April 1918. Do the registers give any evidence of ownership in the Crown?

For the purpose of the present case, it is enough if they are sufficient evidence of legal ownership. If they are, and the legal estate is in the Crown, even though the beneficial interest is not, the plaintiffs remedy cannot be by execution under a *fi. fa.*, but must be by some form of equitable execution. But are the registers evidence that the Crown is the legal owner of the ships? By sect. 64 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), the register, and a certified transcript of the register, are made admissible in evidence, and by sect. 695 are made evidence of the matters stated therein in pursuance of this Act. In the case of a British ship privately owned, one of the matters stated in pursuance of the Act is by sect. 11, "the name and description of the registered owner or owners." In the case of such a ship the register is therefore *prima facie* evidence of ownership. But by sect. 741 the Merchant Shipping Act 1894 does not, except where specially provided, apply to ships belonging to His Majesty. Such ships cannot be registered under the Act of 1894. By sect. 80 of the Merchant Shipping Act 1908 (6 Edw. 7 c. 48), provision is made for the registration of "Government ships" which are defined as "ships not forming part of His Majesty's Navy which belong to His Majesty or are held by any person on behalf or for the benefit of the Crown and for that reason cannot be registered under the principal Act." Sect. 80 (1) provides as follows: "His Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and those Acts, subject to any exceptions and modifications which may be made in the Order in Council, or generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with these regulations as if they were registered in manner provided by those Acts." By Order in Council of the 29th Sept. 1917, regulations were made as regards any Government ships in the service of the Shipping Controller. By these regulations sect. 1 and sects. 8 to 12 of the Merchant Shipping Act 1894 are not to apply to Government ships in the service of the Shipping Controller registered in pursuance of the provisions of the Order in Council. Sect. 1 of 1894 is the section which prescribes the qualifications for owning a British ship. Sects. 8 to 12 prescribed the method and conditions of registration and include sect. 11 quoted above. Under the Order in Council application for registration is to be made by the secretary to the Ministry of Shipping, and such application is to contain a statement of the nature of the title to the said ship, whether by original construction by or for the Shipping Controller or by purchase, capture, condemnation or otherwise. Upon receipt of the application the registrar shall enter the ship in the register book as belonging to His Majesty represented by the

Shipping Controller." It must have been under sect. 80 of the Merchant Shipping Act 1906 and this Order in Council that the *Krasnoiarsk* and *Vologda* were registered. The assistant registrar who produced the registers said they were. It will be observed that the registrar has no discretion in the matter. It will also be observed that "title" is used in a wide sense, for it includes title by capture, but capture does not vest the ownership in the captor. We are quite familiar with at least one class of ship which during the war were registered in the name of His Majesty as represented by a Department of State and which unquestionably were not the property of His Majesty. Enemy ships seized in port at the outbreak of war and ordered by the Prize Court to be detained under the *Chile* form of order were so registered for the purpose of being employed by the Government under the British flag. But the effect of the *Chile* form of order was to reserve all rights intact for decision when the war was over (per Privy Council in *Prinz Adalbert* (118 L. T. Rep. 161; 14 Asp. Mar. Law Cas. 296; (1918) A. C. 500), and until those ships were condemned as prize, which was not done till after the armistice, they remained the property of their original enemy owners pending a final decision of the Prize Court. Now I apply sect. 695 of 1894 to a ship registered under sect. 80 of the Act of 1906 and the Order in Council. The register is evidence of the matters stated therein in pursuance of sect. 80 of the Order in Council. What is stated in these registers is that a ship formerly under the Russian flag is owned by "His Majesty represented by the Shipping Controller," but having regard to sect. 80 and the Order in Council that denotes no more than this, that the ship is a "Government ship" in the service of the Shipping Controller, and "Government ship" denotes no more than this that the ship either belongs to His Majesty or is "held by the Shipping Controller on behalf or for the benefit of the Crown." "Held" is a word which may cover any sort of possession. If ships detained under a *Chile* form of order could be registered under sect. 80 of the Order in Council, I see no reason why ships which were not the property of the Crown, but had come into the possession of the Crown otherwise than by the requisition of a captured but not condemned ship should not be so registered. For instance, if a Russian owner had lent the use of his ship to the Crown for the duration of the war, I see no reason why it shold not be registered as detained ships were registered, if the *Chile* class of ships could be so registered. It is a possible view that neither class could properly be so registered, for it may be that the reason why they could not be registered under the principal Act was not because they were held on behalf of His Majesty, but because they had not ceased to be foreign owned; and, if so, sect. 80 (3) did not apply. But the fact that ships foreign owned were registered under sect. 80 and the Order in Council shows that no sure reference as to ownership can be drawn from the statement in the register. I can draw no certain inference from the register as to the Crown's ownership, whether legal or otherwise. Nothing outside the register makes me draw any such inference. On the contrary, if I consider anything outside, my doubts are only strengthened. On the trial of the *Mogileff* it was proved that the *Mogileff* was released from the service of the Crown to the Russian Volunteer Fleet on certain terms, and for a specific voyage, but there was nothing whatever to suggest that the Crown claimed to be the owner of the *Mogileff*. Reference was made to a petition of right by the Russian Volunteer Fleet that the *Krasnoiarsk* and the *Vologda* and other ships were by agreement taken over or requisitioned by His Majesty's Government on certain terms for the duration of the war, and claiming that the Russian Volunteer Fleet as owners of the said ships are entitled to a return of the ships not already re-delivered.

To this petition the plaintiffs are a party, but the only allegation with regard to them is that five of the ships, including the *Mogileff*, had been re-delivered to the plaintiffs as agents for the Russian Volunteer Fleet.

In this petition of right the suppliants set out a letter from the Foreign Office which says that the vessels can only be returned to the parties who own or control the Russian Volunteer Fleet. The answer and plea denies that there was any agreement with the suppliants, refers to the documents for their contents, and does not admit the allegations in the petition. Of course I cannot accept the allegations of the petition as evidence, nor treat the letter from the Foreign Office as proved. But at least the petition and answer show that it cannot be treated as proved that the ships are the property of His Majesty.

While the question whether the *Krasnoiarsk* and the *Vologda* are the property of His Majesty or of the Russian Volunteer Fleet is still undetermined, I cannot order the sheriff to withdraw.

But I have reluctantly come to the conclusion that I cannot compel the Crown to the determination of that question by the trial of an interpleader issue.

The plaintiffs' rely on *Creighton* v. *Attorney-General* (1731, Bunb. 303), amd *Reid* v. *Stearn* (1 L. T. Rep. 539; 6 Jur. (N.S.) 267). The Crown relies on *Candy and Dean* v. *Maughan* (1843, 1 Dow. & L. 745).

In the cases relied on by the plaintiffs an interpleader issue between the Crown and the subject was ordered to be tried. In *Candy* v. *Maughan* (*sup.*) it was refused. The plaintiffs contend that what was said by Tindal, L.J. and Maule, J. in the course of the argument in *Candy* v. *Maughan* were *obiter dicta*, and that the refusal of an issue was right upon the facts of the case. But the *dicta*, if *obiter*, are very strong, and are to the effect that the Crown cannot be compelled to appear before the court or be made a party to an interpleader issue. Mr. Robertson in his work on Civil Proceedings by and against the Crown, at p. 611, says that *Candy* v. *Maughan* had, in his own knowledge, been followed several times in chambers.

All these cases relate to stakeholders' interpleaders. I can see distinction for the purpose in hand between such interpleaders and sheriffs' interpleaders. The plaintiffs suggested that, as in 1873 there was a conflict between the common law and the equity case, sect. 25 (11) of the Judicature Act 1873 (36 & 37 Vict. c. 66) makes the equity cases the ruling authority. I do not think that section applies to alter the rights of the Crown.

Let us get back to the underlying principle. The plaintiffs say the principle is that no action lies against the Crown at the suit of a subject, and they say that in asking for an interpleader issue no one is seeking to maintain an action against the Crown;

the Crown has asserted a claim, and is invited either to withdraw it or prove it and, as it does not withdraw it, is directed to prove it. I, however, am of opinion that the rule that no action lies against the Crown at the suit of the subject is part only of the wider principle that the King cannot, against his will, be made to submit to the jurisdiction of the King's courts. For this I cite the passage in Blackstone, vol. 1, chap. 7, quoted by Brett, L.J. in the *Parlement-Belge* (42 L. T. Rep. 273 ; 4 Asp. Mar. Law Cas. 234 ; 5 Prob. Div. 197, at p. 206). Brett, L.J., in the *Parlement-Belge* (*sup.*) quotes Blackstone, par. 1, chap. 7, as follows : —" Our King owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power ; authority to try would be vain and idle without an authority to redress, and the sentence of a court would be contemptible unless the court had power to command the execution of it, but who shall command the King ? "

In this case the Crown does not consent to submit to the jurisdiction of the court, and the court cannot command it to do so.

The result of my decision is to leave matters in a most unsatisfactory position. The difficulties of the sheriff are obvious. The plaintiffs are in hardly less difficulty. It was suggested that they can get the matter in issue determined by proceeding with the petition of right I have already referred to. But of that petition they are not masters, and the evidence in support of it must mainly come from the Russian Volunteer Fleet who in the *Mogileff* action are the plaintiffs' judgment debtors.

It was also suggested that the plaintiffs could bring a position of right claiming that the register be rectified. But it may well be that the ships are properly registered, and yet that they are the property of the Russian Volunteer Fleet. It may be questioned whether petition of right lies where the suppliant seeks to recover nothing from the Crown, neither land, nor goods, nor money, nor any incorporeal right (Robertson, p. 331), even supposing that petition of right is an available remedy for the purpose of having it declared that the ships are not the property of the Crown. Plaintiffs on such a petition would have upon them the burden of proving a negative, whereas, if an interpleader issue could be tried, the Crown would naturally be made plaintiff, and have to establish its claim. But while I feel all the difficulties and the risk of a denial of justice to the plaintiffs, I must administer the law as I find it, trusting that some method may be devised for the speedy determination of the matter in issue, and that the advisers of the Crown will assist to that end. They must bear in mind that at times when the Crown by its servants, and in the various departments of government engages in commerce, as shipowner and charterer, as marine underwriter and wholesale dealer in commodities, great hardships may be occasioned to the subject by too strict an insistence upon the constitutional rights of the Crown.

I vary the order by dismissing the summons simply, without costs either here or below. The sheriff has failed. Neither the plaintiffs nor the Crown have wholly succeeded.

The Borneo Company appealed.

MacKinnon, K.C. and *G. P. Langton* for the appellants.

Sir *Gordon Hewart* (A.-G.) and *Darby* for the Board of Trade.

Holman Gregory, K.C. and *J. Ellis Cunliffe* for the sheriff.

BANKES, L.J.—This is an appeal from the judgment of Hill, J. I very much regret that it is not possible, in my opinion, to take any other view of the matter than that taken by the learned judge. In my opinion the view which he took was entirely right.

The matter arises in this way : the appellants were execution creditors, and they obtained a judgment against the Russian Volunteer Fleet Committee. In execution of that judgment they caused a writ of *fi. fa.* to be issued, directed to the sheriff of Lincolnshire to seize two vessels which they asserted belonged to the Russian Volunteer Fleet Committee. The sheriff, acting upon the writ, seized the vessels, and thereupon a claim was made, which is contained in a letter written by Mr. Barnes, the solicitor for the Board of Trade, of the 6th Aug. 1921, in which he says he confirms his telegram of the previous day addressed to the sheriff, which he sets out, and then he goes on to say : " As indicated in the above quoted telegram, the vessels are registered in the name of His Majesty, represented by the Shipping Controller, London. I shall be happy to produce to you or your representative transcripts of the registers of these respective vessels showing that they are the property of His Majesty, and, not having heard from you in reply to my telegram, I am to request that you withdraw your officer immediately and report to me that you have done so." The registers were afterwards produced, or verified, and it appeared that the vessels were registered in London in the name of His Majesty represented by the Shipping Controller, and it seems to me quite plain that that was a claim on behalf of the Crown, and it was understood by the sheriff as being a claim on behalf of the Crown. Upon that the sheriff issued an interpleader summons, a copy of which is set out on p. 12 of the proceedings. It is dated the 16th Aug. 1921, and the heading, of which we have not got a copy, we are told refers to the claimants as the Crown on the one side and the execution creditors on the other. Then the summons directs all parties concerned to attend before the registrar and so forth " on the hearing of an application on the part of the sheriff of Lincolnshire that the plaintiffs and the claimants appear and state the nature and particulars of their respective claims."

Interpleader, as its name indicates, was a proceeding instituted for the purpose of relieving persons, sheriffs, and others, who made no claim themselves to a subject matter which was claimed by two other parties, to appear before the court and in a summary proceeding at their instance get a decision from the court as between the two claimants as to which of them was entitled to the subject matter of the claim.

It is not necessary to refer to the history of the proceeding, because now the procedure is contained in the rule of court which deals with interpleader. The learned judge has held that Order LVII. does not apply to the Crown, or bind the Crown, and that it is not possible to compel the Crown to interplead. On p. 22 of the proceedings he sums up his view in this way : " Let us get back to the underlying

principle. The plaintiffs say the principle is that no action lies against the Crown at the suit of a subject, and they say that in asking for an interpleader issue no one is seeking to maintain an action against the Crown; the Crown has asserted a claim and is invited either to withdraw it or to prove it, and, as it does not withdraw it, is directed to prove it. I, however, am of opinion that the rule that no action lies against the Crown at the suit of the subject is part only of the wider principle that the King cannot, against his will, be made to submit to the jurisdiction of the King's courts." For that he cites an authority, and, in my opinion, the view there expressed by the learned judge is quite correct.

Mr. MacKinnon has based his argument, as I understand it, upon two grounds. He says, first of all, there is authority to the contrary of the view expressed by the learned judge, and he relies for that upon the case of *Reid* v. *Stearn* (1860, 1 L. T. Rep. 539; 6 Jur. N. S. 267). I desire to say that in my opinion that case is really no authority for the proposition for which Mr. MacKinnon cites it or for which apparently it has been cited on other occasions. It is quite true that in his judgment in that case Stuart, V.-C. (6 Jur. N. S. at p. 268) said that he "conceived, if the Crown was adversely claiming against the stakeholders, that they had a right, when other persons were claiming the same money, to file a bill of interpleader, and to make the Crown a defendant to the bill, because the Crown was one of the parties contesting the right. The question of title had not been seriously argued, and he did not decide it one way or the other, but he should not hold that the Crown was an improper party. He thought the bill had been rightly framed, in bringing all the claimants before the court." When one looks at the facts of that case one finds that it was a suit instituted by the plaintiffs against the four defendants claiming the return or the payment of a certain sum of money, or a direction that the defendants might be decreed to interplead, and one of the four defendants, so added apparently, was the Crown—in what form we do not know. It may have been in the form of an action against the Attorney-General, but that does not appear. But whatever form the action was in, it is manifest, I think, that whoever was made a defendant as representing the Crown, consented to the jurisdiction, and appeared, and, therefore, was a party properly before the court. It was in those circumstances that Stuart, V.-C. made the observation he did and made the order he did.

It seems to me that that case has no application to the present case, or any similar case where the Crown is objecting that it ought not to be made a party, or in this particular case where the Crown is objecting that there is no jurisdiction to make an interpleader order as against the Crown. I pass, therefore, from that case by repeating that, in my opinion, it is no authority for the proposition for which it is cited by Mr. MacKinnon.

There are, on the other hand, in *Candy* v. *Maugham* (1843, 6 M. & G. 710; 13 L. J. C. P. 17) very clear dicta by the learned judges who were parties to that decision, that interpleader would not lie against the Crown, and, for the reason which Hill, J. has given, and which is a much broader and deeper reason, it seems to me that interpleader proceedings cannot be taken against the Crown and that the court cannot make an order either directing an issue against the Crown or barring the claim of the Crown. Now the other point taken by Mr. MacKinnon does not seem to me to be open upon these proceedings. That point is that it is competent for these parties, or a party under similar circumstances, to bring an action against the Attorney-General claiming a declaration as to the rights of the execution creditors. Now that may or may not be; I express no opinion about it. All I need say is this, that it does not seem to me that in the proceedings where an interpleader summons has been taken out by the sheriff, asking and asking only that the Crown may appear and state its claim and be a party to the interpleader, it is not competent, upon such a summons, to take the course suggested by Mr. MacKinnon, and to treat this as though it were an action against the Attorney-General claiming a declaration of the rights of the execution creditors.

I do not know that I need say any more except that, in my opinion, the appeal fails. We are not asked to make any direction that the sheriff shall remain in possession. Therefore, the order will simply be that the appeal is dismissed with costs, and that so far as the sheriff is concerned, the sheriff's costs will be added to the costs of the execution creditors.

Scrutton, L.J.—I agree that in the matter which is now before the court we cannot do anything else than dismiss the appeal. In this case, however, I desire to say that it seems to show the extreme advisability of action by the committee which it is stated has been appointed under the presidency of the Attorney-General to consider in what respects the rights of the Crown should or should not be altered in legislation, for I cannot help feeling that the objection that has been taken by the Crown in this case, which, I think, is a good objection in law, has the effect of preventing an order of this court being enforced, and of delaying justice to one of His Majesty's subjects. However, all this court can do is to enforce the law, and not to express any opinion on the desirability of the action taken by the Crown of insisting on its legal rights.

The case comes before the court on an interpleader summons that the plaintiffs and the claimant shall appear and state the nature of their claims, and maintain or relinquish the claim. The plaintiff is a person who got a judgment *in rem* against the owners of the particular ship, and obtained a writ of *fi. fa.* against property, which he alleges is the property of the owners of the ship in respect of which he has got a judgment *in rem* for a certain sum of money.

The Crown has stated to the sheriff that the Crown itself is the owner of the property seized, and therefore has requested him not to proceed on a writ of *fi. fa.* The sheriff has taken out a summons that the plaintiffs and the claimant—which must mean the Crown, as it appears from the title the Crown is represented by the Shipping Controller—shall appear and shall maintain or relinquish their claim. The Crown does not consent to the court's making the order. It appears to me, therefore, that the court has no jurisdiction to make an order adverse to the Crown without the Crown's consent.

In my view the interpleader rules which have the force of statute do not bind the Crown. The principle, I think, is that statutes do not bind the

Crown in any case where they would affect any existing prerogative or interest of the Crown, unless either express words or necessary implication compel the court to come to that view. There are no express words in this case making the interpleader rules apply to the Crown, and I cannot see that there is any necessary implication. In those circumstances I think that the interpleader rules do not bind the Crown.

I should come to that conclusion without authority, but as far as the authority is concerned, I think the Court of Common Pleas in the case of *Candy* v. *Maughan* (6 M. & G. 710; 13 L. J. 17 C. P.) did decide, as far as the Interpleader Act was concerned, that the Crown was not bound by the existing Interpleader Act.

The second point was then argued by Serjeant Manning, which was that if the Interpleader Act did not apply, without the Interpleader Act the Crown had power to interfere. His argument in the report (6 M. & G. 710), edited by himself, and therefore I expect accurately stated, is that: "Wherever the court sees that the Crown, though no party to the record, has an interest in the matter in suit, they may pronounce judgment for the Crown. And if a presumption of title only appears for the Crown, the court will, in some cases, proceed to give judgment in the action; but will suspend execution until the party has interpleaded with the Crown. For these positions a variety of authorities will be found collected in Mann. Exch. Prac., 2nd edit., 123 (*vide Adam Penreth's* case, T. 29, E. 1).

Then follow some twenty or thirty authorities. I have looked at Manning's Exchequer Practice, and for the passage. If a presumption of title only appears for the Crown, the court will in some cases proceed to give judgment in the action, but will suspend execution until the party has interpleaded with the Crown. The only one other authority is cited, which is apparently in the Year Books of the 23th of Edward I. That case is known as *Adam Penreth's* case. Mr. MacKinnon, with whose industry the court generally has no reason to be dissatisfied, is quite unable to find that report, and certainly I have not been able in the intervals of listening to counsel in this case to discover that particular report in the Year Books, but I notice that Maule, J. then asks the questions how was the court put in motion, and Serjeant Manning reports himself as answering on the suggestion of the King's Serjeant or sometimes *proprio motu*. In 13 L. J. 17 C. P. he is only reported as answering *proprio motu*, to which Maule, J. replies in the *Law Journal*: "Then this can hardly be the proper subject of a motion from the bar," that is, it cannot be a matter for application to the court by adversely claiming; it is in the power of the court, and not in the power of any party to come to the court and say "Make the order." As stated by Serjeant Manning (6 M. & G. at p. 712), and I have no doubt, more accurately, if it is done on the suggestion of the King's Serjeant the Crown waives its privileges, and if *proprio motu* it is not open to some party to the action to come to the court and say as a right, "Exercise these powers."

It seems to me, therefore, that applying the strict law the summons taken out by the sheriff was wrong because it purported adversely to the Crown to require the Crown to appear and to maintain or relinquish its claim. I, therefore, think that this appeal must be dismissed, though, as I have said, I feel that the result of the action taken by the Crown in this case is to delay justice to a British subject. That, however, is not a matter for this court. I desire to say, as my brother has said, that I express no opinion as to the rights and duties of the sheriff which are not before us. The sheriff has got a writ to execute, if he determines not to execute it that will be, as Mr. Gregory says, at his risk. We are not deciding one way or the other in the circumstances of this case that he is, or is not, entitled to withdraw.

Atkin, L.J.—I agree. This is a summons taken out by the sheriff under the interpleader order, which is Order LVII. of the Rules of the Supreme Court. That is an order which took the place of the statutory provisions under the Act of William IV. and the provisions of the Common Law Procedure Act of 1860. It is an order which provides for the originating of process by a stakeholder, or by the sheriff, and it gives power to the court to exercise coercive authority over the persons who are brought before the court by an interpleader summons, namely, the sheriff himself and the claimants. I think it only necessary to refer to the rules—I do not propose to do it in detail—to show that there is a complete code by which in the first place the summons calls on the claimants to appear and state the nature and particulars of their claim, and to maintain or relinquish it. The rules then proceed to give power to the judge to order that the claimant be made a defendant in the action, or that an issue be tried, and to direct which of the claimants be plaintiff, and which may not, and the court has power to decide the matter in a suitable case in a summary way. If the claimant has been served, and does not appear—that is to say if the Crown in this case having been served does not appear—the courts may make an order declaring him, and all persons claiming under him for ever barred, and there are many other provisions including a provision as to costs. Now it appears to me quite plain that the order does not bind the Crown, and is not intended to give, and does not give, the court the coercive jurisdiction against the Crown that it plainly has against claimants who are properly brought before it on an interpleader summons.

It appears to me that that is sufficient to dispose of this case, but I think myself that it is very unfortunate that it should be so, because not only is the subject delayed in obtaining the amount of money for which the court has decided he is entitled to have judgment, but also as it appears to me that as an officer of the Crown, and a very important public officer of the Crown, the sheriff is harassed by reason of the difficulties that he is put into as to the course that he should take. Nevertheless, that seems to me to be the position at present. I say nothing as to whether there is any other process of law by which the execution creditor can have the matter determined as against the Crown, and I say nothing at all as to the rights of the execution creditor as against the sheriff, or of the sheriff against the execution creditor. The position merely remains in this way, that according to our decision the sheriff is not in a position to take out an interpleader summons making the Crown claimants. We determine nothing else as to the rights of the parties at all. I agree that Hill, J.'s judgment is right, and for the reasons that have been given by him, and that this appeal should be dismissed with

costs, and with the order that was made by my Lord protecting the sheriff as to his costs.

Appeal dismissed.

Solicitors for the Borneo Company, *Downing, Middleton*, and *Lewis*.

Solicitor for the Crown, *Solicitor to the Board of Trade*.

Solicitors for the Sheriff of Lincolnshire, *Taylor, Jelf*, and *Co.*, agents for *Burton, Scorers*, and *White*, Lincoln.

Wednesday, July 6, 1921.

(Before Lord Sterndale, M.R., and Atkin and Younger, L.JJ.)

The Cumberland Queen. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision at night—Insufficient lights on sailing ship—Failure of steamship to see loom of sailing ship until about 300*ft. away—Look-out—Negligence.*

A steamer, making sixteen knots, collided with a sailing vessel at night. The night was "fine, clear, dark, and overcast." The sailer's lights were defective. Those on board the steamship did not see the loom of the sailer until they were within about 300*ft. of her.*

The President found, on the advice of the Elder Brethren, that the loom of the sailer ought to have been seen at a distance of a quarter of a mile. He held, that, although the lights of the sailer were grossly improper, the steamship was alone to blame, because if she had seen the loom of the sailer at a distance of a quarter of a mile, as, he found, she ought to have done, the collision might and ought to have been avoided. The owners of the steamship appealed.

On appeal the Assessors expressed the opinion that in the circumstances it was very doubtful whether the loom of the sailer could have been seen at a distance of a quarter of a mile, or at a distance appreciably greater than that at which it was first seen by those on the steamship.

Held, that the sailer was to blame for carrying improper light, and that she was alone to blame for the collision, as it had not been proved that the look-out on the steamship was in any way defective.

Decision of Duke, P. reversed.

Action of damage by collision, and counter-claim.

The plaintiffs were the London and North Western Railway Company, owners of the steamer *Slieve Gallion*, and the defendants were the owners of the schooner *Cumberland Queen*.

The plaintiffs alleged by their statement of claim, that shortly before 4.40 a.m. on the 9th Oct. 1920 the *Slieve Gallion* was in the Irish Sea in the course of a voyage from Holyhead to Greenore, making about sixteen knots. The weather was clear and dark, and the tide was first of the flood of the force of about a knot. A good look-out was being kept on board. In these circumstances those on board the *Slieve Gallion* saw the loom of a vessel which proved to be the *Cumberland Queen* about a ship's length away and about a point on the starboard bow. The *Cumberland Queen* was heard to blow two blasts on the foghorn, but came on and struck the starboard side of the bridge of the *Slieve Gallion* with the bowsprit, doing damage. Just before the collision a defective red light was seen, and also a white light aft apparently moving.

The defence alleged (*inter alia*) that a good look-out was not kept on board the *Slieve Gallion*, and that her speed was excessive in the circumstances.

Laing, K.C. and *J. B. Aspinall* for the plaintiffs.

Raeburn, K.C. and *G. P. Langton*, for the defendants.

Jan. 28, 1921.—Sir Henry Duke, P.—This was a collision in the Irish Sea in the neighbourhood of the Skerries about five miles W.N.W. of the Skerries, and the time of its occurrence is put by the defendants as having been in the early morning of the 9th Oct. last. The plaintiffs are the London and North Western Railway Company and their vessel the *Slieve Gallion* was on a voyage from Holyhead to Greenore in the ordinary course of her plying in the service of the plaintiffs. The defendants' vessel was the four-masted schooner *Cumberland Queen* belonging to a port in Nova Scotia, and she was on a voyage from Preston to Parsboro. The *Cumberland Queen* had left Preston the previous day; and the *Slieve Gallion* had left Holyhead an hour before the collision. A variety of questions have arisen in the case, but owing to the course of events the questions which decide the case are—What were the conditions as to weather? What was the state of the lights on the *Cumberland Queen*? and What was the character of the look-out of the *Slieve Gallion*? The collision, it is to be observed, was almost avoided by action which was taken on board the *Slieve Gallion* at the very last period in the history of the events in question when the collision was observed by those on board the *Slieve Gallion* to be inevitable. I accept what was said by the chief officer of the *Slieve Gallion*, Mr. Gill, with regard to that matter. He described how the *Slieve Gallion* left Holyhead at ten minutes before four o'clock. He said that he was on the fo'c'sle head till they were passed the breakwater light at Holyhead at 4.13, that he then made the rounds, and that after making the rounds he went upon the bridge where he found the captain in charge of the bridge, the quartermaster at the wheel and two look-out men. He describes the weather as clear, and he says that just before the collision—three minutes before the collision—the captain left the bridge in order to look at his compass and to make a calculation which it was necessary should be made for setting the course of the ship having regard to the conditions of tide, and to the time at which the passage was being made. The master he said went down to consult his course book, and then he said that at a point of time which he fixes—he did not fix it with exact certainty, but which must have been within a minute of the collision—the nearest period at which he can fix it was two or three minutes before the collision—the master of the *Slieve Gallion* left the bridge; the quartermaster at the wheel called out, "I think I see a vessel on the starboard bow;" he says that he was looking at that time on the port bow and that he, the chief officer, wheeled round and looked with his glasses. One of the look-out men described how the chief officer was on the bridge with his glasses slung round his neck, and that corroborates his statement that from time to time he was looking out with his

(*a*) Reported by Geoffrey Hutchinson and W. C. Sandford, Esqrs., Barristers-at-Law.

glasses. He says, "I looked round and looked with my glasses and I picked up the loom of a sailing vessel. I could see no light whatever, red, white nor anything. I had heard nothing, the vessel was about a point on the starboard bow, about a ship's length away." (His length is 311 ft.) He gave an order hard astarboard; turned to see it carried out; rang the port engine full speed astern; helped to reverse the port propeller; and then he describes the bow of the *Cumberland Queen* at about the bridge of the *Slieve Gallion*, and in fact the collision carried away the shelter in which one of the two look-out men had been standing during the period before the collision. That is the description of the collision by the chief officer of the *Slieve Gallion*.

I come first to consider the question of weather. It is material in various aspects of the case. If the weather was of anything like the nature described by those on board the *Cumberland Queen* a speed of sixteen knots was a speed which involved the highest degree of recklessness and the matter must be considered in view of the conclusion which would result, as well as in the light of the evidence as a whole. The witnesses of the *Cumberland Queen* described with great particularity the course of their voyage from Preston—how, after they passed, I think it was, the Nelson Buoy, they were sounding fog signals continuously in accordance with regulations right up to the time of the collision. Some of them gave a great many circumstances in corroboration which they said they remembered. They say that on the day of the collision there was a fog during their passage from Preston to the point of the collision and they referred to the fact that a dense fog set in not long after the collision. They called the master of the steamship *Primrose* which rendered assistance to the *Cumberland Queen*, and they relied upon statements by members of the ship's company of the *Slieve Gallion* that they heard certain fog signals. On the other hand what is said is that the master of the *Slieve Gallion* was on his bridge from the time he left Holyhead until two or three minutes before the collision; that the chief officer was on duty; that the look-out men were there; that the speed was deliberately set; that the records of the lightships and the lighthouses in the region which would be affected by a fog of the prevalence of that described by the *Cumberland Queen* do not show fog at any such time as is in question in this case; and that, on the contrary, they show a high degree of visibility. They rely, too, upon the bearings taken by the chief officer of the *Slieve Gallion* immediately after the collision—bearings which were recorded in the log and in which the distance of various lights up to a range of seven miles or thereabouts from the point of the collision are set down. It is a direct conflict. The case of fog is set up by the *Cumberland Queen* deliberately, and with the intention of relying upon the kind of proof which is stated here. The case, on the other hand, is stated with great clearness and without any misapprehension of the grave conflict that there is in the case, and it is necessary to examine the evidence closely in order to see what is the true conclusion. I have been struck by one or two things with regard to the evidence in the case of the *Cumberland Queen*.

[The learned President dealt with some of the evidence offered by the defendants, and continued:] I attach weight to those discrepancies in averment in the case of the *Cumberland Queen*, and, on the whole, I have come to the conclusion that I ought to accept the evidence of the *Slieve Gallion* with regard to the state of the weather. I find that the weather from the time at which the *Slieve Gallion* left Holyhead before four o'clock to the time of the collision—for an appreciable period of time after the collision was such as is described in their statement of the weather conditions, namely, that it was a fine, clear, dark, overcast night.

The second material question in the case is that of the lights of the *Cumberland Queen*. Mr. Raeburn frankly admitted—as he had no alternative but to admit—that the port light of the *Cumberland Queen* (which is the light here in question) was such that the light failed to comply with the collision regulations, and failed to comply to such an extent, and in such a way that there was an infringement of the regulations which amounted to a possible cause of collision. I must carry the matter further than that. I must see what was, in truth, the state of the port light of the *Cumberland Queen*, and to what extent, if at all, it was visible from the *Slieve Gallion*. At the instance of the plaintiffs the Elder Brethren, who are advising me in the case, made an inspection of this light, and no complaint at all has been made of the procedure they adopted. They got the assistance of an engineer at Trinity House, and they themselves have made personal experiments, and the evidence furnished by the observations of the Elder Brethren, and by the report of the engineer, are part of the evidence in the case by common consent of the parties. Now, having seen the engineer's evidence, it comes to this, that the light had a maximum initial intensity of five candles; that the lamp in which it burned was set in an indifferent lense; that no part of the flame was in the focus; that the flame was to some extent out of centre in the lense; only the second prism from the bottom in the lense of the lantern—the enclosing lantern—showed a full beam; a third prism from the bottom showed only a glimmer and looked at from its own level there was only a dull loom visible from the central belt and the prisms above. As to the light emitted by the second and third lowest prism, the only effective part of the beam, the engineer says, does not exceed one candle. And he points out that certain uprights by which the lamp could and would be lifted are capable of blocking the visibility of the lights if turned in the direction of an observer, and would obscure 30 per cent. of the range of the light with a maximum intensity of obscuration amounting to 80 per cent., and that if they were turned to the side they would obscure 15 per cent. with a maximum intensity of obscuration of 90 per cent. I do not give the weight to that matter of obscuration which I was invited to give to it. The Elder Brethren take the view that, although there is that degree of obscuration, when you come to the distances which are here in question the obscuration is not so effective as it is close at hand, but what is seen upon the near view, on the handling of this lamp in a room, is a defect in the vision of the rays of light which is to a great extent obliterated when the light is in action at a considerable distance, or even at such distances as are in question here. That justifies some part of the evidence which was given by the experts for the defendants, though I do not think it justifies the whole of it. I think

they gave too favourable an account of this light as a working ship's light. As to the practical tests, I am told by the Elder Brethren in their report that on a very clear and fine night where an ordinary red sea light would be visible at upwards of two miles—two miles with the naked eye and substantially more than two miles with the aid of binoculars—this light from 100 yards to 1000 yards was an ordinary red light which could be observed as a ship's red light would be observed, but that beyond 1000 yards (in fact, at some distance within 1000 yards) the light became invisible because of this defective intensity, and that very close at hand, within 100 yards, its construction had the effect of reducing the rays which proceeded from it to the form of a thin pencil of red light. Close at hand it was a thin pencil, and as the light was removed to a great distance the power of the light was increased and overcame the mechanical difficulties in the diffusion of the light. That was the light with which the *Cumberland Queen* had crossed the Atlantic, and was setting out to cross the Atlantic again. It is not necessary to discuss its defects in detail. It is sufficient to say here that it was a light which did not come within any measurable distance of complying with the regulations against collisions at sea, and that there was on the part of the *Cumberland Queen* in respect of light a gross infringement of these regulations.

The question which is next to be considered is the question of look-out on board the *Slieve Gallion*, and that is a question of very considerable difficulty. Something is to be said, I think, as to what was the duty imposed upon those in charge of the *Slieve Gallion*, if they were going to cross the Irish Sea where they crossed it at a speed of sixteen knots an hour. It is a speed which it is very beneficial in the public interest that a steamship should be able to use. Everybody who has had to travel by sea is grateful for the power and skill which permit of high speed, such as that, and, in some cases, of a higher speed. But the power of travelling at sea with a speed of that kind imposes on those who exercise it the highest degree of obligation in respect not only of care, but in respect of the standard of efficiency by which their performances are to be measured. You must not travel at sixteen knots even on a fine, clear, dark night across the Irish Sea without providing against all the risks which that navigation involves. Other vessels are put under the obligation by the Collision Regulations of showing their lights, but lights fail, men in charge of lights are negligent, and accidents happen. You may not have a light, or you may have a light which from some cause inherent in the light or the management of it, is not available as a warning. Not only so, but lighted vessels are not the only obstacles to navigation or which involve risk to persons who are on board vessels navigating at high rates of speed. There may be causes of risk which cannot be seen, but there are notorious causes of risk which can be seen, so that it does not discharge the liability which is upon those navigating at high speed, or at whatever speed they may choose to navigate at, to say, that a collision has occurred with an unlighted ship, or that a collision had occurred with an imperfectly lighted ship. The question still has to be asked, What was the nature of the look-out, were the conditions such that with a diligent and efficient look-out the collision could have been avoided or the consequences of the collision could have been diminished?

Now, the look-out on board the *Slieve Gallion* consisted at the time in question of two look-out men stationed each in a shelter on either side of the bridge with the help, not provided for purposes of look-out but valuable, of an officer on the bridge, the officer of the watch, and a helmsman at an open wheel on the bridge. The eyes of the ship are the eyes of the two look-out men. It is said here that the eyes of the ship—the look-out man on the starboard look-out—were not effective, that the look-out was not a look-out with which you could safely navigate the Irish Sea at the point, and on the course in question, at a speed of sixteen knots. The test must be made at that point. So far as the chief officer was concerned I accept all he said. If I may say so, I was well impressed with his evidence. I think he came on duty to do his duty well and qualified to do it. I was quite satisfied there was no dullness on his part, and that in taking over the charge when the master went below he was quite alert, and that in the multitude of his duties, he could not be blamed for what he failed to see. He would look in the first instance for lights, and so far as I know he had not stood on the starboard look-out on his ship long enough to have any responsibility upon him for what might be there, and so far as the helmsman was concerned his business was with the wheel and the compass. So far as the port look-out man was concerned, he had that quarter to attend to, and he was attending to it, and was very vigilant. Can the same be said with regard to the look-out man on the starboard side? He was in the box and gave his evidence to the best of his ability. He certainly did not establish affirmatively that he was giving a diligent and sufficient look-out. A great deal depends, in forming an opinion as to the character of his look-out, upon the limit of visibility of a sailing ship of the type of the *Cumberland Queen* on a night such as the night in question. It is quite true it must be said in favour of those who were concerned that to pick up the loom of a vessel on a night such as they had to deal with is a totally different thing and a much more exacting task than it is to observe a vessel proceeding under her lights. But it has to be done. I have consulted the Elder Brethren as to the range within which I might say with any confidence that a diligent and efficient look-out man on such a night as was described, and as is insisted upon in the case of the *Slieve Gallion*, could be excused for not seeing the hull and sails—the outline, or the loom, as it is called—of the *Cumberland Queen*, and those who advise me cannot bring it down to a quarter of a mile.

Their belief is that with a diligent and efficient look-out the loom of the *Cumberland Queen* might have been and would have been observed at substantially more than a quarter of a mile. It was said with very great force that the chief officer and various of the rest of the company of the *Slieve Gallion* stated accurately many things. They saw little things which showed their vigilance. On the whole, I accept their evidence on the subject; their look-out is not stronger than the evidence of Hughes (the starboard look-out man) makes it; and, having regard to the evidence which Hughes gave and to the advice which I have received as to the

limit within which it would be impossible on such a night that an efficient look-out should fail to observe the loom of a large vessel like the *Cumberland Queen*, I have come to the conclusion that in the particulars that I have mentioned the *Slieve Gallion* had a defective look-out, and therefore was not complying with the regulations.

The crucial question comes to be this: the *Cumberland Queen* having been navigated in breach of the regulations, and the *Slieve Gallion* having failed in discharge of her obligations under the regulation as to look-out, where does the responsibility for this collision fall either in whole or in part? I take the law to be that by the exercise of that degree of care and skill which is to be expected of competent seamen, those who are confronted with a breach of the regulations are bound to avoid mishap as the result of that breach of the regulation, and if they fail to avoid a mishap, the liability in respect of it falls upon them. I have to consider whether, with care and skill, those on board the *Slieve Gallion* could have avoided the grave default of the *Cumberland Queen*, in her failure to be equipped with efficient lights—having in fact lights which had an insufficient range of visibility—a range of visibility which Mr. Raeburn would only insist upon at which he thought it must be said the *Slieve Gallion* could have seen the loom of the hull of the *Cumberland Queen*, namely, a quarter of a mile. Now, so far as the lights are concerned, the *Slieve Gallion* had not the proper warning; but, notwithstanding that, if the look-out had been the kind of look-out which is to be expected from a steamer navigating in the Irish Sea, say, at a speed of sixteen knots, the *Cumberland Queen* would have been seen at upwards of a quarter of a mile, at any rate, from the point at which this collision occurred. She was so well under control that the *Cumberland Queen* being observed at a distance of 400ft. the collision was nearly avoided. I have come to the conclusion that if she had been seen at a distance of a quarter of a mile, or ever less than a quarter of a mile, the collision would have been avoided, and I confess that I come reluctantly to the conclusion that the *Cumberland Queen*, which sailed the seas in a condition in which she ought not to have sailed, must be exonerated from blame for this collision, and that the *Slieve Gallion* must be held to be wholly to blame for this collision.

Now, I must consider the question of costs. I have said something as to the case which was set up here about fog, and I have pronounced judgment as to the state of the lights of the *Cumberland Queen;* and, if I were to apportion costs, I should apportion the costs arising out of the question as to fog, and the costs arising out of the question as to the lights of the *Cumberland Queen*, against the *Cumberland Queen*. I do not propose to deal with it in that manner; but I propose to give the *Cumberland Queen* one half only of her costs of the trial.

The Slieve Gallion *held alone to blame.*

The owners of the *Slieve Gallion* appealed.

Laing, K.C., *Bateson*, K.C., and *J. B. Aspinall*, for the appellants.

Raeburn, K.C. and *G. P. Langton*, for the respondents, the owners of the *Cumberland Queen*.

Lord STERNDALE, M.R.—This is an appeal from the President of the Probate, Divorce and Admiralty Division, in a case arising out of a collision between the *Slieve Gallion* and the *Cumberland Queen*. The *Slieve Gallion* is one of the London and North-Western Railway Company's boats, 311ft. in length, a steel twin screw steamer with engines working up to 3000 horse-power indicated, and she was on a voyage from Holyhead to Greenore; she had only got a few miles out of Holyhead when the collision happened. The *Cumberland Queen* is a wooden four-masted schooner, belonging to the Port of Parsboro, Nova Scotia, 680 tons gross, 179ft. in length, and she was on a voyage from Preston to Parsboro. The *Slieve Gallion* was doing about sixteen knots. The speed of the *Cumberland Queen* I do not think is material; she was in fact, with all sails set, making about four knots close hauled. The *Slieve Gallion* saw the loom of the *Cumberland Queen* about a ship's length away, and had not seen her before, about a point on the starboard bow. The helm was put hard astarboard and the port engine ordered full speed astern, and the *Cumberland Queen* was then, and then only, heard to blow two blasts on her foghorn; but the starboard side of the bridge of the *Slieve Gallion* and the bowsprit of the *Cumberland Queen* came into contact.

Now, if that were the whole of the case, of course it is a simple case of a steamer going not at an excessive speed in the weather as found by the learned President—as to which I shall have something to say—but going at a considerable speed and failing to keep out of the way of a sailing ship, and it would be a very simple case indeed; but that is not the whole of the case. The case for the *Slieve Gallion* is that the *Cumberland Queen* was not seen before because she had a defective red light which could not be seen, and that the loom could not have been seen at a greater distance than it was seen at. Now the *Cumberland Queen*, of course, defended her red light, and it seems to be a red light which she had been in the habit of using for some considerable time. It is worthy of notice that the *Cumberland Queen* came into court setting up a case, and setting it up as the President found deliberately, which he finds to be a wholly untrue case—that is as to the weather. According to her evidence it was foggy, and she was blowing her foghorn, and she sets up that case no doubt in order to blame the *Slieve Gallion* for her speed and also to blame her for not stopping when she heard, or ought to have heard, a foghorn forward of the beam. Now that case the President has entirely disbelieved, and he has disbelieved it after finding that it was set up deliberately by the *Cumberland Queen* with the intention of relying upon the proof which was stated by them in court, so that the *Cumberland Queen* does not enter the case on the facts as found by the President in a very creditable position. She entered it setting up a false case for the purpose of making an allegation against the other vessel which was not well founded. The President has found that the weather was such as is described in the statement of the weather conditions by the *Slieve Gallion*, namely, that it was a fine, clear, dark, overcast night. I do not know that those adjectives are altogether consistent with one another, but that is the finding of the President.

With regard to the light, his conclusion is stated in two or three passages in his judgment. He says: "It is not necessary to discuss its defects in detail. It is sufficient to say here that it was a light which did not come within any measurable distance of complying with the Regulations against Collisions at Sea, and that there was, on the part of the

Cumberland Queen in respect of light, a gross infringement of these regulations." Then he says that the *Cumberland Queen* was obviously in fault in respect of her light, but, for a reason which he gives, he does not find that was a contributing cause to the collision, because he finds chiefly on the advice, though not perhaps entirely on the advice of the Elder Brethren, that the loom of the *Cumberland Queen* could and ought to have been seen by those on board the *Slieve Gallion* at a distance of, at the very least, a quarter of a mile, and that if they had seen her and acted for her at that distance there would have been no collision. Therefore, he has held the *Slieve Gallion* alone to blame and acquitted the *Cumberland Queen* of any default which was in any way a contributing cause of the collision. The evidence as to the light, and the conclusion as to the light, except the general one that I have stated, are not very definite. A test was made of this light by the Elder Brethren and also an examination was made of it by experts on each side, and the report of the Elder Brethren during that test is—I had better take it as stated by the President—"That the light had a maximum intensity of five candles; and the lamp in which it burned was set in an indifferent lens; that no part of the flame was in the focus; that the flame was, to some extent, out of centre in the lens." Then they say that, "On a very clear and fine night where an ordinary red sea light would be visible at upwards of two miles—two miles with the naked eye and substantially more than two miles with the aid of binoculars—this light from 100 yards to 1000 yards was an ordinary red light which could be observed as a ship's red light would be observed, but that beyond 1000 yards—in fact at some distance within 1000 yards the light became invisible because of this defective intensity, and that very close at hand, within 100 yards, its construction had the effect of reducing the rays which proceeded from it to the form of a thin pencil of red light. Close at hand it was a thin pencil and as the light was removed to a great distance the power of the light was increased and overcame the mechanical difficulties in the diffusion of the light." The "thin pencil of light" was what the chief officer of the *Slieve Gallion* saw when he got close upon the *Cumberland Queen*; he did not see anything until then. I do not attach very much importance to the question of the "thin pencil of light," because in this test which was made with the accused light close to an ordinary red light the ordinary red light was shown at a very close distance to show a thin pencil too. I do not know whether that is always the case with ship's lights; I should have doubted it myself, but it was so on this occasion. If the result of this test is to be accepted as what could be seen upon that particular night, then it would appear that the red light ought to have been seen before the *Cumberland Queen* was seen, but the President, when the test was suggested, pointed out that the test might not be conclusive because you could not be quite certain that the state of the light at the time of the test was the same as at the time of the collision, and he did not seem to think himself that the test would be very much guidance to him. When it was suggested he said to Mr. Raeburn who was appearing for the *Cumberland Queen*: "You see, so many questions arise. There is the question of the state of your wick, the question of the amount of oil in your reservoir, and other questions. I am not sure it is helpful"; and afterwards he says: "My impression is that in the facts of this case it would not be a valuable piece of evidence in the case. I have mentioned the matter to the Elder Brethren, and they concur with my opinion." I think that last remark was probably referring to the advice that had been given to him as to the distance at which the loom could have been seen, but the first part was referring to the difficulty of reproducing at the test the actual conditions existing at the time of the collision. It is also the fact that some four or five hours before the collision this light had been found to be defective and had been taken down and cleaned by an ordinary seaman, the son of the master of the *Cumberland Queen*, and certainly, to my mind, his description of what he found wrong with the light is rather difficult to understand; but at any rate there had been something wrong, and if it were the fact—I do not know whether it was or not—that he had not thoroughly cleaned it when he did take it down for the purpose of cleaning and wiping, the light would be made worse. What the exact state of things as to the light on this particular night was the President has not found, and I should have less difficulty in dealing with the case if he had found it; but forming the best judgment I can upon what he did find with regard to it, I think the proper conclusion to be drawn from his judgment is that he did not find that the light could, or ought to, have been seen at any reasonable distance. It must be remembered also with regard to the test that the test was made by skilled persons, who knew in what direction to look for the light, who were looking in that direction, and who were guided as to the direction by the ordinary red light being placed close to the accused light in order to guide them as to the direction in which to look; and apparently there was a considerable difference of opinion amongst the experts who examined it, either at that test or another, as to the distance at which the light could be seen. The experts on behalf of the *Cumberland Queen* could see it much more distinctly and at a much greater distance than the experts called for the *Slieve Gallion*; perhaps that is not altogether to be wondered at, but I am taking the test made by the Elder Brethren.

Now the first thing that strikes me about it is this. The President, though he has found that the *Slieve Gallion* was to blame for not seeing the loom of the ship sooner than she did, has not found that she was to blame for not seeing the light, and also he says this: "So far as the lights are concerned the *Slieve Gallion* had not the proper warning," and he also says that which I have already quoted, that the light was one which did not come within measurable distance of complying with the regulations. I think the result of that, although he has not found it specifically, is that he does find the light was such that the *Slieve Gallion* is not to be blamed for not seeing it before she did; in fact, she never saw it until the collision was actually on the point of taking place, if it had not already taken place. But he has also found that that default did not contribute to the collision. Now on that point, I regret to say, I cannot agree with the President. Here is a vessel on the findings—as I think they are—navigating without a light which can be seen at a proper distance to warn other vessels that she is there. That is found in the passage I have already men-

tioned by the President. That, of course, puts the other vessel into a very much greater difficulty than she otherwise would have been, and that again I find is accepted by the President, because he says: "It is quite true it must be said in favour of those who were concerned that to pick up the loom of a vessel on a night such as they had to deal with is a totally different thing, and a much more exacting task than it is to observe a vessel proceeding under her lights." "Proceeding under her lights" I take it must mean proceeding under her lights, they being such as could be seen at a reasonable and proper distance, whether the full range or not. If a vessel is entirely in fault for a breach of the regulations and by that default puts the other vessel which has to navigate for her into an exceptionally difficult position, I do not think that she can escape blame, even if the other vessel does not do exactly what is right, and even indeed if she be guilty of a default in look-out, because I think it has been decided, and I think it is good law—in accordance with the case of *The Ovingdean Grange* (87 L. T. Rep. 15; 9 Asp. Mar. Law. Cas. 242; (1902) P. 208), and the principle laid down there, although that was not a case of lights—that a vessel which does put another into an exceptionally difficult position of this kind and continues to do so up to the time of the collision, cannot escape blame simply because the other vessel does not do what she ought to do. The other vessel may be to blame too, but the vessel which is navigating in this way in breach of the regulations cannot, in my opinion, escape blame for the collision, and I think, therefore, on any finding as to the *Slieve Gallion* the *Cumberland Queen* was here to blame for her bad light and was to blame in a way which contributed to the collision.

That leaves to be decided the question, whether the *Slieve Gallion* was to blame, and as to that I feel much greater difficulty. The President has found that she was to blame for not seeing the loom, and he thinks that the look-out—I shall deal with the look-outs in a moment—on the starboard side of the bridge of the *Slieve Gallion* was negligent in not observing the loom at any rate about a quarter of a mile off. In all probablilty if it had been observed at a quarter of a mile the collision might have been avoided by the *Slieve Gallion*. He has found that, as I have said, chiefly upon the advice of the Elder Brethren. Now the look-outs were a look-out man on the port side and a look-out man on the starboard side of the bridge, and in addition, the chief officer, whose evidence was this: He was on the bridge in charge, and he was asked: "Q. Did you yourself—speaking for yourself now—did you keep a sharp look-out?—Yes. Q. Did you keep a look-out on both sides, I mean, did you look both sides?—On both sides. Q. Both bows?—Both bows, from port to starboard, right round. Q. Had you anything else to do except to keep a look-out?—Nothing else except to keep a look-out and see the course was steered." I read that witness's evidence because he was a witness whom the President thought was a witness whose evidence ought to be accepted. He says: "So far as the chief officer was concerned, I accept all he said. If I may say so I was well impressed with his evidence. I think he came on duty to do his duty well and qualified to do it. I was quite satisfied there was no dullness on his part, and that in taking over the charge when the master went below he was quite alert and that in the multitude of his duties, he could not be blamed for what he failed to see." I think that, if I may say so, is rather a slip—to speak of the "multitude of his duties," because the evidence that he gave—and it was the only evidence there was, and the President accepted him as a truthful witness—was that all the duties that he had were to keep a look-out and to see that the course was steered, and he said that he did keep such a look-out on both bows. It is very difficult to see how the look-out on the starboard side can be negligent in not having seen the loom sooner than he did without also blaming the chief officer who was keeping a look-out on both sides. As a matter of fact, just before the *Cumberland Queen* was sighted at a distance of only a ship's length, which sighting was by the man at the wheel, the chief officer was looking on the port side, but then the quartermaster told him there was a vessel, he thought, on the starboard side, he looked round with his binoculars and he did see the loom of the *Cumberland Queen* quite close to him, as I have said.

What the President says is this: "On the whole I accept their evidence on the subject"—that is, the witnesses of the *Slieve Gallion* on the subject of their look-out. "Their look-out was not stronger than the evidence of Hughes makes it." Now, with the greatest respect, I think it is rather stronger, because I do not think you can neglect the chief officer, who was keeping a look-out ahead, and as he says, on both bows. Then he goes on: "And having regard to the evidence which Hughes gave and to the advice which I have received as to the limit within which it would be impossible on such a night that an efficient look-out should fail to observe the loom of a large vessel like the *Cumberland Queen* I have come to the conclusion that in the particulars that I have mentioned the *Slieve Gallion* had a defective look-out, and, therefore, was not complying with the regulations." I think that may be put in other words: That the look-out was a bad and negligent look-out on the *Slieve Gallion*. I leave for the moment the advice, which, really, I think was the most important factor in the President's decision, because he also does speak of having regard to the evidence which Hughes gave. He does not tell us exactly in what particulars the evidence of Hughes leads him to, or assists him in arriving at, his conclusion. Again, I should have found it more easy to deal with the case if I had had a specific finding on that point, but I think, reading Hughes's evidence, that probably the most important part, though perhaps not the whole of the evidence, to which he was referring, was the answer which Hughes gave to some questions put by the President himself at the end of the witness's examination. He asked him this: "Q. You could see her"—that is the *Cumberland Queen*—"at that time"—that is the time that the other look-out man called to him to jump out of the shelter in which he was stationed, because the other vessel was on the point of striking; the shelter was in fact swept away by the collision. The answer was "Yes. Q. Could you see if she had any lights showing?—I could. Q. Well, had she lights showing?—Well, I did not see any. Q. Why was that, was it because your eyes were failing you, or because they were not there?—No, I have good eyesight. Q. Had she any lights showing?—I do not say she had not any. Q. Were there any visible to you?—No." Now we come to the evidence on which I think the learned

President was relying: "Supposing you had been looking on the spot where she was, how far off do you think you could have seen her?—I could have seen her a good distance. Q. What would attract your attention to a vessel like that on a night such as you had? Would you find her by looking for her, or would you find her when she happened to come into sight?—When she happened to come into sight. Q. Was the night a night on which you would be likely to find a vessel by looking for her?—That is right. Q. You would?—Yes. Q. What we want to know is, if you would have found her if you were looking for her; were you looking for her?—No, I was not looking for her. Q. What were you looking for?—I was keeping a look-out for lights." There is another answer that I think it is possible may have been relied upon, though I hardly think it can have been. This man, who had been a gunlayer on the well-known destroyer *Broke* at the time of the Battle of Jutland, was asked this: "Do you think you could have seen the *Cumberland Queen* on that night so as to be able to train a gun on her at 6000 yards"—that means the loom of the *Cumberland Queen*—"A. Well, I would if I had been looking in that direction—I would have seen her all right." I do not know whether he meant to say that, but nobody can possibly accept it. It is not the case of either side that you could have seen the loom at 6000 yards, and I think he was only magnifying his skill as a gun-layer and making, possibly, a foolish answer, and I do not think that that is the part of the answer which the President considered important, but the other part that I have read I think very likely he did, and if that is to be taken to mean this: If I had been looking out I could have seen her, but I was not looking out because my only business was to look for lights, then I think he would have been wrong. *Primâ facie* no doubt the light is what you look for, but if he means that if you see no light you can dispense with any necessity to keep a further look-out I think he was wrong, but I do not read the evidence in that way, and as the President has not, if I may say so, told us specifically what the evidence was and what was the construction he put upon it, I feel bound to put on it my own construction as best I can, and I think that it really means this: If I had had my attention directed to that spot where the vessel in fact was I should have seen her at some considerable distance—"a good distance," is the expression; but I should have only done that if I had been looking for her there, and I was not looking for her there, because there had been nothing to direct my attention to the probability of a vessel being in that direction. I think that is what he meant. I was looking out for lights and *prima facie* that was his duty. As there was no light my attention was not directed to that particular spot, and therefore I was not looking out for her as I should have been if I had any indication that there was a ship there to look for. That, I think, is a fair construction of that evidence, and I do not think on that construction it shows a negligent or improper look-out.

But now there is a much more important point, which is this. The President took the advice of the Elder Brethren on the point at what distance ought an efficient look-out to have seen the loom of the *Cumberland Queen*. He says this: "I have consulted the Elder Brethren as to the range within which I might say with any confidence that a diligent and efficient look-out man on such a night as was described, and, as is insisted upon in the case of the *Slieve Gallion*, could be excused for not seeing the hull and sails—the outline or the loom as it is called—of the *Cumberland Queen*, and those who advise me cannot bring it down to a quarter of a mile." Now, it did occur to me, not knowing anything about these matters practically at all, that unless you have a more accurate and particular description of the weather than that it was a fine, clear, dark, overcast night it would be rather difficult for anybody who was not there to predict exactly at what distance the loom of a ship like the *Cumberland Queen* could have been seen, and it is to be noticed that the master of the *Slieve Gallion*—he was not on deck but he was asked as an expert witness, he was on deck three minutes before, and therefore he knew what kind of night it was—was asked rather as an expert, this question: "Q. What was there during the darkness of that night to render it likely or unlikely that you would see the loom of a ship?—Well, it was a very, very dark night with an overcast sky; it was not a clear dark night. Q. What sort of sea?—The sea was smooth. Q. Does that make a difference?—It does. Q. As to whether you are likely or not to see an oncoming ship?—Yes. Q. Well, how?—Well, I think you can see better with a little breeze—a better defined horizon. Q. That breaks the water?—Yes. Q. You say it was dark and overcast?—Yes. Q. Have you considered at all whether you would be likely to see the loom of a ship on a night like that more than 300ft. or 400ft. away?—You would not see her any more than that—not much more—not going at sixteen knots. Q. Well, taking her as she was, and you as you were?—Yes. Q. Have you considered it at all before you came into the witness box?—No, I have not." These were questions asked by the learned President. That was the evidence of a man no doubt interested, because he was the master of the accused ship, but the evidence of a man of experience who actually knew what the conditions were upon that night; but as this advice had been given to the President by the Elder Brethren, and I think is really the foundation of his judgment against the *Slieve Gallion*, I thought it right to consult our Assessors on the matter, and I put to them these questions: "The night is found to be a dark, clear, overcast night"—I took those words from the President's judgment. There is also information in the weather reports as to the visibility of lights. The weather reports were put in, and they gave indications of the visibility of the Skerries Light, and, I think, some other lights. "Is it possible, on this information, to say that the loom of the *Cumberland Queen* could have been seen at a distance of a quarter of a mile, or at an appreciably greater distance than that at which it was seen?" And what our Assessors tell us is that they consider it very doubtful, and I say, for what it is worth—and I do not think it is worth anything—that that agrees entirely with my own view. With simply a description of a night like this it is very difficult indeed, without having been there, to know exactly at what distance a loom could be seen, because although you may have two nights which might be fairly described as fine, clear, dark, overcast nights, the amount of visibility on one night may differ very much from the amount of visibility on the other, and I think, if I may say so with the

greatest possible respect, that the advice which was given to the President was rather more positive than the circumstances and the information in the possession of the court justified, and I feel bound to act—I should feel bound to act anyhow, and I feel bound to act still more because it is my own view—on the advice that it is very doubtful, unless you were there, whether you can say positively that the loom could have been seen at the distance mentioned by the President. The question therefore arises in those circumstances, in that doubtfulness, and in the circumstances of the *Slieve Gallion* having been misled by the action of the *Cumberland Queen* and by that action deprived of the warning that she ought to have had from the light, is it possible to say that the look-out—I take the whole look-out, not only Hughes, the starboard look-out, but the look-out on the *Slieve Gallion*—was defective, and that there was a negligent and bad look-out? I do not think that it is, and, therefore, I think the *Slieve Gallion* ought not to be held to blame for a bad look-out in these circumstances. The *Cumberland Queen* was obviously to blame in about as many respects as she could be. She came into court with an entirely false case; she had a light which I think I am justified in saying the President has found did not afford any proper assistance to the *Slieve Gallion*, and that, in my opinion, was the real cause of the collision, and, therefore, although with great diffidence, as I am differing from the learned President's judgment, I think this appeal should be allowed, and that the *Cumberland Queen* should be held alone to blame for the collision, and that will involve also, of course, the costs here and below.

Atkin, L.J.—The *Cumberland Queen* at the time this collision happened, undoubtedly was committing a breach of the regulations, because her port light was defective, and defective to a quite extraordinary degree. Taking it at the very best which can be said for her, which I think would fairly represent the circumstances of the trial, when the lamp had been trimmed and lighted by an experienced lamp-trimmer of Trinity House, the range of the port light was not more than half a mile, that is to say, it was about 25 per cent. of of the range that was required by the regulations, and, undoubtedly, if the absence of the light caused the collision, there can be only one answer as to whether the *Cumberland Queen* should be held to blame or not.

Now the question, and the material question, that arises is whether or not the absence of the light did cause the collision, and what is suggested, and what, I think, has been found, is, that it did not cause the collision because in spite of the defect of the light the *Cumberland Queen* could have been picked up, or should have been seen, by those on board the *Slieve Gallion*, if they had maintained an efficient look-out in time to enable the *Slieve Gallion* to perform what was undoubtedly her duty and keep out of the way of the *Cumberland Queen*, and, of course, if they could have seen her at such a distance, light or no light, then the absence of the light would not have caused the collision, because the object of a light is merely to indicate that the vessel is there, and if you can see the vessel, even without the light, in time to act there is no need for the light, and action must be taken. Therefore, to my mind, the first question is whether or not it was possible for those on board the *Slieve Gallion*, if they had kept an efficient look-out, to have seen the *Cumberland Queen* at a distance sufficient to enable them to avoid the collision? Now they did in fact see her, according to their story, at about 300ft. off, and it is not suggested that if they could only see the vessel at that time and at that distance they omitted to do anything which they ought to have done or that they did anything which they ought not to have done; in other words, the *Slieve Gallion* would not be responsible for the collision. But it is said that even assuming there was no light at all, the loom of the vessel coming without a light could have been observed at a distance of about a quarter of a mile. I think that some distance such as that is almost the closest that you could bring the *Cumberland Queen* to the *Slieve Gallion* so as to give the *Slieve Gallion* sufficient time to act—I will assume a little nearer. That undoubtedly is a very material question, because it not only deals with this question as to whether or not the fault of the *Cumberland Queen* caused the collision, but it also covers the question as to whether or not those on board the *Slieve Gallion* were keeping an efficient look-out, and therefore one has to consider the finding of the learned President in that respect. What he has found is this: He had been advised that the loom could be seen at a distance of a quarter of a mile or more, certainly at a quarter of a mile, and on the basis that the loom could have been seen at a distance of a quarter of a mile he says the man on the look-out did not see it until 300ft. away, and that indicates to me that the look-out was not an efficient look-out, and I have no doubt at all that he bases his finding upon that question as to the limit of visibility of the sailing ship, because one passage in the judgment, which I think has not been read, is this—he is dealing with the question of look-out, and he says: "So far as the port look-out man was concerned, he had that quarter to attend to, and he was attending to it, and was very vigilant. Can the same be said with regard to the look-out man on the starboard side? He was in the box and gave his evidence to the best of his ability. He certainly did not establish affirmatively that he was giving a diligent and sufficient look-out." I am not quite sure what that really means; I do not think it is a finding that he established from his evidence that he was keeping a bad look-out. "A great deal depends"—this is the passage I want to read—"in forming an opinion as to the character of his look-out, upon the limit of visibility of a sailing ship of the type of the *Cumberland Queen* on a night such as the night in question," and then he proceeds to discuss it and to state the advice he has received from his advisers, the Elder Brethren. Now the Master of the Rolls has read the advice that we have received—which, I think, is different advice from that received by the President, and acting upon that advice—if it is to be accepted, and I do accept it—that is to say, the advice that we have received—it seems to me that the whole substratum of the President's finding on this point has disappeared, because then it becomes very doubtful as to whether or not the *Cumberland Queen* could have been seen at a greater distance than about 300ft., and if it could not have been seen at a distance of more than 300ft. two things seem to follow: one is that there was nothing that could have been done on the part of the *Slieve Gallion* to avoid the collision; another is that there

is no evidence of an inefficient look-out on her part, and therefore no breach of the regulations on her part, because, as I have said, the ground for saying that there was a bad look-out is that the ship could have been observed a quarter of a mile away; they did not see her until 300ft. away, therefore you cannot have been looking. That disposes of the first proposition and you obviously have no evidence of a bad look-out. The only other evidence of a bad look-out is that upon which it seems to me quite plain, and the President in his judgment makes it quite plain he would not have acted, if it had been left by itself, namely, the answers made by Hughes who was the look-out on the starboard side, and, I think, very naturally, because the evidence of Hughes as reported seems to me to indicate that his answers are not to be relied upon. I doubt very much whether he understood the bearing of the question, or understood what was really being put to him, but if he did, it is quite plain at any rate that he largely exaggerated his powers, and, therefore, he is an unreliable witness upon the very point which is used against him, namely, as to what his powers of vision were in that particular respect. Therefore, it appears to me that on this question about the loom of the vessel, which is the ground, to my mind, upon which the President has decided, upon the advice that we have received we are bound to come to the conclusion that in fact there was no evidence of an inefficient look-out on board the *Slieve Gallion* and that the ship could not have been observed at a greater distance than about 300ft., and, therefore, the collision was caused by the fault of the *Cumberland Queen*.

But the question does not really rest there, and it cannot be rested entirely upon that, and it is as to this part of the question in the case that I have felt very considerable difficulties—that is the question of the light, because, whether the loom could have been observed at 300ft. or not, if, in fact, there was a light that could have been observed at a quarter of a mile or so, then the whole of the inferences which were drawn in respect of the power of seeing the loom can be drawn, and to my mind should be drawn, in reference to seeing the light. Now we have no finding from the President in respect of the light, and the question, as I say, does present undoubted difficulties. The evidence of the trial of the light is that when it was tested under the conditions which are mentioned—favourable conditions to the light—then it could be seen at a range of about half a mile, and if it could be seen, as I have said, even at a quarter of a mile range, I imagine there would be great difficulty in acquitting the *Slieve Gallion* of blame. But I think this has got to be said, not as a matter of law but, as I think, a plain question of drawing the right inference of fact: If a ship is found to have had a defective light, an extremely defective light, and there is a question as to at what range it could have been seen, and it is clear that, at any rate, the range was defective to 75 per cent., it is plain, to my mind, that there is a very substantial burthen thrown upon the ship of showing, if she says: Well, you could have seen the light half a mile or for a quarter of a mile off; that, in fact, that light could be observed at that particular distance which she alleges. She starts with a defective light—she starts with an admittedly very defective light—and it appears to me that there is a very serious burthen cast upon her of showing what the distance is at which the light could have been seen, if she desires to cast the blame upon the other ship. To my mind that burthen, on the whole, is not discharged in this case. We do not know anything about the light in itself except as a result of the test, but we do know that there was a look-out on board the *Slieve Gallion*. We do know that the chief officer was keeping a look-out and had not seen any light; we do know that, upon any footing, the starboard look-out man, Hughes, was keeping a look-out for lights and did not see the light, and we do know that the quartermaster at the helm only picked her out by the loom and did not pick her out by the light, and we know that, apparently, no light was visible, no genuine light, once she had been picked up at 300ft. I do not attach so much importance to that because the evidence of the test was that, apparently, with a light burning and visible at half a mile range, still within 100 yards you would only see a thin pencil of light; but upon the whole I have come to the conclusion that in this case there is no evidence that the light could have been seen at all, so as to have guided a man on the look-out on the *Slieve Gallion*. Now, if that is so, the same result follows, as I have said in reference to the loom, namely, that there is no evidence that the look-out on the *Slieve Gallion* ought to have picked up this vessel any earlier than in fact they did. The result of that will be that in fact, first of all, there is no evidence of an inefficient look-out. If there were other independent evidence of an inefficient look-out it would still prevent the *Slieve Gallion* from being affected, because even if there had been an efficient look-out there would have been nothing for them to have seen earlier than at this distance of about 300ft. I think it follows from that that the *Cumberland Queen* must be held alone to blame.

I must say I have no compunction in coming to that conclusion once I am forced to come to it by the facts, because it is perfectly obvious that with that light in that condition in the Irish Channel she was a very serious danger to navigation, and we find her coming into court in order to protect herself by a certainly perjured tale. I myself am a little surprised, under any circumstances, that she was allowed any costs at all on that finding by the learned President, and I think that she alone ought to be held to blame.

I should like to add this: Once one comes to this conclusion it becomes unnecessary to consider the question as to whether or not, even if the *Slieve Gallion* could have picked her up earlier than at a quarter of a mile, she could then have escaped her liability. All I can say about that is that as at present advised it seems to me that even so there would be a continuing negligence on the *Cumberland Queen's* part, namely, the absence of light, which, at even a quarter of a mile, put the *Slieve Gallion* in a position of exceptional difficulty, and which would, at any rate, have contributed to the accident; but in view of the advice we have received it seems to me to follow that the *Cumberland Queen* was alone to blame.

Younger, L.J.—I am of the same opinion, and I desire to add only a few words by way of explanation of the conclusion at which, along with my Lord and the Lord Justice, I have arrived, that the *Cumberland Queen* was alone to blame for this collision.

The learned President, as I understand his judgment, has arrived at the decision that the

Slieve Gallion was alone to blame upon two grounds, which he states towards the end of his judgment. The first was that he was of opinion that the look-out upon the *Slieve Gallion* must not be regarded as having been stronger than the evidence of Hughes made it, and his second ground of decision was that he was advised by the Elder Brethren that on the night in question the loom of a vessel like the *Cumberland Queen* should have been visible to those keeping a look-out on board the *Slieve Gallion* at a distance of not less than a quarter of a mile, a distance which I think it must be taken the President was of opinion would have been sufficient to enable the *Slieve Gallion* by ordinary care and skill to avoid the collision. Now those are both, in a sense, findings of fact, although the second is based upon technical advice; but I should not, myself, presume to question them and to arrive at a contrary conclusion of my own unless I felt myself able to do so by applying to the facts of the case the standard of truth and accuracy which, with reference to other witness, and particularly the chief officer, the President has, in his judgment, himself set. It is by applying that standard to that evidence so approved by the President that I have reached the conclusion at which I have arrived. I think, when one reads that evidence, one must feel that the President failed to attach sufficient weight to it, particularly to the evidence of the chief officer. I think that he himself would not have been able to discount that evidence on which he placed such complete reliance to the extent he did had he not been under the misapprehension, which the Master of the Rolls has already pointed out, that at the relevant moment the chief officer was engaged in a multitude of duties which precluded him from keeping a look-out as vigilant as that which might have been expected from a responsible witness of his capacity and integrity. When one refers to his evidence one finds, as the Master of the Rolls has already pointed out, that at the moment not only was he, as he says, keeping a sharp look-out on both sides, but that at the time he had nothing else to do except to keep a look-out and see the course that was steered.

In these circumstances, we find that this vessel, the *Cumberland Queen*, was first seen by the steersman. It is, I suppose, a matter of fair observation that it was not in fact the primary duty of the steersman to be looking out for vessels like the *Cumberland Queen*, but if, in point of fact, it did happen that this steersman whose evidence appears to be perfectly reliable, was at the moment on the look-out and did see the *Cumberland Queen*, then, I think, it is a little difficult to arrive at the conclusion which seems to be implicit in the learned President's judgment, that somebody other than the steersman on the look-out and being the look-out man, would have, and ought to have, seen this vessel at an earlier moment. Further, I think that the terms in which the steersman, the quarter-master, announced the discovery by him of the *Cumberland Queen* are not without some significance. He says: "I think I see the loom of a vessel," or words to that effect—a certain element of doubt, confirmed by the fact that the chief officer apparently saw this loom of a vessel through his glasses, which he at once applied to the place pointed by the steersman where he saw it. That, to my mind, apart altogether from the evidence of Hughes, is a strong *primâ facie* case going to show that at that moment there was a vigilant and effective look-out being kept on board the *Slieve Gallion* which did not depend on the evidence of Hughes at all, and, therefore, that the look-out was much stronger than the evidence of Hughes made it; and on that ground, it seems to me, the first portion of the President's finding is open to criticism, judged by, as I have put it, the standard of accuracy set by him with reference to the witnesses, and particularly the chief officer, to whom I have referred. But then, when one comes to consider the evidence of Hughes, I think that this observation may fairly be made. There are passages in his evidence which it is, I think, impossible to understand, except upon the footing that he was a witness who was liable to exaggeration with reference to his own physical capacity of vision or otherwise; but when one compares Hughes's evidence with the evidence of the quarter-master and of the first officer, I think that portion of the evidence which is most in harmony with all that is deposed to on this occasion is the part of it in which, in answer to the President, Hughes indicated the difficulty that he had in accurately determining the size, shape and character of this vessel, the *Cumberland Queen*, after her presence had been brought to his notice by the intimation made by the quartermaster and the first officer; and when you take that also in conjunction with the evidence of the man that the darkness of the night in question was such that the visibility of an unlighted vessel like the *Cumberland Queen* would not be greater than the distance at which she was first seen, you have, as it appears to me, a body of positive evidence supporting the view put forward by the *Slieve Gallion*, that in fact there was, at the moment when this vessel became visible, a vigilant look-out being maintained on board of her, relieving her from all imputations in respect of negligence for not keeping a look-out at that moment. Further, I think it is fair to say this: Mr. Raeburn, quite properly, in supporting his case before us, stated that throughout, or anyhow, in the court below, with reference to Hughes, his case had been that Hughes was asleep. I think it is well to point out this, that when the chief officer was being examined and cross-examined, and when Hughes was being cross-examined in the court below, the case which was being presented to the court by the *Cumberland Queen* was not that a vigilant look-out was not being kept on board the *Slieve Gallion* as a primary case, but it was this: That the *Slieve Gallion*, in a misty night, was going at the rate of sixteen knots when no look-out would have been of any use. In other words, the case which at that moment those appearing for the *Cumberland Queen* hoped to be able to establish was a case which, on the judgment of the President, had it been made good, would, as he says, have involved the highest degree of recklessness. Now, I think, myself, that if a case of that kind is being presented to the court at a moment when the witnesses on the other side are being cross-examined and that that cross-examination is, to put it at its lowest, primarily directed towards obtaining evidence which will be at least consistent with that case, one looks at it narrowly if afterwards that cross-examination is relied upon for the purpose of establishing, not that the *Cumberland Queen* could not have been seen, but that it was not seen because the witness himself was asleep. In my judgment, the cross-

examination and the evidence of Hughes do not justify any such finding, and I do not, myself, think from the way in which the President has dealt with the evidence of Hughes, that he intended so to find.

Accordingly, it appears to me that the first ground upon which the President proceeded may be displaced by reference to the rest of the evidence not held by him to have been inaccurate or otherwise than truthful.

With regard to the second ground upon which he proceeded, namely, the advice which he received from those who were there to advise him, we have, as my Lord has intimated, received somewhat different advice from those who advise us, and if I may respectfully say so, I do—knowing personally, of course, nothing of these matters, but judging only by the probabilities of this case—most heartily accept the advice which we have received, confirmed, as it appears to me, by the definite evidence of those on board the *Slieve Gallion* to which I have referred.

One question only remains, namely, the question of lights. With reference to that, I, for myself, feel on stronger ground, because here, I think, I can accept wholeheartedly the decision of fact, the finding of fact of the learned President. It appears to me that, although he has not said so in words, he must have been of opinion that the red light on board the *Cumberland Queen* was not visible in any effective sense because had he not been of that opinion it would have been quite unnecessary for him to trouble himself about the loom of the vessel. Accordingly, I think that the question of lights is really disposed of by that implicit finding of fact on the part of the President, and the result is that, in my judgment, this collision was directly and solely due to the *Cumberland Queen* navigating these seas on a dark night, a practically unlighted ship.

Solicitors for the appellants, *H. L. Thornhill.*

Solicitors for the respondents, *Pritchard* and *Sons*, for *Collins, Robinson*, and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS

Dec. 10, 17, 19, 29, 1921, *and Feb.* 15, 1922.

(Before HILL, J. and Elder Brethren.)

THE HERMIONE. (*a*)

King's ship—Ship's agent—Salvage claim by the ship's officers and crew—Instructions to agent to prosecute the claim—Settlement—Authority of the agent—Naval Agency and Distribution Act 1864 (26 *&* 27 *Vict. c.* 116).

The authority of an agent for the officers and crew of a King's ship, under the Naval Agency Act 1864 (26 *&* 27 *Vict. c.* 116) *is not wider than that of a solicitor, and does not therefore extend to the settlement of claims by the ship's officers and crew without their express authority.*

Thus a ship's agent who settles a claim by the officers and crew of a King's ship for salvage reward without the consent, express or implied, of the commanding officer, is liable in damages to the extent of the award which the officers and crew would have received if the salvage claim had been duly prosecuted, less the amount received under the terms of settlement.

The agent has no authority to settle the claims of the officers (other than the commanding officer) and crew without their instructions when the commanding officer has been giving instructions on their behalf as well as his own, notwithstanding that the commanding officer takes an exaggerated view of their claims.

THIS was an action brought by Commander Noakes, R.N., on behalf of himself and the officers and crew of H.M.S. *Daffodil*, against Stillwell and Sons, who were at all material times the only appointed ship's agents for H.M.S. *Daffodil*, under the Naval Agency and Distribution Act 1864 (26 & 27 Vict. c. 116). The plaintiff's claim was for a declaration fixing the amount of salvage award proper for certain salvage services performed by them to the steamer *Hermione* in April 1917, and for an order that the defendants should pay to them such sum less the sum of 100*l.*, which the plaintiff had already received under the terms of a settlement of his claims in respect of these services effected by the defendants, as the plaintiff alleged, within his authority.

The plaintiff by his statement of claim alleged that on the 14th April 1917 and subsequent days they performed certain salvage services (particulars of which were alleged in the statement of claim, and appear, so far as relevant, in the judgment of the learned judge) to the steamer *Hermione*, which resulted in benefit to her, and in her cargo, to the value of 76,359*l.*, being saved. The statement of claim further alleged that by letter dated the 23rd April 1917 the plaintiff, on behalf of himself and the officers and crew of H.M.S. *Daffodil*, instructed the defendants to put forward a claim for salvage in respect of these services. In or about June 1917 the permission of the Admiralty to put forward the claim was received, and was forwarded by the plaintiff to the defendants on the 18th June 1917. The defendants employed as their agent Mr. Arthur Tyler, solicitor, to act for the commander, officers, and crew of the *Daffodil*, and on the 23rd June 1917 a writ *in rem* was issued in the Admiralty Division of the High Court against the owners of the steamship *Hermione*, her cargo and freight. Service of the writ was accepted by Messrs. William A. Crump and Sons, solicitors for the defendants in the said action, and Messrs. Crump gave an undertaking to appear, but refused to give an undertaking to prove values or put a bail. Upon receipt of the plaintiff's instructions to put forward a claim for salvage and (or) after the refusal of Messrs. Crump to prove values or to put in bail, the defendants and (or) their agent, Mr. Tyler, negligently and in breach of their duty failed to take the necessary or any steps to arrest the cargo which had been salved from the *Hermione*, and (or) to obtain security for the claim of the plaintiff and (or) to enforce the said undertaking, to appear and (or) to proceed *in personam* against the defendants. On or about the 18th Nov. 1919 the defendants and (or) their agent, Mr. Tyler without communicating to the plaintiff the offer of settlement, negligently and in breach of their duty, and contrary to the express instructions of

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

the plaintiff, contained in letters to the defendants dated the 5th July and the 14th Aug. 1919, accepted the sum of 100*l.* and 10*l.* 10*s.* costs in full satisfaction and settlement of the plaintiff's claim, the sum of 100*l.* did not represent a fair and reasonable remuneration for the said services.

The defendants by their defence admitted that at all material times they were the duly appointed ship's agents for H.M.S. *Daffodil* under the Naval Agency and Distribution Act 1864. They denied that the plaintiff rendered services to the *Hermione* as alleged, or that the cargo of the *Hermione* was saved or that the *Hermione* was benefited, saying that the plaintiff acted negligently in handling her. The defendants admitted that they received a letter from the plaintiff dated the 23rd April 1917, but denied that it contained any instructions to put forward a claim for salvage. No instructions to put forward a claim and no information upon which to base such claim was received by the defendants until the receipt of a letter from the plaintiff dated the 18th June 1917. The defendants admitted that they took no steps to arrest the cargo salved from the *Hermione*, or to obtain security for the claim of the plaintiff or to proceed *in personam* against the defendants in the said action. Such failure did not in the circumstances of the case amount to or constitute negligence or breach of duty. By letter dated the 28th Feb. 1918, Mr. Tyler requested Messrs. Crump, the solicitors for the owners of the *Hermione* to give an undertaking to prove values. Messrs. Crump refused to give any such undertaking and stated that there were no values to prove. The plaintiff had acted negligently in failing to obtain a salvage bond from the master of the *Hermione*, or otherwise preserve his claim against the *Hermione* and her cargo, as it was his duty in the interest of his officers and crew to do. Appearance was entered by Messrs. Crump on the 6th March 1918. Upon the advice of counsel the defendants took no steps to proceed to search for and arrest with a view to appraisement the cargo alleged by the plaintiff to have been saved by the officers and crew of H.M.S. *Daffodil*, and they did not abandon the said action *in rem* against the ship, cargo, and freight, and proceed *in personam* against the owners of the cargo alleged by the plaintiff to have been saved. Under the circumstances then known to the defendants they acted reasonably, and without negligence and *bonâ fide* in the best interests of the plaintiff, his officers and crew. The defendants further admitted that they settled the action against the *Hermione*. In so doing they acted upon the advice of counsel, who advised that the plaintiff had no chance of success against the owners of the *Hermione*, and had no prospect of success under the circumstances of the case against the owners of the cargo. The sum of 100*l.* was a fair and reasonable remuneration for the services rendered by H.M.S. *Daffodil*. The defendants denied that they accepted the offer of 100*l.* in settlement without communicating it to the plaintiff, or that they were negligent or guilty of breach of duty in accepting it, or that they accepted it contrary to the express instructions of the plaintiff. The letters of the 5th July 1919 and the 14th Aug. 1919 contained no express instruction as alleged. In reply to the plaintiff's letter of the 14th Aug. 1919 the defendants, acting under the advice of counsel, informed the plaintiff by letter dated the 4th Sept. 1919 that they were in agreement with the opinion of counsel, which had previously been sent to the plaintiff, and advised the plaintiff, in reply to his specific inquiry, to accept the sum of 100*l.* in settlement, failing an increased offer. The plaintiff failed to reply to the letter, whereby he intimated his agreement with the advice given by the defendants and his willingness that the defendants should settle the action. The defendants, acting as reasonable men and without negligence and in good faith, were entitled to believe and in fact did believe that they were authorised by the plaintiff expressly to negotiate for a settlement of the said action on the basis of 100*l.* as a minimum figure. The defendants did in fact, through their agent, Mr. Tyler, endeavour to get an increased offer from Messrs. Crump, but on their failure to get any increase in the offer, on the 18th Nov. 1919, no communication having been received from the plaintiff either instructing them to the contrary, or at all, they accepted the sum of 100*l.* together with 10*l.* 10*s.* costs, in full settlement and satisfaction of the plaintiff's claim in the action.

Dunlop, K.C. and *G. P. Langton* for the plaintiff.

Bateson, K.C. and *Wilfrid Lewis* for the defendants.

Alfred Bucknill held a watching brief for the Salvage Association.

Feb. 15.—HILL, J. said:—In this action the plaintiff, as former commander of H.M.S. *Daffodil*, suing on behalf of himself and those who were her officers and crew on the 14th and 15th April 1917, claims damages against the defendants, alleging that the defendants, by themselves and their agents, Mr. Arthur Tyler, solicitor, were negligent in the prosecution of a salvage claim; and further, that they compromised that claim for the sum of 100*l.* and 10*l.* 10*s.* costs, contrary to the express prohibition of the plaintiff. The defendants were appointed by the plaintiff to be ship's agents under the Naval Agency Act 1864 (26 & 27 Vict. c. 116) Mr. Tyler was a solicitor; he died on the 30th April 1919, in the course of the proceedings, and was succeeded by the firm of Arthur Tyler and Co., Mr. Arthur Tyler was instructed by the defendants in the salvage proceedings which were instituted on the plaintiff's instructions, and appeared on the writ as solicitors for the plaintiffs in those proceedings, who were described as the commander, officers and crew of H.M.S. *Daffodil*. It is admitted in the pleadings in the present case that Mr. Tyler acted as agent for the defendants. But for that admission I should have been of the opinion that he was not an agent of the defendants, but only of those persons whose solicitor he was, appointed by the defendants in their capacity as ship's agents, but acting not for the defendants, but for the plaintiffs upon the record. In view of the admission, I deal with the case on the basis that Mr. Tyler was the agent of the defendants, but on the facts as I find them, this point is not of importance in the present case. I may say that there is no action brought against Mr. Tyler. There are two distinct breaches of duty alleged: (1) Negligence in the prosecution of the salvage action; (2) settling it contrary to an express prohibition. I have come to the conclusion that there was no negligence on the part of either the defendants or Mr. Tyler or his successors in the prosecution of the salvage action. And as to the charge of settling it contrary to an express prohibition,

there is no doubt at all that Messrs. Tyler and Co. had the authority of the defendants to settle as they did; and the only question left is, whether the defendants gave that authority contrary to the express prohibition of the plaintiff. I base my finding that Messrs. Tyler & Co. had the defendants' authority to settle upon the correspondence, which shows a previous authority [the learned judge referred to the correspondence] and a ratification (if there was not a previous authority, which there was). [The learned judge again referred to the correspondence.] As regards the defendants I have, with some hesitation, come to the conclusion that they authorised the settlement contrary to an express prohibition, and that, while in the absence of such prohibition, they could not, in all the circumstances of the case, have been held negligent to settle as they did, yet they were guilty of a breach of duty in settling contrary to an express prohibition and are liable in damages for the consequences. Their duty under the Act, and apart from the Act as plaintiff's agents, was to do all things necessary or proper in the course of the salvage claim. That in my view included an authority to settle a salvage claim, provided it was done reasonably, but the authority to settle in a ship's agent is not wider than that of a solicitor, and does not extend to a settlement on terms forbidden by the principal.

The main facts of the case are as follows: On the 14th April 1917 the steamship *Hermione*, homeward bound with a cargo of wheat, frozen meat, and other goods, was mined in the neighbourhood of the *Coningbeg* Light vessel. Her crew took to the boats. The *Daffodil*, a sloop of 868 tons, with a complement of ninety-one, was on duty near by, and went to the assistance of the *Hermione*. The *Hermione* was badly holed. No. 1 hold was full of water, No. 2 had 18ft. of water, there was also a crack in the upper part amidships, the windlass was disabled; she was badly by the head. An officer, engineer, and men from the *Daffodil* boarded her, as did the master and boatswain of the *Hermione*. The pumps were got to work and prevented the water from increasing. The *Daffodil* took the *Hermione* in tow, and brought her to an anchorage in Dunmore Bay. The *Hermione's* own crew returned, and the *Daffodil* left for duty outside. An armed trawler remained alongside. The intention of the plaintiff was to return and take the *Hermione* further in on the following morning and beach her. About half-past ten in the evening the bulkhead between Nos. 1 and 2 holds was heard cracking, and the water in No. 2 rapidly increased, with the result that the *Hermione* sank forward, and the engine and stokehold were flooded. On the following morning the *Daffodil* returned, and her men spent the day in breaking out a quantity of rubber and ipecacuanha, which formed part of the cargo. This the *Daffodil* landed. A number of horses on board were landed by the steamship *Arklow*. The ship and the rest of the cargo were subsequently taken in charge by the Salvage Association acting for the underwriters. The bulk of the cargo, including all the frozen meat and most of the wheat, was worthless, but other parts of the cargo were landed and forwarded to destination. The value of the salved portion was considerable. The ship became a constructive total loss, but a few movables were saved. Expenses were incurred by the Waterford Harbour Commissioners in breaking up the wreck, and apparently these were in part recouped out of the value of the cargo salved, I presume under powers of the Waterford Harbour Commissioners to treat ship and cargo as a common fund for recouping expenses.

What the *Daffodil* succeeded in doing was to bring the *Hermione* from a place where she would have sunk in deep water to a place where she sank in shallow water, so that part of her cargo could be salved. They further broke out and landed the rubber and ipecacuanha. That is the only part of the cargo of which they completed the salvage. The services were short, the towage seven hours, the distance was twenty-five miles, the weather was fine. The *Daffodil* was exposed to some extra risk from mines and possibly submarines while towing. She had three armed trawlers acting as escort. As between the *Daffodil* and the *Hermione*, each accuses the other of negligence. The *Daffodil* says that the *Hermione* was negligently allowed to sink at anchor in Dunmore Bay. The *Hermione* says the *Daffodil* ought to have taken assistance of a pilot which was offered and ought to have beached the *Hermione* at once. Now that the case has been tried out, and the facts investigated, I am unable to find negligence. I am unable to find that these charges of negligence are made out. No. 2 hold was full of wheat. The bulkhead between Nos. 1 and 2 must have been damaged by the explosion, for water was flowing in to No. 2. I am advised that the wet wheat in No. 2 would rapidly swell and be likely to cause the damaged bulkhead to give way. I accept the evidence of the master of the *Hermione* that there was a sudden increase of water which no pumps could have controlled. It was said that the master ought to have used the trawler alongside to beach the ship, but it is very doubtful whether there was time to do anything effective. I cannot find that the sinking was due to the negligence which is charged against the master and crew of the *Hermione*. On the other hand, the master was satisfied to have the *Hermione* brought to anchor where she was, and the plaintiff, who did not know that the cargo in No. 2 was wheat, was not negligent in bringing the ship to an anchor instead of immediately beaching her; and, except to assist in beaching, the help of a pilot was not required. There was no negligence of the plaintiff or his men. The sinking was a misfortune, both for the owners and underwriters and for the plaintiff and his officers and crew. Had the service been completed up to the point of beaching, it would have been valuable. As regards the cargo, whether the *Hermione*, which was twenty-eight years old, would in any event have escaped becoming a constructive total loss, is more doubtful, but much more of the cargo would have been saved. The sinking turned the service into one of very moderate success whereby a comparatively small part of the whole cargo was brought into greater comparative safety, and of that again a small part was actually brought into final safety by being landed by the *Daffodil* at Waterford. Even of what was actually saved, the commander, officers, and crew of a King's ship could look for no reward as to part, for the wheat was the property of the Crown, and in respect of it no action would lie in this court and no claim would be recognised by the Crown for services rendered by servants of the Crown.

Such, on the facts as now ascertained, was the service in respect of which the plaintiff was anxious

to prosecute a claim. It was a good claim for what it was worth. In my opinion the suggestion that it had been lost by the failure of the plaintiff to hand over the rubber and ipecacuanha to the receiver of wreck is without foundation. The receiver of wreck in his letter makes no complaint of it, and I can see no ground for saying that when there are people representing the owners on the spot, as there were shipowners' agents at Waterford, the salvor forfeits his claim because he does not hand over the property salved to the receiver of wreck. On the other hand, it was not a certain claim, for it was always open to the suggestion, which, in fact, was made by Messrs. Crump and Son for the underwriters and owners as early as the 25th July 1917, that the plaintiff had improperly failed to beach the ship at once, a suggestion which we now know to be unsound, but which had to be considered by anyone who was advising the plaintiff.

I now come to the prosecution of the claim. A good deal of complaint was made as to delay in issuing a writ, failure to arrest and obtain bail and have values proved, and so forth. I need not investigate this closely. I do not find that there was any just cause of complaint in these respects. By the time the plaintiff gave adequate instructions, all or nearly all the salved cargo of any substantial value had been landed and forwarded to destination. But I do not think it is necessary to consider that matter further because I am clearly of opinion that no damage resulted from any such delay, if delay there was. A writ was issued; an undertaking to appear was given on the 6th March 1918; appearance was entered by Messrs. Crump and Son on the instructions of the Salvage Association, which represented both the owners of the *Hermione* and of the cargo interests other than the Government. The plaintiffs were therefore put in a position to proceed *in personam* and to obtain discovery, and the values would have been ascertained, and a judgment *in personam* would have resulted in payment of award and costs. Mr. Tyler twice took the opinion of counsel. The plaintiff does not complain of the particular counsel chosen. He frequently appeared for commanders, officers, and crews of King's ships. The first instructions consisted of the writ, which bore upon it the endorsement of undertaking to appear, a statement of the services with the log and chart, a bundle containing the Admiralty consent and the reports by the plaintiff and correspondence. They were put before counsel. The first opinion, given on the 13th April 1918, treated the case against the ship as hopeless, because she had become a total loss, and as to the cargo, assumed that only certain small values had been saved. Upon this opinion being submitted to the plaintiff, he wrote a long letter on the 10th June 1918, giving his views of the facts and referring to portions of the cargo salved as of the value of at least 10,000*l.* This letter, with the other papers, was put before counsel by a letter of the 18th June 1918, p. 62, and counsel gave a second opinion dated the 24th June 1918. He advised that there was no chance of success in respect of the ship, and that as to the salved cargo, apart from the difficulties of appraisement of a dispersed cargo, the plaintiff had lost his claim by not taking the necessary steps at the time of the salvage, by informing the receiver of wreck and obtaining a bond before the cargo was dispersed. Counsel, in coming to this opinion, was apparently misled by a prize salvage case of the *Otway* [unreported], and an Admiralty war order relating thereto. The *Otway* had no bearing at all, so far as I can see, upon a case in which a claim *in personam* had been made effective by the appearance of the owners of the property alleged to have been salved.

In view of these opinions of counsel, I am of opinion that Mr. Tyler and the defendants were justified in thinking that it was to the plaintiffs' interest that the action should be settled upon any terms that could be obtained; and if, in the unfettered exercise of their authority as solicitor and as ship's agents respectively, they had settled for 100*l.* and payment of 10*l.* 10*s.* costs, I do not think it could be said that they had acted negligently. It is said that they ought to have done more to ascertain the value of the cargo saved, but if the opinion of counsel was sound, it made no difference whether the cargo was worth more or less, and money spent in continuing the action until values were ascertained would only have been money thrown away. The settlement was not made until Nov. 1919, when it was obvious that Messrs. Crump would make no better offer.

Now comes the question whether the settlement was not made contrary to the express prohibition of the plaintiff. The answer depends on some half dozen letters which appear in the correspondence. [The learned judge referred to the correspondence] and upon the absence of a reply by the plaintiff, to the letter on p. . . . [The learned judge again referred to the correspondence]. In his long letter of the 10th June 1918, the plaintiff had said: "I still wish to prefer my full claim . . . and I request that you will not interpret the foregoing to any relinquishment of our claim," and then he went on: "I think these small values amount to a very considerable sum: I should say at least 10,000*l.* without taking the wreck into consideration. I should be very much obliged if you would carefully consider these remarks, and it is for you to say if there is any prospect of success in the High Court." Later on he expressed the hope "that you will be able to get some offer from the people who, without doubt, have made considerable gain out of the risks and labours of the *Daffodil's* crew. Without prejudice as to any further action we may take, we are of course entirely in your hands as to the legal position." The defendants wrote to the plaintiff on the second opinion of counsel. There were often delays in the correspondence because by this time the plaintiff was serving, I think, in the Eastern Mediterranean. On the 28th May the defendants wrote to the plaintiff: "Our solicitors inform us to-day that the defendants' solicitors have made a suggestion that if you are prepared to accept 100*l.* they will advise their clients to agree to this proposal. Would you kindly let us know whether this would be agreeable to yourself and the crew of H.M.S. *Daffodil?*" On the 5th July, he replied to that: "I do not think I should be justified in accepting the offer of 100*l.* In order to avoid a lot of expensive litigation, I would accept an offer of 10,000*l.* . . . I cannot agree with Captain Anderson's opinion." . . . [*i.e.*, counsel's opinion]. "If you have no objection, I propose on my return to England to obtain independent advice, unless something better can be done, with reference to this claim." On the 26th July, Messrs. Stilwell write acknowledging receipt of the letter of the 5th inst.: "With reference to your estimate of the value of your claim for salvage, we

regret that this is far in excess of the amount that the High Court or any arbitrator now awards, and venture to suggest that when you return to England you should call on our solicitors. . . . Of course, if you prefer to take an independent opinion, you are quite at liberty to do so." On the 14th Aug., Commander Noakes wrote first of all: "I definitely withdraw my offer on behalf of the ship's company of H.M.S. *Daffodil* to accept 10,000*l.*"; and then: "I request that you will be good enough to inform me the exact position in which this claim now stands:—(*a*) If you are in complete agreement with your counsel's opinion or not? (*b*) What further steps, if any, you propose to take? (*c*) If I have been informed of all the steps already taken? (*d*) If you recommend me to accept the 100*l.* offered by the owners?" Then he ends: "I will at once inform you on my return to England, which I expect will be shortly, so that this claim may be proceeded with." On the 4th Sept. Messrs. Stilwell wrote to him in reply to that: (1) "We agree with our counsel's opinion, he is now Attorney-General at Gibraltar; (2) the only step that we can suggest is to try to screw the owners to a more liberal offer; (3) we have informed you of all the steps so far taken; (4) failing any increased offer the 100*l.* had better be accepted."

That letter was received by the plaintiff in the Mediterranean towards the end of September; he sent no reply, and it was in that state of their instructions that the defendants authorised Messrs. Tyler to settle, and they did settle; giving up most of their own claim for costs, getting 10*l.* 10*s.* for costs from the other side and the 100*l.* which had originally been offered. The result was that the plaintiffs got 100*l.* and no costs at all chargeable to them because Messrs. Tyler gave up the difference between their own costs, which were said to have amounted in out-of-pockets to 60*l.* at this time, and the 10*l.* 10*s.* Messrs. Tyler accepted the 10*l.* 10*s.* in satisfaction of their costs. On the 19th Nov. Messrs. Stilwell wrote to Commander Noakes reporting the settlement. Again he ents no reply, came to England early in the following year, and the next letter from him was a letter from his present solicitors complaining of the settlement.

Taking all these letters up to the 4th Sept. 1919, coupled with the fact that the plaintiff sent no reply, can it be said that the plaintiff authorised the defendants, or by his conduct induced the defendants to believe that he had given them authority to settle or to make a settlement of the kind which was made? I think not. He had refused to accept 100*l.*, and proposed on his return to England to obtain independent advice, "unless something better can be done with reference to this claim." He has later on withdrawn his own absurd figure of 10,000*l.*, and asked whether the defendants recommended him to accept 100*l.* He did not assent to the accepting of 100*l.*, and in that letter said he expected to be in England shortly, so that the claim might be proceeded with. The defendants expressed in reply their opinion as to the wisdom of accepting the 100*l.*, but without receiving a reply, although the time for reply in the ordinary course had gone by, authorised a settlement. I cannot find in those matters, first of all, that the plaintiff authorised the settlement. It is to my mind quite clear he did not. Did he by his silence induce the defendants to believe that he had authorised it? Again, in face of the specific prohibition in the letters, I cannot find that by not replying to the last letter he led the defendants to suppose that they had authority. On this matter I may also add that it was not the want of a reply to their last letter which induced the defendants to do anything, because they had begun the final settlement before any reply could have been received. I think, though as I say, I came to the decision with some hesitation, I must find that the defendants settled in breach of their duty towards the plaintiff. It was said with truth that the defendants were agents, not only of Commander Noakes, but of his officers and crew, and they were also entitled to have some regard to this fact, that Commander Noakes was apparently a person who sometimes expressed very rash opinions, because in one of his letters he stated he did not mind if the whole of the award recovered was used up in costs, he still wanted to fight. It is also quite true that as agents for the officers and crew, the defendants had their interests to consider, but that gave them no authority to settle Commander Noakes's claim against his prohibition; and their only alternative, if they thought he was a wholly unreasonable man, would seem to me to be to communicate with him and the other people for whom they were acting and say: "Well, we cannot go on: we must cease to act as your agent." Therefore, I can see no way by which I can acquit them of a breach of duty.

Then I have to consider what are the damages. This again is a different point. The damages are the difference between the 100*l.* received and the sum which would have been recovered, less perhaps the difference between solicitor and client and party and party costs which the plaintiffs might have had to bear, had the salvage action been continued, and of course that might have been not a wholly negligible amount if the issue of negligence had been raised in the salvage action and had been fought out. Now the amount which would have been recovered, on the facts as we now know them, would not have been large in my judgment, but it would have been substantially more than 100*l.* It is not possible now to ascertain with exact precision the values of the property salved, and I must say that the plaintiff has given me very little assistance in ascertaining what they probably were. An official from the office of the Salvage Association was called, but he spoke only of the value of certain wheat and cases of preserved meat sold by the Salvage Association. He also produced the manifest and statement of insured values. Besides that, an officer of the Salvage Association was called who superintended the salvage operations, and his report was put in. There was also a statement by the receiver of wrecks of the values declared to the Customs and the goods landed. I should have thought that, long before this, the adjustment of the general average and salvage expenses must have been completed and the salved values proved. But I was not given the benefit of anything of the sort. I am left very much to conjecture. The wheat and frozen meat represented, according to the manifest, 2806 tons out of the total weight on board. The wheat was Government wheat and does not come into account. The frozen meat was only a cause of expense in getting rid of it; it was absolutely worthless. What was saved was fifty seven horses landed by the steamship *Arklow* at a salvage cost of 710*l.* Their value was put forward as 3000*l.* If one deducts

the 710*l.*, one gets about 2300*l.* left after deducting the salvage paid to the *Arklow*. There were twenty four bales of rubber, consisting of 24½ tons landed by the *Daffodil* or one of the ships. The evidence was given of its value; that it was of good quality, and it was said only good quality rubber was being shipped at that time. I took that at about 8000*l.* There were thirty-six packages of ipecacuanha, of which no evidence was given, which was put forward as being worth 500*l.* I accept that. There were 179 bales of wool. Thirty-six are described in the manifest as arriving at Liverpool on the 27th April, "more or less damaged by sea water and heating"; and others were described in evidence as being wet and black. The costs of breaking them out and landing varied from 10*s.* to 40*l.* a bale. The insured value was 70*l.* a bale, and the declared value of the 130 bales at the Customs was 48*l.* all round. Well, I do not know; one must write these down very heavily from their damaged condition. I took about 4000*l.* as the value of the wool. There were 250 barrels of Premier Jus described in the manifest as arriving at Liverpool on the 27th April "apparently sound." The cost of breaking out and landing was 10*s.* a barrel. There were twenty-nine casks of sterine, which have been similarly described; and five casks of pickled meat similarly described. There is nothing to assist in arriving at these values. I tried to identify these particular items with the goods mentioned in the receiver's letter giving the values declared to the Customs and with any particular items in the statement of insured value, but one cannot identify them. A large quantity of packing house products are mixed up which probably included the Premier Jus and sterine, but I cannot get my feet on to any sure ground in ascertaining the value of these particular things. I think 1000*l.* was their value. Then there were 7585 cases of preserved meat, which were from the 'tweendecks and were landed at Dunmore East at a cost of 1*s.* 3*d.* per case, and were there loaded on the steamship *Pine* on the 2nd and 3rd May. There were 3014 more cases, part of 5337 cases, which were sold to a Mr. Mann at 20s. a case, as they lay on the ship, but these were under water. He gave 1*l.* a case and paid the owners 3014*l.* I took that figure as certain. The balance of the 5000 odd cases to be sold to him were seized or their proceeds were seized by the harbour authorities for wreck raising expenses. Then apart from those cases there are 7595 cases which had not been badly under water; they are spoken of as wet. Again, I have tried to get at either the insured value or the landed value of those. To my mind it is exceedingly difficult. The documents do not agree, and the matter has not been cleared up by the plaintiff. Taking the evidence of what was landed as 7585*l.* and adding to that 5000*l.*, I get 12,900*l.*, but the receiver gives 13,000*l.* odd as landed. The receiver gives the value as 45,000*l.* There were on board altogether, according to the manifest, 18,000*l.* The insured value of the total was 39,900*l.* I have done the best I could to get any results out of these figures, but I cannot; I am only making a guess. I take the values at 2*l.*, which is double what Mr. Mann paid for his, which were not so good. That gives 15,000*l.* for these. Now adding up all these figures, it will be found that what was saved comes to something over 35,000*l.*, or 36,000*l.*, or 37,000*l.*; it does not matter; it is substantially under 40,000*l.* I take that. No doubt there would have to be very considerable deductions made from that, but no claim has been made in respect of freight; it may be none was saved. Very likely it is not claimed because the expenses of forwarding the small parcels of cargo that were saved would eat up any freight there was upon them. I ignore the expenses on the one side and the freight on the other, and take it that the plaintiffs completed the salvage of property worth 8500*l.*; that is the rubber and ipecacuanha brought into greater comparative safety. In taking the property as being worth something under 40,000*l.*, I think I am being generous to the plaintiff.

Now what, in such circumstances, would the court have awarded the commander, officers and crew of a King's ship, remembering that nothing had to be awarded to the *Daffodil* as the instrument of salvage, and that only a personal award had to be made for the personal risk and exertions of the commander, officers and crew, and that in a case in which by the misfortune of the salvors, and of everybody the service had turned out to be one which saved only a small portion of the property at risk. I think the amount would necessarily have been a very moderate amount. At the outside I think, if I had been trying the case, I should not have given more than something between 500*l.* and 600*l.* I think something would have had to come off that for costs incurred by the plaintiff which would not have been recovered; and if (and I do not see why it should not) the issue of negligence had been fought, that might well have run into 50*l.* I think I shall be dealing with the plaintiff quite fairly if I say that, if the case had been continued and had been fought out, the net result would have been to give the plaintiff 500*l.* instead of 100*l.*; the damages therefore are 400*l.*, and for that amount I give judgment.

Solicitors: *Parker, Garrett,* and *Co.; Wooley, Tyler,* and *Bury.*

Jan. 24, *Feb.* 8 *and* 16, 1922.

(Before Sir HENRY DUKE, P.)

THE HARLOW. (*a*)

Limitation of liability — Tug and tows — Unregistered lighters—"Not recognised as a British ship"—"Ship"—"Every description of vessel used in navigation not propelled by oars"—Right to limit liability—Tug towing five lighters—Common owner—Damage by tug and one lighter—Negligence—Liability, whether limited on tonnages of tug or her tows, or which of them—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 508, 742—*Merchant Shipping (Liability of Shipowners) Act* 1898 (61 *&* 62 *Vict. c.* 44), *s.* 1—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 85, *sched.* 2.

The owner of an unregistered ship is not deprived of the right to limit his liability under sect. 503 *of the Merchant Shipping Act* 1894 *by reason of the fact that his ship has not been registered. The right to limit liability extended by sect.* 1 *of the Merchant Shipping (Liability of Shipowners) Act* 1898 *as amended by sect.* 85, *sched.* 2 *of the Merchant Shipping Act* 1906 *to the owners,*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

builders and other parties interested in any ship built within His Majesty's dominions is an unqualified right, and is not restricted to such period after launching as may be necessary to effect registration.

Lighters used for navigation in the transport of goods on the Thames, in tow of tugs and upon the tides, fitted with rudders and managed by their own crews, are ships within the meaning of sect. 742 *of the Merchant Shipping Act* 1894.

The Mac (4 *Asp. Mar. Law Cas.* 555 ; 46 *L. T. Rep.* 907 ; 7 *Prob. Div.* 126) *considered.*

Where damage is done jointly by several vessels belonging to the same owner—e.g., *a tug and her tows, by the negligence of those on board some or one of them, the owner of these vessels is only entitled to limit his liability to an aggregate amount calculated upon the several tonnages of each of the vessels which might have been proceeded against* in rem *in respect of the damage done, since as the employer of all the negligent persons he might be held liable for all the damage, not only in each action* in rem *but in proceedings* in personam.

The Graygarth (126 *L. T. Rep.* 675 ; (1922) *P.* 80) *explained.*

ACTION of limitation of liability.

The plaintiffs were Cory Lighterage Limited, owners of the steam tug *Harlow* and five lighters which were being towed by the *Harlow* at the time of the collisions causing the damage in respect of which the plaintiffs sought to limit their liability. The defendants were the owners of the steamship *Dalton* and all other persons claiming to have sustained damage by reason of the collision or collisions between the *Harlow* and her tow and the steamship *Dalton* on the 2nd Jan. 1921.

This limitation suit arose out of an action brought by Cory Lighterage Limited against the owners of the steamship *Dalton* claiming for damage to their tug *Harlow* and their lighters *Agenor* and *Fifteen* in tow of the *Harlow* at the time of the collision. The owners of the *Dalton* counterclaimed against Cory Lighterage Limited and their bail for damage sustained by the *Dalton*. Judgment in that action was pronounced on the 7th June 1921 by Hill, J. who found against the plaintiffs' claim and in favour of the defendants' counterclaim, pronouncing judgment against Cory Lighterage Limited and their bail. The judgment of Hill, J., in so far as it was material to this action, was as follows :

"The collision in this case happened early in the morning of the 2nd Jan. of this year in Barking Reach about abreast of Murrell's Rubbish Wharf, on the north side, which is just about the point marked "False Point" on the chart. The plaintiffs say it happened well north of mid-river. The defendants say it happened in mid-channel. The tug *Harlow*, 59 tons gross and 68ft. long, was proceeding up the river with five loaded, or partly loaded, barges in tow, ranged two, two, and one. The total length of the flotilla was about 300ft. The *Harlow* intended to drop one of the barges on the south side a little above Tripcock Point. The *Dalton* was 1275 tons gross, and 225ft. long, in ballast, and in charge of a pilot. She had left the pier on the north shore, which is unnamed on the chart and is next above Beckton Pier. Having backed and turned under her port helm, she was proceeding down river. The weather was fine and clear, the wind about south-west, a fresh westerly breeze, the tide just quarter flood, half a knot to one knot, with little, if any, force in the bight in the south side of Barking Reach. The stem of the *Dalton* was in collision with the port quarter of the *Harlow*, and following that one of the barges struck the starboard bow of the *Dalton*. The *Dalton* was not damaged by impact with the *Harlow*. The *Dalton* was damaged by the impact with the barges. Two of the barges were also damaged. The *Harlow*, having its rudder or steering gear disabled, subsequently struck a sailing barge and then a steamer, the *Taormina*, and then ran on the mud on the north shore. There was no evidence as to the damage to the *Harlow* by impact with the *Dalton*. Unhappily four men were drowned with the engineer and fireman of the *Harlow* and two lightermen. They appear to have been right aft on the *Harlow* at the moment of the collision, which pushed the stem of the *Harlow* under water before the towing-ropes parted, as they did."

[The learned judge then considered the cases made on behalf of the two vessels, and continued :]

"I find first that (as, indeed, is agreed) the collision was at an angle of seven to eight points ; secondly, that at the collision the *Dalton* was heading straight down, and the tug and tows were heading nearly athwart the river ; thirdly, that the *Dalton* did not alter her heading to port. Her starboarding merely kept her straight under reversed engines. She has created the main difficulty in her case by giving two short blasts. But it is not an uncommon thing for steamers to make that unauthorised helm signal which the *Dalton* said she made. It is not according to the rules, but we are quite familiar with vessels giving these signals, not as indicating the course they are taking, but as indicating how they intend to pass some other vessel. I am satisfied that her head did not go to port or get further towards the north shore than her position when she sighted the tug.

"I find that the collision was in mid-river, and not to the north of mid-river. It follows from those findings that the tug and tows were, at the collision, crossing the *Dalton* from starboard to port, and had come from southward to mid-river. I reject the evidence of the master of the tug that the light of the *Dalton* which was seen first was a red light. Until the moment of collision he was on the *Dalton's* starboard bow. His is the only direct evidence for the plaintiffs on the point. The mate was in the cabin with the lightermen, who, according to the Thames rule, ought to have been on the lighters. The tug is to blame for proceeding up on the wrong side of the river, and attempting to get across at an improper time, having regard to the *Dalton*. I accept the *Dalton's* evidence that she was in mid-river and that faced with the upcoming vessels, the sailing barge, the tugs and tows, and the steamship *Taormina*, the engines were immediately stopped, and after an interval, reversed, and that her way was substantially off at the collision. [The learned judge then considered the conduct of the *Dalton* and continued :] I therefore pronounce the tug alone to blame."

The following discussion then took place :

Counsel for the defendants (*Digby*) : In this case, my Lord, the plaintiffs are suing as Cory Lighterage Limited, and in par. 1 they are suing as owners of the *Harlow* and of the lighters *Fifteen* and *Agenor*, and I ask that the judgment be against

the plaintiffs the owners of the tug and also as the owners of the two lighters.

HILL, J.—You mean there may be some question of limitation.

Digby: There may be. They sue as that and they claimed damages for the two lighters.

HILL, J.—Yes.

Counsel for the plaintiffs (*Bateson*, K.C.): I suppose your Lordship will give judgment for the defendants on the claim and counter-claim?

HILL, J.: Yes. When they come to limit their liability that remains to be seen.

Digby: I understand there is a case pending now in the Court of Appeal. (Counsel referred to the *Graygarth*, *infra*.)

HILL, J: Yes, Messrs. Rea's tugs. I do not know if I can do what you ask. I should have to find out what the negligence was.

Digby: The negligence of the lighters would be the negligence of the tug. The evidence before your Lordship was that there was nobody on the lighter at all, and the negligence was the tug towing the lighter into collision with the *Dalton*—wrongful navigation of the tug.

HILL, J.: Yes, it was. Of course, it has not been necessary, in my judgment, to-day to consider whether the absence of the lightermen from their lighters, which was certainly a breach of the Thames Rules, contributed to the damage to the *Dalton*.

Digby: If your Lordship would find it did not, then we should be thrown back on the negligence of the *Harlow*.

HILL, J.: Your damage was certainly caused by the negligence of those in charge of the tugs, who were servants of Messrs. Cory.

Digby: And equally of the lightermen. So, whether your Lordship found there was negligence on the part of the lightermen or not, they contributed equally.

HILL, J.: Do you ask me to find on the question whether the lighter ought to have been cast off? It is one of the things that was argued, and whether, if she had been cast off, it would have avoided the collision. As it may become important when the question of limitation arises, I think I ought to add this, that having consulted the Elder Brethren in this matter I come to the conclusion that if the lightermen had been, as they ought to have been, on board their lighters, the lighters could have been cast off, and ought to have been cast off, in such a time as would, if it did not avoid the collision between the barge and the *Dalton*, at any rate have greatly lessened the damage done to the *Dalton*. The very object of the Thames Rule of having the men on board the lighter is that they may be handy in circumstances like these, and the ropes ought to be so attached that they could be very easily let go. Is that enough for you? What do you want me to do on that?

Digby: I should submit that the form of the order would be: Judgment against the owners of both the tug and the two lighters, as you have found negligence.

HILL, J.: They were all Cory's, were not they?

Digby: Yes.

HILL, J.: Both the lighters were damaged. I was only told that one lighter struck the *Dalton*. I was never told how the second lighter was damaged. I think this matter will have to be investigated, if you want to do so, at some later stage, because we have not the materials to do it. I do not want to shut you out by pronouncing the tug alone to blame, because it may be that some other servant, in fact some other servant of Cory's was to blame. All I shall do is to pronounce for the defendants and to give judgment for the defendants against the Cory Lighterage Limited on the claim and counterclaim."

On the 17th June an action was begun by the owners of the *Taormina* against Cory Lighterage Limited. Cory Lighterage Limited then commenced the present limitation proceedings, addressing their writ, in the usual form, "to the the owners of the steamship *Dalton* and all other persons claiming to have sustained damage by reason of the collision or collisions between the *Harlow* and her tow and the steamship *Dalton* on the 2nd Jan. 1921." Notice of the action was given in the newspapers; the owners of the *Taormina*, as well as the owners of the *Dalton*, delivered a defence.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 2 (1): Every British ship shall, unless exempted from registry, be registered under this Act. (2) If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship. (3) A ship required by this Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the registry of the ship.

Sect. 503: 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) . . . (*c*) where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of 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 of 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. 508: Nothing in this part of this Act [*i.e.*, Part VIII., in which sect. 503 (*sup.*) is contained] shall be construed . . . to extend to any British ship which is not recognised as a British ship within the meaning of this Act.

Sect. 742: In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say . . . "Vessel" includes any ship or boat or any other description of craft used in navigation. "Ship" includes any description of vessel used in navigation not propelled by oars.

The Merchant Shipping (Liability of Shipowners) Act 1898 (61 & 62 Vict. c. 44) provides:

Sect. 1: Sections five hundred and two to five hundred and nine inclusive of the Merchant Shipping Act 1894 shall extend and apply to the owners, builders, and other parties interested in any ship built at any port or place in Her Majesty's dominions from and including the launching of such ship until the registration thereof under section two of the Merchant Shipping Act 1894. [*Provided always that such owners, builders, or other parties interested as aforesaid shall not benefit under this section for a period beyond three months after the launching of such ship.*]

The Merchant Shipping Act 1906 (6 Edw. 7, c. 48), s. 85, sched. 2, repeals the words of sect. 1 of the Act of 1898 bracketed in italics above.

Bateson, K.C. and *Bucknill* for the plaintiffs.—The *Dalton* was damaged in collision with the barge *Silver* in tow of the *Harlow*. The finding of negligence in the bargemen is not material because the plaintiffs are entitled to limit liability on the tonnage of the vessel which did the damage, *i.e.*, the *Silver*:

The Graygarth, 126 L. T. Rep. 675; (1922) P. 80.

The *Silver* is a "'ship" within the meaning of sects. 503, 742 of the Merchant Shipping Act 1894, and the plaintiffs are therefore entitled to limit liability in respect of her. [Counsel read affidavits from which it appeared that the *Silver* and the other lighters belonging to the plaintiffs were open steel barges, built in the United Kingdom and used in the Thames navigation. They were always towed and were never propelled by oars]:

The Mudlark, 1911, P. 116;
The Mac, 4 Asp. Mar Law Cas. 555; 46 L. T. Rep. 907; 7 Prob. Div. 126.

The *Silver* is a ship "recognised as a British ship," notwithstanding she is not registered in accordance with the provisions of the Merchant Shipping Act 1894. The right to limit liability is extended to the plaintiffs by sect. 1 of the Merchant Shipping (Liability of Shipowners) Act 1898. The proviso which this section formerly contained restricting this right to a period of three months from the launching of the ship was removed by sect. 85, sched. 2, of the Merchant Shipping Act 1906. The right to limit is now absolute. The plaintiffs are entitled to limit on the *Silver* alone:

The Graygarth (*sup.*).

In that case the owners of a tug and her tow were held entitled to limit for damage done by the tow on the tonnage of the tow, though the negligence was in the tug. The judgment decides affirmatively that the limit of liability is based on the tow, and not negatively that the limit is not the limit of the tug. Alternatively the plaintiffs are entitled to limit on the *Harlow* and the *Silver*, and should not be liable beyond that amount.

Dunlop, K.C. and *Digby* for the defendants (the owners of the *Dalton*). The plaintiffs are not entitled to limit their liability on the *Silver* or any of the barges. The judge treated the tug and her tows as a unit, and the onus is on the plaintiffs to show that some of the barges did not contribute to the damage. They should have proved in the collision action that if the barges astern of the *Silver* had been let go the damage would have been minimised. Under the Merchant Shipping Act 1894 the owners of lighters are not entitled to limit liability. Nor is there any case where an unregistered ship has obtained a decree. The Merchant Shipping Act 1921 was passed to remove this disability under which the Act of 1894 placed persons in the position of the plaintiffs. The Act was unnecessary if these persons were already entitled to limit. The Merchant Shipping (Liability of Shipowners) Act 1898 was passed to remove the difficulty which arose in *The Andalusian* (4 Asp. Mar. Law Cas. 22; 39 L. T. Rep. 204; 3 Prob. Div. 182). It does not excuse registration, since a penalty is provided for failing to register by the Act of 1894. Nor does the Act of 1906 excuse registration by removing the proviso that registration must be carried out within three months. If an unregistered ship whose owners did not intend to register it were entitled to the benefits conferred by the Act of 1894 there would no longer be any point in registration. Immunity is only allowed for such period as is reasonably necessary to effect registration. There must be an intention to register in the owners. If the plaintiffs are entitled to limit on the barges, they must limit on an aggregate tonnage of all the vessels which caused the damage. In the *Graygarth* (*sup.*) the defendants were content if they obtained a fund limited on the tonnage of the tow. The court was not asked to decide, and did not decide, whether the defendants could claim against a fund limited on the tonnage of the tug as well as the tonnage of the tow.

Langton for the defendants, the owners of the *Taormina*.—These defendants are "one of the other persons who suffered damage by reason of the collision" to whom the writ was addressed, and are entitled to be heard on the question of the constitution of the fund. [It was objected on behalf of the plaintiffs that their liability to the owners of the *Taormina* not having yet been determined, counsel for the *Taormina* was not entitled to be heard. The learned President considered that counsel was entitled to be heard.] A "barge," a "lighter," a "hopper," are distinct classes of craft [counsel referred to the definitions under these headings in Murray's dictionary]. The cases cited were hopper barge cases. A hopper is part of a ship. In *The Mac* (*sup.*) the decision that a hopper barge is a "ship" was *obiter dicta*. In *Gapp v. Bond* (57 L. T. Rep. 437; 19 Q. B. Div. 200) it was decided that a dumb barge is not a ship. Every craft is not a "vessel" or a "ship." Other types of craft have been considered: see

The Blow Boat, 1912, P. 217.

There is nothing in *The Graygarth* (*sup.*) which limits the owners' liability to either the tug or the tow.

Bateson, K.C. replied.

Cur. adv. vult.

Feb. 16.—Sir HENRY DUKE, P. in a written judgment, said: At 2.30 a.m. in the morning of the 2nd Jan. 1921 the steamship *Dalton* outward bound was proceeding down the Thames when the steam tug *Harlow*, which was bound up river with five coal laden barges in tow in three ranks—two, two and one—finding herself and her tow on the wrong side of mid-channel, made to cross the course of the *Dalton*, came into collision with her, and brought into collision one or more of the *Harlow's* barges. There was damage to the *Harlow*, attended by loss of life. The *Dalton* sustained damage by collision with a barge or barges. In an action *in rem* in respect of the collision—which I will call the damage action—in which there were cross claims, the owners respectively of the vessels concerned claimed damages. The owners of the *Harlow* were owners also of the lighters. The crew of the tug and the various lightermen were their servants. Judgment was given in favour of the owners of the *Dalton* against the owners of the *Harlow*. The *Harlow* was held to blame for the collision and the *Dalton* free from blame. There was also a finding that the lightermen of the five barges were guilty of improper navigation, which was expressed in these words:

"If the lightermen had been, as they ought to have been, on board their lighters, the lighters could have been cast off, and ought to have been cast off, in such a time as would, if it did not avoid the collision between the barge and the *Dalton*, at any rate have greatly lessened the damage done to the *Dalton*. There was, therefore, a finding which establishes that the defendants, owners of the *Harlow* and the barges, were by their servants on all these vessels guilty of improper navigation, and that the plaintiffs suffered damage.

The owners of the *Harlow* and of the barges she had in tow are plaintiffs in the present action which is brought for the purpose of limiting their liability in respect of damages by the collision in accordance with the Merchant Shipping Act 1894, s. 503. Their statement of claim as originally framed claimed a decree of limitation to an amount to be measured by the tonnage of the *Harlow*. The owners of the *Dalton* by their defence resisted this claim on the ground that the damage to the *Dalton* was caused not by the *Harlow* alone but by the joint action of the *Harlow* and her tow. After the pleadings had been closed judgment was given in the court of Appeal in the case of the *Graygarth* (*ante*, p. 675; (1922) P. 80) [the learned President was supplied with a proof copy of the judgments of the Court of Appeal, which now appear in Law Reports 1922, p. 80], an action which raised questions as to the incidence of damage in the Admiralty jurisdiction where a vessel is brought into collision by improper navigation directed or controlled by persons outside such vessel. For the purpose of raising a contention sought to be founded upon this judgment, the plaintiffs amended their statement of claim by alleging that the damage to the *Dalton* was caused by collision with her of one among the *Harlow's* tow of barges, the barge *Silver*. They claimed alternatively to limit their liability by the tonnage of the *Silver* alone, or of the *Harlow* alone, or of the *Harlow* with the *Silver*.

After the amendments of the pleadings as between the original parties an appearance was entered for other defendants, the owners of the steamship *Taormina*. They allege that by reason of the same acts of improper navigation of the plaintiffs' servants which caused damage to the *Dalton*, the *Harlow* came into collision with the *Taormina*, and they dispute the right of the plaintiffs to limit their liability as claimed in the statement of claim or at all. Whether, or to what extent, if at all, the plaintiffs are entitled to limit their liability in the circumstances of the case is a matter on which the owners of the *Dalton* and the owners of the *Taormina* to some extent made common cause in argument, though in the event of a decree of limitation based upon the tonnage of the *Silver* alone or of the *Harlow* alone, their interests might hereafter be found in conflict.

It is convenient to deal in the first place with a contention which was argued on different grounds by counsel for the respective defendants, and which was to the effect that in respect of the five barges and each of them the Merchant Shipping Act 1894 gives no right to the plaintiffs to limit their liability. Both arguments depend upon the true effect of the Merchant Shipping Act 1894, s. 508, and certain amending Acts. By sect. 508 it is enacted that the provisions of the statute in relation to limitation of liability "shall not extend to any British ship which is not 'recognised as a British ship'" within the meaning of that Act.

For the owners of the *Taormina* it was contended that upon the true construction of the statute neither of the lighters in question is a ship within the meaning of the Merchant Shipping Act 1894, ss. 503, 742. Ship is defined in sect. 742 as including "any vessel used in navigation not propelled by oars." These barges were admittedly not propelled by oars. Each was a vessel used for navigation in the transport of goods on the Thames, in tow of tugs and upon the tides, fitted with a rudder and managed by her own crew. The judgments of the Court of Appeal in the *Mac* (46 L. T. Rep. 907; 4 Asp. 555; 7 Prob. Div. 126) were cited, and for the owners of the *Taormina* it was urged that the decision in that case is not decisive of the question now under consideration. It is true that some of the matter debated in the *Mac* arose on the construction of the words "ship or boat" in a section of the Merchant Shipping Act 1852, and that the court had to decide whether a mud hopper—like in construction and mode of navigation to the barges here in question—was a ship "or boat." Each member of the court, however, considered whether she was a "ship," and held that she was. Upon the reasoning which Lord Esher applied in the *Mac*, as reported at length in 4 Asp. Mar. Law Cas. 555, I ought, in my opinion, to hold that each of the barges here in question is a "ship" within the definition contained in the Merchant Shipping Act 1894, s. 742. *Gapp* v. *Bond* (57 L. T. Rep. 437; 19 Q. B. Div. 200), which was relied on in some measure by Mr. Langton for the owners of the *Taormina*, was a case under the Bills of Sale Act 1878, and the craft in question was a barge propelled by oars. It does not help in the decision of this case.

The question whether by reason of the terms of the Merchant Shipping Act 1894, s. 508, the plaintiffs are excluded from the benefit of limitation of liability under that statute depends upon the combined operation of sects. 502, 503, and 508 of that Act, and of the Merchant Shipping (Liability of Shipowners) Act 1898 (61 & 62 Vict. c. 14), s. 1, Merchant Shipping Act 1906 (6 Edw. 7, c. 48), s. 85, sched. 2, and perhaps the Merchant Shipping Act 1921 (11 & 12 Geo. 5, c. 28). The Merchant Shipping Act 1894, sect. 2, enacts that "every British ship shall, unless exempted from registry, be registered under this Act, and if not registered shall not be recognised as a British ship." Sect. 508 has the restrictive words with regard to limitation to which I have already referred. But the Merchant Shipping Act of 1898 as amended by the Merchant Shipping Act 1906, s. 85, and sched. 2, extends the privilege of limitation of liability to the owners, builders, and other parties interested in any ship built at any port or place in His Majesty's dominions, "from and including the launching of such ship until the registration thereof under sect. 2 of the Act of 1894." I was invited by Mr. Dunlop to construe the words I have just cited as amounting to no more than a grant of the power to limit liability before registration of a ship for such period of time between launching and registering as may be required for the doing of the things necessary for the purpose of registration. To induce such a construction reference was made to the fact that in the Act of 1898, s. 1, the power of limitation before registration was confined by proviso to a period not exceeding three months after launching, and that the Act of 1906 simply repealed the proviso, leaving the section in a form which does not abrogate

the general enactment in the Merchant Shipping Act 1894, s. 2, against recognition of an unregistered ship. The Merchant Shipping Act 1921, s. 1, was cited as supporting this view in that it extends rights of limitation of liability to "every description of lighter, barge or like vessel used in navigation in Great Britain, however propelled," and provides for a modified process of registration. I get no distinct guidance from this Act of 1921, and I do not see my way to construe, as I am invited to do the Merchant Shipping Act 1898, s. 1 as amended by the Merchant Shipping Act 1906, s. 85, and sched. 2. So long as a ship which has been launched remains capable of being registered under the Merchant Shipping Act 1894, s. 2, the amending enactments in their literal terms give her owners a right to claim limitation of liability for damages at any time after her being launched and before her being registered. The statute seems to me to be capable of literal and practical application in the present case. The plaintiffs' five barges were admittedly built within the King's dominions, namely, in Great Britain, and I must hold the plaintiffs to be entitled to limit according to the Merchant Shipping Act 1894, s. 503, their liability in respect of damage caused by negligent navigation of them. Had my opinion been otherwise I think I must still have held that the plaintiffs could limit their liability in respect of the *Harlow*.

There remains the question what is the right of the plaintiffs as to limitation in relation to the several craft concerned, having regard to the circumstances of the collision or collisions between the *Harlow* and her tow and the *Dalton*.

It is established that the whole of the barges in the *Harlow's* tow were improperly navigated. Which of them, by reason of this improper navigation, caused damage to the *Dalton?* The case for the defendants as presented to me was that the barges constituted in reality a floating mass, and that even if the blow upon the *Dalton* which caused her damage was delivered by the stem of one, namely, the *Silver* as the plaintiffs allege, all five contributed by their weight and momentum to the damage. Taking into consideration the oral testimony at the trial, as well as the affidavits used by consent at the hearing before me, I find that the *Silver* alone collided with the *Dalton*. The further facts which seems to me to be material and to be established can be shortly stated. The *Silver* and the *Sokoto* were the barges in tow immediately astern of the *Harlow*. At the collision of the *Dalton* with the *Harlow*, the *Silver* and the *Sokoto* were following the *Harlow* from the southern side on a course nearly athwart the river. The angle of the collision was nearly a right angle. The *Silver* struck the *Dalton* on that vessel's starboard bow with her huff or swimhead. The direction and the nature of the blow were determined in part by the fact that the *Silver* and the *Sokoto* swung round when the tow rope of the *Harlow* parted. The *Sokoto* was at the time alongside the *Silver* and moving with her, and increased the severity of the blow. Both were loaded with coal. The barges in the next rank behind the *Silver* and the *Sokoto* were the *Sixteen* and the *Fifteen* behind the *Sokoto*. A single barge, the *Agenor* was in tow in the third rank. The *Sixteen* escaped without damage. The *Fifteen* and the *Agenor* were damaged by collision, the one with the other. The sternpost of the *Fifteen* was split, and damage done on her port quarter and her starboard side. The damage to the *Agenor* was on her starboard side amidships. Having regard to the character of the damage to the *Fifteen* and the *Agenor*, and the absence of any damage to the *Sixteen*, the *Silver*, and the *Sokoto* by any collision among themselves, as well as to the fact that the barges in the tow ranged alongside the *Dalton* after her impact with the *Harlow*, I have come to the conclusion that the five barges were not massed at the time of the collision of the *Silver* with the *Dalton*, and that they did not add by their combined weight or momentum to the force of that collision. The *Sokoto*, however, does appear to me to have moved with the *Silver* at the *Silver's* collision, and have contributed by her weight and momentum to the damage.

The result of these findings in point of fact is that the negligent navigation of the *Harlow*, the *Silver*, and the *Sokoto* caused the damage to the *Dalton*, which was immediately caused by the huff or swim of the *Silver*.

Except for the question which was raised by Mr. Bateson for the plaintiffs upon the view which he presented on their behalf of the effect of the recent judgment of the Court of Appeal in the case of *The Graygarth* (126 L. T. Rep. 675; (1922), P. 80), I should have thought that upon principle the damage to the *Dalton* having been caused by the negligent navigation of three vessels jointly, each vessel might be proceeded against *in rem* in respect of such damage, and that the plaintiffs, as the employers of all the negligent persons, might be held liable for all the damage, not only in each action *in rem*, but in proceedings *in personam*. Mr. Bateson contended, however, that the result of the judgment in *The Graygarth* is to establish a rule that where tug and tow are both negligently navigated, and damage is done by a blow struck by one of them in the course of the negligent navigation, liability for the damage is to be limited by reference to the tonnage of the vessel which in fact struck the blow. To examine this contention it is necessary to see what were the facts, and the judgment of the court in the case cited. The tug *Graygarth* being negligently navigated, brought her tow, the *Ran* into collision with the *Para*. The owners of the *Para* proceeded against the owners of the *Ran* by an action *in rem*, and the *Graygarth* and *Ran* being in one ownership, the owners of the *Para* proved that the servants of the common owner who were navigating the tug had brought the tow into collision with the *Para*, and thereby caused the damage alleged. They claimed in their action judgment for an award of damages to be enforced against the tow, the *Ran*, and did not make any claim *in rem* against the tug *Graygarth*. Following upon the judgment which they received in their action, they were confronted by the owners of the *Ran* with a claim to limit their liability in respect of the collision by the tonnage of the *Graygarth*. This claim succeeded at first instance, but upon appeal, the owners of the *Para*, who had claimed a decree *in rem* against the owners of the *Ran*, were held entitled to the decree which they sought, and, inasmuch as their right *in rem* was against the *Ran*, were held entitled to damages measured by the tonnage of the *Ran*, and not by the tonnage of the *Graygarth*. Mr. Bateson insisted that the Court of Appeal had held the owners of the *Para* entitled to damages against the *Ran*, and not entitled to damages against the *Graygarth*. This contention is, in my judgment, erroneous.

The owners of the *Para* had not claimed a decree against the owners of the *Graygarth* as such. The Master of the Rolls, it will be seen, said this: "The action having been brought against the owners of the *Ran*, they, as represented by their bail, could only be responsible if the *Ran* was improperly navigated, and such improper navigation caused the collision. As owners of the *Graygarth*, they might be liable also, but in the action in which they were sued as owners of the *Ran* they could only be responsible if the *Ran* was improperly navigated. The *Ran* was found to have been improperly navigated, and judgment went against her owners accordingly. To say that this decision proceeded upon a rule that the vessel in collision can alone be involved in liability, is directly contrary to the statement of the Master of the Rolls with regard to the owners, that "as owners of the *Graygarth* they might be liable also." The simple explanation of the substitution of a judgment in respect of the *Ran* for the judgment which had been entered up in respect of the *Graygarth* seems to me to be that stated by Mr. Dunlop, namely, that the bail given in respect of the *Ran* to the extent of her owners' liability as limited by her tonnage was sufficient to satisfy the claim of the successful plaintiffs, whereas a liability limited by the tonnage of the *Graygarth* would not have been, and they did not weakly select a smaller, or needlessly seek a larger security than their claim required.

To attribute to the decision in the case of the *Graygarth* (*sup.*) the effect attributed to it by the plaintiffs would, in my opinion, be contrary to the declared reasons of the judgments there delivered. It would also ignore the principle laid down in the House of Lords in the *Devonshire* (107 L. T. Rep. 179; 12 Asp. Mar. Law Cas. 210; (1912) A. C. 634) that except in cases where litigants in collision cases in the Admiralty jurisdiction are held both to blame and division of damages follows, owners of vessels which, by improper navigation inflict damage on a third vessel by their joint wrongful act are each made liable for all the damage he helps to inflict.

The plaintiffs are entitled to limit their liability in respect of the improper navigation of the *Harlow* and her tow on the occasion in question to an aggregate amount made up of 8*l.* per ton of the several tonnages of the tug *Harlow*, the dumb barge *Silver* and the dumb barge *Sokoto*. Questions of limitation in respect of loss of life, which were raised by the pleadings, were admitted to have been disposed of pending the litigation.

In view of the claim asserted on behalf of the owners of the *Taormina* to be entitled to prove for their damages against the amount limited in respect of the *Harlow*, it will be necessary that that amount when paid into court shall stand in a distinct account pending the determination of the question of the right of the owners of the *Taormina* to share in the distribution of it.

[*March* 6.—On the application of counsel for the *Taormina* the learned President ordered that the directions contained in the last paragraph of his judgment (*sup.*) for setting up a separate fund for the *Harlow* should be struck out on the ground that they were superfluous.]

Solicitors: for the plaintiffs, *Keene, Marsland, Brydon*, and *Bennett*; for the defendants, the owners of the *Dalton, Thomas Cooper* and *Co.*; for the defendants, the owners of the *Taormina, Ince, Colt, Ince*, and *Roscoe*.

PRIZE COURT.

Dec. 13 *and* 21, 1921.

(Before Sir HENRY DUKE, P.)

THE SULMAN PAK AND OTHER VESSELS. (*a*)

Prize bounty—Operations in Mesopotamia—Gunboats on the Tigris—Co-operation with land forces—Capture of armed enemy vessels—Claim for prize bounty—Joint operations of sea and land forces—Naval Prize Act 1864 (27 *&* 28 *Vict.* c. 25), *sect.* 42—*Order in Council of the* 2*nd March* 1915.

H.M.S. T., Ma., *and* Mo. *took part in the advance along the Tigris in the course of the British operations in Mesopotamia in* 1917. *In these operations which were planned under the direction of the General Officer Commanding in Mesopotamia, the ships co-operated generally with the land forces in fighting which took place between the* 23*rd and* 25*th Feb. at S., where the passage of the river, which had been blocked by Turkish forces, was effected. The flotilla was then able to pass up the river, and on the* 26*th Feb. the General Officer Commanding directed it to "push on and inflict as much damage as possible." On the same day the flotilla was again held up at N. K. by the Turkish rearguard, and the passage of the river was again opened by the land forces operating with cavalry and field guns. The flotilla then again advanced, overtook the vessels of the Turkish river service, and made the capture. It then anchored for two days near the furthest point reached by the operations, and sent the prizes down the river. At some time before the* 25*th Feb. one of the captured vessels had been bombed by an army aeroplane.*

The officers and crews of the flotilla claimed prize bounty. It was contended by the Treasury that the operation constituted a joint naval and military operation.

Held, that the fact that the flotilla and the land forces were engaged in a joint scheme of operations did not establish a joint capture; it was necessary to show that both forces were in fact participating in the operation of capture. As the troops in fact took no part in the operation of capture, as they were in fact out of reach when the capture was made, and as the flotilla got far enough up the river to be able to act effectually for itself, without requiring or receiving help from the land forces in the immediate enterprise, the prizes were made by the flotilla alone.

Judgment in favour of the claim.

MOTION for prize bounty.

This was a motion by Captain Wilfrid Nunn, R.N., and the officers and crews of H.M. gunboats *Tarantula, Mantis*, and *Moth* for a declaration under sect. 42 of the Naval Prize Act 1864, and the Order in Council of the 24th March 1915 that they were entitled to prize bounty amounting to 7745*l.* in respect of the capture by them in the Tigris in Feb. 1917 of the Turkish armed vessels *Sulman Pak, Sumana, Pioneer* and *Basrah*.

Wilfrid Lewis for the claimants.

C. W. Lilley for the Procurator-General on behalf of the Crown.

The following authorities were referred to in the course of the argument, the substance of which

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

fully appears from the judgment of the learned President:

La Bellone, 2 *Dods.* 243;
The Triumph and *The Usk*, 116 L. T. Rep. 512; 14 Asp. Mar. Law Cas. 63; (1917) P. 127;
The Feldmarschall, 124 L. T. Rep. 637; 15 Asp. Mar. Law Cas. 299; (1920) P. 289;
The Stella del' Norte, 5 C. Rob. 349;
The Vryheid, 2 C. Rob. 16;
The Banda and *The Kirwee Booty*, 14 L. T. Rep. 293; 2 Mar. Law Cas. (O.S.) 323; L. Rep. 1 A. & E. 109.

Cur. adv. vult.

Dec. 21.—Sir HENRY DUKE, P. said:—This is the claim of Captain Wilfrid Nunn, R.N., and the officers and ships' companies of H.M.S. *Tarantula*, *Mantis*, and *Moth* for an award of prize bounty under sect. 42 of the Naval Prize Act 1864 for the capture of the armed Turkish vessels *Sulman Pak*, *Sumana*, *Pioneer*, and *Basrah* in the river Tigris on the 26th Feb. 1917, during the operations in Mesopotamia which resulted in the overthrow of the Turkish authority in that region, the capture of Baghdad, and the occupation of the country by His Majesty's forces. The number of persons on board the captured vessels at the beginning of the engagement in which they were captured was placed at 1,549, and the claim for bounty at the rate of 5*l.* a head is 7745*l.* The validity of the claim depends on the answer to be made to the question whether the capture of the Turkish vessels was a purely naval operation or was a conjoint operation of sea and land forces. Apart from this contention nothing was in dispute between the claimants and the Lords Commissioners of the Treasury.

The grounds of objection to the claim were that the action of the naval flotilla was ancillary to that of the Army, that the capture was made in the course of carrying out directions of Sir Stanley Maude, the Commander-in-Chief of the Army in Mesopotamia, and that the capture was rendered possible by the operation of the Army under Sir Stanley Maude's command. The flotilla in the Tigris, which was under the immediate command of Captain Nunn, formed part of the naval forces on the East India station under Vice-Admiral Sir Rosslyn Wemyss, Commander-in-Chief. It acted in concert with the army, the commander doing all in his power to meet the requirements of the General Officer Commanding in Chief. Sir Stanley Maude's dispatch of the 10th April 1917, which was put in evidence, describes fully the plan of the campaign in the course of which the capture was made. Turkish forces of great strength centred at Sannaiyat on the Tigris and holding positions of wide extent on both banks barred the intended British advances upon Baghdad. Down river British naval forces operated. Up river Turkish armed craft and river transport occupied the waterway and maintained the river communications of the enemy. To capture Sannaiyat, to cross the Tigris higher up, to clear the right bank, to advance in force on the left bank, and to drive the enemy beyond Baghdad appear to have been the operations which were resolved upon by the Commander-in-Chief. Of the part played by the flotilla, Sir Stanley Maude says in his dispatch: "They carried out somewhat restricted but none the less important duties in the earlier part of the period. The fact that the enemy barred the way at Sannaiyat necessitated their work being at first limited to assisting in the protection of our water communications, co-operating with our detachment on the Euphrates front, and occasionally shelling the enemy's position at Sannaiyat, where the naval kite balloon section rendered good service in observation work. Their opportunity came later, when, after the passage of the Tigris, they pressed forward in pursuit and rendered brilliant and substantial services."

The services designated consisted substantially of the forcing of the passage of the Tigris beyond the Turkish rearguard position. Sir Stanley Maude's dispatch divides the military operations into eight periods, of which two come in question here—namely, "Capture of Sannaiyat and passage of the Tigris the 17th to the 24th Feb.," and "The advance on Baghdad, the 25th Feb. to the 11th March." The flotilla co-operated on the 22nd and 23rd Feb. in the operations against Sannaiyat and in the fighting which attended the crossing of the Tigris. On the 24th Feb. it moved up river and late at night took possession of Kut. During the whole day of the 25th Feb. fighting with the Turkish rearguard proceeded. By a forced march during the night of the 25th the main force of the Turkish Army placed a substantial distance between themselves and the British forces. Sir Stanley Maude early on the 26th directed the flotilla to "push on and inflict as much damage as possible." Advancing up the Tigris they encountered at Nahr Kellah formidable fire from Turkish rearguard forces in occupation of a strong position on the Nahr Kellah bend. The course of the river gave a great advantage to the enemy. It changes at the extremity of a narrow peninsula from a course of about due north to a course of about due south. Strong Turkish forces occupied the banks and although the cavalry of the British forces supported by field guns engaged this powerful rearguard the general British advance appears not to have reached Nahr Kellah during that or the next day. The main body of the Turkish Army was retreating through the desert on the left bank of the Tigris. The flotilla, however, forced its way beyond the extremity of the peninsula and steamed up the Tigris, and at a distance, as Captain Nunn showed, of from fifteen to twenty miles in a direct line beyond Nahr Kellah, overtook the vessels of the Turkish river service and made the capture. The capture took place in the early evening. The vessels anchored for the night near the furthest point reached in the operation and remained there the next two days. The prizes were sent down the river. On the 1st March the flotilla again advanced and on the morning of that day the *Tarantula* reached Azizjeh just as the troops were entering that village. The reach in which the last captures were made was stated to be about five miles as the crow flies below Azizjeh and about twenty miles in a direct line above Nahr Kellah. By reason of the tortuous course of the Tigris the distances in the waterway greatly exceed the distances over land.

The contention that the capture of the Turkish vessels was a joint operation of the flotilla and the Army was founded on the existence of a general plan of campaign directed by Sir Stanley Maude, the general co-operation between the forces to which I have referred, the order or request to push on and inflict as much damage as possible, the cavalry attack on Nahr Kellah, and the fact that the *Basrah*, the largest of the captured vessels, had been, in the fighting before the 25th Feb.,

bombed from an Army aeroplane. On the part of the flotilla reliance was placed upon the arrest of the military advance at or below Nahr Kellah during and after 26th Feb., and on the absence of any participation by land forces in the actual operation of capture. Reference was made for the Treasury to the description of the general scheme of operations by Sir Stanley Maude and Captain Nunn in operations in which both the troops and the flotilla were engaged, and to the terms in which the general included the vessels as part of the spoils of war taken in his advance.

Care is required in defining the exact grounds on which head money by way of prize bounty is awarded and the character of the participation of land forces which suffices to prevent a capture from being attributed to naval forces in such a way as to entitle them to an award.

Sect. 42 of the Naval Prize Act 1864 appoints the bounty of the Crown to "such of the officers and crew of any of his Majesty's ships of war as are actually present at the actual taking or destroying of any armed ship of His Majesty's enemies." It is well settled that, as was said by Lord Stowell with regard to an earlier statute, in *La Bellone* (2 Dods. 343, at p. 351), "conjunct expeditions are entirely out of the statute with respect to both the Services." To establish a joint capture, however, requires proof that both forces concerned were in fact participants in the operation of capture. "The actual captor," Lord Stowell said in *The John* (1 Dods. 363), "is the favourite of the law and the court will not suffer his interest to be affected but by evidence the most satisfactory. The *onus probandi* lies upon the party setting up the claim as joint captors, who, in order to establish it must bring very clear proof in support of his case." Blockade by a squadron, or chase by a squadron, and capture by one ship of a squadron in the prosecution of the common enterprise; and presence upon the scene of a capture in readiness to assist; are instances in which the seizure by one vessel has moved for the benefit of her consorts. But, as was said by Sir William Grant in pronouncing the judgment of the Privy Council in *The Nordstern* (1 Acton 128, 135, 140), the question is "whether such a co-operation existed as to make the capture in question necessarily consequent and dependent thereon. . . . It is not sufficient a joint enterprise shall exist at the time, except it expressly refer to the capture in question. . . ." The judgment in *El Rayo* (1 Dods. 42) shows that where two ships of war are in sight at the time of capture the prize may be the prize of one of them if the act of capture was the independent act of that one.

The question as it presents itself to me is not whether the flotilla and the troops on the 26th Feb. 1917 were engaged in a joint scheme of operations, but whether the flotilla and the troops were engaged jointly in the capture of the Turkish ships, and I have come to the conclusion that the troops in fact took no part in the capture. I do not lay stress on the fact that the flotilla was under purely naval command. Without unity of command there might have been joint action. The troops were in fact out of reach when the captures were made. The bombing of the *Basrah* by army airmen was not an incident of the capture. The flotilla got away past Nahr Kellah far enough and effectually enough to be able to act for itself, and without requiring or receiving help from land forces in the immediate enterprise it alone made the prizes in respect of which the bounty is claimed. I find the facts correctly alleged in the affidavit of Captain Sherbrook, filed in support of the claim, which says that "the capture of the armed vessels was solely effected by His Majesty's ships *Tarantula*, *Mantis*, and *Moth*, in the circumstances set out in the affidavit and that no other ship or vessel was present at the actual taking of such enemy ships." My judgment, therefore, must be in favour of the claim, and I pronounce that the amount to be distributed is 7745*l*.

Solicitors: *Messrs. Woolley, Tyler*, and *Bury*, for Messrs. *Stilwell* and *Sons*, Navy and Prize Agents; the *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 14 *and* 15, 1921.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE JOANNIS VATIS. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Damage to ship and cargo—Action by the owners of the ship—"As owners of ship and her cargo"—Bail—Underwriters on cargo invited to join in proceedings—Refusal by some of the underwriters—Rights of those underwriters to share in sum subsequently recovered in the action—Right to intervene—Costs—Order XII., r. 24.

It is the duty of the Court, when by its process a sum has been recovered in Admiralty, to see that it goes to the persons entitled to claim, and it should be divided pari passu *between them.* The Glamorganshire (6 *Asp. Mar. Law Cas.* 344; 59 *L. T. Rep.* 572; 13 *App. Cas.* 454) *considered.*

Where a person sued as owner of a vessel and cargo and established the liability of the defendant to pay damages in respect of both ship and cargo, and certain of the cargo owners refused to, or elected not to, take their share in the expenses connected with establishing the liabitity, it was held that the cargo owners were not shut out from any benefit in the judgment.

The steamer W. H. *and her cargo was damaged in collision with the steamer* J. V. *The owners of the* W. H. *commenced an action "as owners of the* W. H. *and cargo," claiming for the damage sustained thereby. The owners of the* J. V. *gave an undertaking for bail in the sum of* 100,000*l.*, *which exceeded their statutory liability, the owners of the* W. H. *giving bail in a like amount.*

The underwriters on the cargo of the W. H. *were afterwards invited by the shipowners' solicitors to join the shipowners in the proceedings.*

Some of the underwriters did not assent to this proposal. Nevertheless, after judgment had been given against the J. V. *these underwriters instructed the solicitors acting for the owners of the* W. H., *and those underwriters who had agreed to join with them in the litigation, to put forward claims against the sum obtained from the owners of the* J. V. *The solicitors*

(*a*) Reported by GEOFFREY HUTCHINSON and W. C. SANDFORD, Esqrs., Barristers-at-Law.

agreed to do so, and received the documents supporting these claims. The total claims then exceeded the amount for which the owners of the J. V. *had given bail, and for which they had been held liable. The owners of the* W. H. *and those underwriters who had joined with them in the litigation accordingly took up the position that those underwriters who had not agreed to join were not entitled to share in the fund before the court.*

At the reference the registrar reported that those underwriters who had refused to join in the litigation were nevertheless entitled to share in the fund on the ground that the writ had been issued in the names of the owners of the W. H. *and her cargo, and that the solicitors for the owners of the* W. H. *and the other underwriters had agreed and consented to the underwriters who had at first refused to take part in the action subsequently becoming parties to it in its second stage.*

The owners of the W. H. *and the underwriters who had joined in the action, moved that this report be rejected.*

Held, on appeal, that all persons having a claim on the fund, including the non-assenting underwriters, were entitled to share in the distribution.

Judgment of Hill, J. affirmed.

Motion in objection to a report of the Admiralty registrar.

On the 22nd Aug. 1917 a collision occurred off Bizerta between the steamer *Worsley Hall* and the Greek steamer *Joannis Vatis*. Proceedings were commenced against the *Joannis Vatis* at Bizerta, but were discontinued. On the 27th Aug. 1917 Messrs. Hill, Dickinson, and Co. telegraphed to the owners of the *Joannis Vatis*:

We are instructed on behalf of the owners of the *Worsley Hall* concerning collision *Joannis Vatis*. Please instruct your English agents or lawyers arrange exchange bail in England and for question liability to be decided English Admiralty Court, otherwise will be necessary arrest your steamer.

The owners agreed and gave bail to the extent of 100,000*l*., being the statutory liability of the *Joannis Vatis*. The owners of the *Worsley Hall* gave bail in a like amount. On the 30th Aug. 1917 Messrs. Hill, Dickinson, and Co. issued a writ, which was intituled in the usual manner, the plaintiffs being described as "the owners of the steamship *Worsley Hall* and cargo." The endorsement of the writ was: "The plaintiffs' claim is for damages arising out of a collision between the steamship *Worsley Hall* and the *Joannis Vatis*. . . ." The subsequent litigation ended in a decision of the House of Lords on the 19th Dec. 1919 pronouncing the *Joannis Vatis* alone to blame.

On the 22nd Jan. 1918 Messrs. F. C. Danson and Co., who were the average adjusters employed to adjust the claims against the *Joannis Vatis*, wrote to the underwriters of the cargo of the *Worsley Hall*:

In view of the steps taken to safeguard the interests of the cargo, and of the large extent to which the cargo is interested, the solicitors who have the case in hand (Messrs. Hill, Dickinson, and Co.) have expressed the opinion that it would be reasonable for the cargo interests to join the owners of the ship in collision proceedings, and we have been requested by the owners to bring the matter before the leading underwriters interested for their consideration and decision . . . we shall be glad to have your views on the matter. . .

In reply to this invitation, some of the underwriters agreed to join the owners of the *Worsley Hall* in the litigation and some refused to do so on the ground that no special circumstances arose in the case to justify the departure from the usual practice. Nevertheless, Messrs. Hill, Dickinson, and Co. subsequently received instructions from the underwriters who had refused to join in the litigation to put forward claims on their behalf. They also accepted documents supporting these claims. The claims against the *Joannis Vatis* then amount to 146,953*l*. 15*s*. On the 22nd July 1920 Messrs. Hill, Dickinson and Co. accordingly wrote to those underwriters who had not agreed to join the shipowners in the litigation:

As you are aware we have for some time been engaged in gathering together the documents supporting the claims for loss of or damage to cargo with a view to the parties interested therein obtaining the benefit of the bail obtained.

We have now made out the claims the documents in support of which have up to the present reached us and find that these added to the shipowners' claim amount to approximately 136,000*l*. The shipowners claim amounts to 62,190*l*. 14*s*. In these circumstances as the total claims considerably exceed the amount of bail those cargo underwriters who did not agree to share the burden of the expense incurred by the shipowners in carrying on the proceedings against the *Joannis Vatis* are not entitled to the benefit of the bail obtained.

To this, the underwriters objected, and instructed other solicitors to put forward claims at the reference on their behalf.

On the 14th March 1921 the registrar reported that the underwriters were entitled to share in the 100,000*l*. notwithstanding that they had refused to join in the proceedings. He gave the following reasons for his decision:

Reasons for Report.

In this reference the parties were the owners of the steamship *Worsley Hall* and two sets of, strictly speaking, cargo owners, but in fact underwriters, who for the purposes of description may be called assenting and non-assenting underwriters.

The defendants did not appear, having no interest in the reference, having given bail for 100,000*l*., which was more than the limit of their liability.

The collision occurred off Bizerta, on the 22nd Aug. 1917, and the *Worsley Hall* put into Bizerta for temporary repairs.

Proceedings were begun against the *Joannis Vatis* at Bizerta, and the owners of the *Joannis Vatis* gave bail in 100,000*l*., the value of their vessel. Subsequently, by arrangement between the parties, the proceedings at Bizerta were discontinued and fresh proceedings were brought in the High Court in England.

The writ was issued in the name of the owners of of the *Worsley Hall* and of her cargo, and, as arranged, the same bail, 100,000*l*., was given in the action in the High Court.

Messrs. F. C. Danson & Co. the average adjusters, who had this matter in hand, on the 22nd Jan. 1918, wrote to various underwriters asking if they would "join the owners of the ship in the collision proceedings." The Alliance Marine Insurance Company and some other companies refused. These are called above non-assenting underwriters. After litigation, which culminated in a decision of the House of Lords that the *Joannis Vatis* was alone to blame, the non-assenting underwriters asked Messrs. Hill, Dickinson, and Co., the solicitors for the *Worsley Hall*, to prepare and put forward their claims against the 100,000*l*. (see letter of

Union Marine Insurance, the 3rd Dec. 1918, and subsequent letters) and Messrs. Hill, Dickinson, and Co. did so, acting as if the non-assenting underwriters had a full right to claim against the 100,000*l.*

Subsequently, when it was clear that the above sum was insufficient to satisfy all claims in full, Messrs. Hill, Dickinson, and Co. wrote to the non-assenting underwriters (see letter the 28th July 1920 to the Reliance Insurance Company and following letters) that as they had not agreed to share the burden of the proceedings against the *Joannis Vatis*, they were "not entitled to the benefit of the bail obtained," in other words, to claim against the 100,000*l.* which that bail represented. The non-assenting underwriters contested this view, and thus arose a preliminary point for decision.

The above is a short outline of the facts. It was argued on behalf of the non-assenting underwriters that there was a custom that underwriters on cargo should not join in an action by the shipowners but had right, if such action terminated in favour of the shipowners, to bring a claim against the wrongdoing ship, as though an original party to the action.

This is, no doubt, a convenient practice for underwriters of whom there may be many interested in a single shipment in large and small amounts, but it is not a custom as legally understood. I am clearly of opinion however, that the refusal to join in this action was, if such refusal stood alone, a bar to a claim in this particular action.

If the names and addresses of the parties to the action had been demanded by the defendants it is clear the non-assenting underwriters suing in the names of the assured would not have been given, for they were not parties to the action. The true position is, that they stood by to see what might be the result of the litigation in its first stage, viz., as regards liability for the collision.

I am, however, also of opinion that as Messrs. Hill, Dickinson, and Co. must be taken to be the agents in the conduct of the litigation of the owners of the *Worsley Hall*, and of the assenting underwriters that they subsequently agreed and consented to the non-assenting underwriters sharing in the 100,000*l.*, and becoming parties to the action in its second stage. Having regard to the form of the writ there is no technical difficulty in the non-assenting underwriters joining in the action at this later stage. However, after Messrs. Hill, Dickinson, and Co. obtaining documents from the non-assenting parties and preparing the claims against the fund, the earlier clients are in my view estopped from refusing, at the eleventh hour, to allow the non-assenting underwriters to share *pari passu* in the fund available for all claimants. It was argued on behalf of the owners of the ship and the assenting underwriters that the defendants only gave bail to satisfy the claims of those underwriters who were actually consenting parties to the action.

This is, I think, a fallacy, for 100,000*l.* represented the value of the *Joannis Vatis*, and the defendants had no more knowledge of or interest in those who might claim as owners of cargo, many or few, than has a wrongdoer when he pays money into court in a limitation action.

Therefore, I decide that the non-assenting underwriters are entitled to share in the 100,000*l.* It is desirable to state that the merchants who sat with me concur in this view on non-legal grounds.

(Signed) E. S. ROSCOE, Registrar.

The owners of the *Worsley Hall* and the assenting underwriters moved that the registrar's report be rejected in so far as he allowed the claims of the non-assenting underwriters.

Butler Aspinall, K.C., *Dunlop*, K.C., and *A. T. Bucknill* for the owners of the *Worsley Hall* and the assenting underwriters.—The respondents are not entitled to share in the bail. They took no part in obtaining it. The shipowners' solicitors did not agree to put forward claims for the non-assenting underwriters. There was no consideration for such an agreement; nor had they authority to make it. The owners of the *Worsley Hall* gave consideration for the undertaking of the *Joannis Vatis* to give bail, for they themselves gave a similar undertaking. The non-assenting underwriters had an opportunity of becoming parties, of which they did not avail themselves. If they were parties, when did they become parties? There is no material upon which the registrar could find an agreement to allow the non-assenting underwriters to share in the bail fund. The solicitors only agreed to put forward the claims. There is no analogy to limitation proceedings. In this case bail was provided to satisfy the claims of those who were parties to the writ, not of all those who were injured by the collision. The bail bond is an agreement to pay to the parties to this action:

The Saracen, 1 Will. Rob. 451;
The Africano, 70 L. T. Rep. 250; 7 Asp. Mar. Law Cas. 427; (1894) P. 141.

In this case the proceeds were brought into court. There is no estoppel.

Stephens, K.C. and *Balloch* for certain non-assenting underwriters.—The non-assenting underwriters are entitled to come in without paying the costs of the action:

The Duke of Buccleuch, 67 L. T. Rep. 739; 7 Asp. Mar. Law Cas. 294; (1892) P. 201.

There was a claim against the *Worsley Hall*. The refusal of the underwriters was a refusal to bear the costs of any part of this claim. The shipowners were suing as owners and bailees of the cargo. Bail was obtained in this capacity. The underwriters accordingly took no steps to obtain bail. The shipowners obtained bail for the underwriters; they are now estopped from refusing to allow them to share in it. If the underwriters were not parties they now ask leave to intervene. They are entitled to intervene at any time before final judgment—that is to say, at any time before the report of the registrar is confirmed:

The Duke of Buccleuch (*sup.*).

Raeburn, K.C. and *Hayward* for certain other non-assenting underwriters.—If the contention of the appellants is upheld the underwriters will have lost all rights against the *Joannis Vatis*, since the limitation period had expired before Messrs. Hill, Dickinson, and Co. refused to put forward their claim. They gave a retainer to Messrs. Hill, Dickinson, and Co. before the limitation period expired. The underwriters were always parties; if they were not parties, Messrs. Hill, Dickinson undertook to put forward claims for persons who were not parties to the action. The writ was issued in the name of the cargo owners; there was, therefore, nothing for the underwriters to ratify. An action must be commenced on behalf of some existing person or persons:

Keighley, Maxsted, and Co. v. *Bryan, Durrant and Co.*, 84 L. T. Rep. 777; (1901) A. C. 240.

If it is necessary for the underwriters to ratify the issue of the writ, on whose behalf was it issued,

and on whose behalf was bail demanded, if not on behalf of the owners of the cargo ?

Dunlop, K.C. replied.

Cur. adv. vult.

July 30.—Hill, J.—The questions in this case arise out of a collision between the ships *Worsley Hall* and *Joannis Vatis*, for which the *Joannis Vatis* was held alone to blame. The dispute relates to the right to share in a limited fund by persons who suffered damage by the negligence of the *Joannis Vatis*, being the owners of the *Worsley Hall* and the owners of cargo on board the *Worsley Hall*, or rather the underwriters on cargo subrogated to the rights of the cargo owners. This dispute arises not in a default action nor in a limitation action, but in proceedings in which bail was given, and in which there has been no limitation decree. These exceptional circumstances create the difficulties. I will first state the facts.

In Aug. 1917 the ships were in collision in the Mediterranean, and both put into Bizerta. Messrs. Hill, Dickinson, and Co. were instructed by the owners of the *Worsley Hall*. On the 27th Aug. 1917 Messrs. Hill, Dickinson, and Co. sent a telegram to the owners of the *Joannis Vatis*: "We are instructed on behalf of the owners *Worsley Hall* concerning collision with *Joannis Vatis;* please instruct your English agents or lawyers arrange exchange bail in England and for question liability be decided English Admiralty Court, otherwise will be necessary arrest your steamer." The owners of the *Joannis Vatis* instructed Messrs. Crump and Son, who, in turn, threatened to arrest the *Worsley Hall*. These arrests, if made at Bizerta, would have been governed by French law, and the limit of liability would have been the value of the ship. Negotiations followed, and ended in an agreement expressed in the letters of the 17th and 18th Sept. 1917, whereby each gave an undertaking to provide bail in 100,000*l.* or the value of the steamer, whichever should be less, and agreed to proceedings in the Admiralty Court in England, and each accepted the writ *in rem* issued by the other. The writ issued by the plaintiffs was in the name of "the owners of the *Worsley Hall* and cargo," and the plaintiffs were stated to reside in Liverpool. The indorsement is: "The plaintiffs' claim is for damages arising out of a collision, &c." At the date of the issue of the writ the only authority to sue was that given by the owners of the *Worsley Hall*. In pursuance of the undertaking to put in bail in respect of the *Joannis Vatis*, a bail bond in the usual form was executed on the 19th March 1918. The cross-actions proceeded to trial. This court on the 25th Oct. 1918, held the *Joannis Vatis* one-third to blame, and condemned the owners of the *Joannis Vatis* and their bail in one-third of the plaintiffs' claim. On appeal the Court of Appeal on the 9th Feb. 1919 affirmed by the House of Lords on the 19th Dec. 1919, held that the *Joannis Vatis* was solely to blame, pronounced for the plaintiffs' claim, and referred the damages to the registrar.

The decree of the Court of Appeal as drawn up condemns the defendants, but not their bail. I have inquired in the registry as to why the decree was so drawn, and was informed that it was by a clerical error. In form, it is a judgment against the owners of the *Joannis Vatis*. While the action was proceeding, the owners of the *Worsley Hall*, through Messrs. F. C. Danson and Co., who had the owners' adjustment in hand, circularised the underwriters on cargo by a letter on the 22nd Jan. 1918, in which they said: "The owners of the vessel obtained bail from the owners of the *Joannis Vatis* to include claims for loss of cargo, as well as for damage to ship, and general average expenses," and stated that Messrs. Hill, Dickinson, and Co. had expressed the opinion that it would be reasonable for the cargo interests to join the owners of the ship in the collision proceedings. To this request some of the underwriters agreed; others of them refused to agree. The two groups are referred to in the registrar's report as the assenting and the non-assenting underwriters. The phrase "join in the collision proceedings" is not altogether free from ambiguity. It might mean that they became plaintiffs to the action, or it might mean that they were to share the costs of the action. There is the same ambiguity in the letters on the subject which are printed in the records. The action proceeded after these assents had been given and refused. Between the decree of this court and the judgment of the Court of Appeal, and also after the judgment of the Court of Appeal, some of the non-assenting underwriters asked Messrs. Hill, Dickinson, and Co. to put forward their claims in due course, and Messrs. Hill, Dickinson, and Co. said they would do so at the proper time. After the judgment of the Court of Appeal, all the underwriters on cargo were circularised—the assenting underwriters by a letter of Messrs. Danson and Co. of the 20th June 1919, and the non-assenting underwriters by a letter of Messrs. Hill, Dickinson, and Co. of the 26th July 1919. The assenting underwriters were asked for any additional claims and documents not already sent in, and the non-assenting underwriters were asked for names and addresses of the cargo owners, and for the documents to prove the claims. Of course, the underwriters could have no claim against the owners of the *Joannis Vatis* except as subrogated to the rights of the cargo owners' claims. The claims were cargo owners' claims.

In the result, a large number of cargo claims reached Messrs. Hill, Dickinson, and Co., and it then turned out that the amount of them, added to the shipowners' claim, exceeded 100,000*l.* Upon this, Messrs. Hill, Dickinson, and Co. wrote the letter of the 28th July 1920:—"The collision between the above-named vessels occurred on the 2nd Aug. 1917, near to Bizerta. After the collision both vessels, being badly damaged, put into Bizerta for repairs, being whilst there within the French jurisdiction. Legal proceedings were commenced at Bizerta, but it was agreed between the parties to the proceedings to drop those proceedings and have the matter tried in the English Admiralty Court, the owners of the *Joannis Vatis* providing bail in a sum not exceeding 100,000*l.* or the value of that steamer, whichever should be least. The amount of bail so obtainable largely exceeds the statutory limit of liability of the vessel, which is the maximum amount for which her owners would be liable in the ordinary course of legal proceedings in this country. As you are aware, we have for some time been engaged in gathering together the documents supporting the claims for loss of or damage to cargo, with a view to the parties interested therein obtaining the benefit of the bail obtained. We have now made out the claims, the documents in support of which have, up to the present, reached us, and find that those, added to the shipowners

claim, amount approximately to 136,000*l.* The shipowners' claim amounts to 62,190*l.* 14*s.* In these circumstances, as the total claims considerably exceed the amount of bail, those cargo under writers who did not agree to share the burden of the expense incurred by the shipowners in carrying on the proceedings against the *Joannis Vatis* are not entitled to the benefit of the bail obtained. As your company did not agree to join the shipowners in their proceedings, they will not participate in the recovery guaranteed by the bail given."

The dissenting underwriters protested, and claimed that they were entitled to have their claims put forward, and that the shipowners and cargo owners were all entitled to share in the 100,000*l.* Some of the non-consenting underwriters consulted Messrs. Thomas Cooper and Co., and others consulted Messrs. Weightman, Pedder, and Co. As to those represented by Messrs. Thomas Cooper and Co., on the 3rd Aug. 1920 Messrs. Thomas Cooper and Co. wrote to Messrs. Hill, Dickinson, and Co.: "The whole of the cargo interests were included in the action which you commenced, and are entitled to participate in the recovery." On the 4th Aug. 1920 Messrs. Hill, Dickinson, and Co. wrote to Messrs. Thomas Cooper and Co.: "The shipowners, on their own behalf and as bailees of the cargo, obtained bail in the sum of 100,000*l.* subject to reduction in the event of the value of the *Joannis Vatis* in her damaged condition proving less. Legal proceedings were then instituted on behalf of the owners of the *Worsley Hall* and cargo. When the names of the underwriters interested in the damaged cargo could be ascertained, the adjusters wrote and requested the underwriters interested to join in the proceedings. At that time the extent of the damage to the *Worsley Hall* and her cargo was not known. The case was then pending in the Admiralty Court. In reply to Messrs. Dansons, some of the underwriters adopted the steps which had been taken on behalf of the cargo in which they were interested by the shipowners, whilst others, including the Eagle, Star, and British Dominions Co. and the Ocean Marine Insurance Co. did not. Our clients, the owners of the *Worsley Hall*, in the circumstances maintain that those underwriters who did not ratify their action by agreeing to join in the expense of the proceedings, are not entitled to participate in the bail." As to those who were represented by Messrs. Weightman, Pedder and Co., on the 20th Sept. 1920, Messrs. Hill, Dickinson, and Co. wrote to Messrs. Weightman, Pedder, and Co.:—"The right course to take will be to file all the cargo claims and let the reference proceed with the assessment of claims in respect of ship and cargo. Should the assessment result in the total amount being substantially in excess of the bail of 100,000*l.*, the question of the right of those cargo owners who did not agree to share the expenses of legal proceedings when the question of liability was in issue to participate in the bail, can be decided by the judge of the Admiralty Court. . . . If you approve of the course we have indicated, we will file the claims and keep you advised as to the position, so that you will have a full opportunity of looking after the interest of the underwriters you represent." Then they add that Messrs. Thomas Cooper and Co. concurred in the course suggested—that Messrs. Thomas Cooper and Co. did concur appears from a letter quoted. Messrs. Weightman, Pedder, and Co. did not concur. Messrs. Hill, Dickinson, and Co. thereupon sent to Messrs Weightman, Pedder, and Co. the documents relating to the claims of Messrs. Weightman, Pedder, and Co.'s clients. Messrs. Hill, Dickinson, and Co. upon this filed the claims of the owners of the *Worsley Hall* and of the cargo owners, insured by the assenting underwriters, and also, without prejudice to the question of their rights to participate, those of the cargo owners insured by the non-assenting underwriters represented by Messrs. Thomas Cooper and Co.; and Messrs. Botterell and Roche filed the claims of the cargo owners insured by the non-assenting underwriters represented by them.

By letters dated the 26th Feb. 1921, Messrs. Hill, Dickinson, and Co. formally intimated to both that, on reference, objection would be made to the claims of the non-assenting underwriters, and this was done.

The reference was heard on the 8th March 1921. Figures were proved, as stated in the report. The damages sustained by the owners of the *Worsley Hall* were 61,518*l.* 14*s.* The total damages sustained by the cargo owners were 181,487*l.* 2*s.* 2*d.*, less realised by sale of damaged cargo 96,052*l.* 1*s.* 2*d.* leaving a net total of 85,435*l.* 1*s.* The total damages, therefore, amount to 146,953*l.* 15*s.* The net figures of the several cargo owners are not stated in the report; the gross figures are given. The cargo represented by Messrs. Hill, Dickinson, and Co.—that is the assenting underwriters—comes to 121,888*l.* 2*s.* 1*d.*, and the non-assenting underwriters, represented by Messrs. Thomas Cooper and Co., amounts to 41,845*l.* 6*s.* 3*d.*; the cargo represented by Messrs. Weightman, Pedder, and Co. amounts to 17,353*l.* 17*s.* 8*d.*, making a total of 181,087*l.* 6*s.* There is a difference of 400*l.*, which I do not understand, between these figures and those given in the report.

The only evidence on the question as to the right to participate was given by Mr. Harris, of the Reliance Marine Insurance Company, one of the non-assenting group of underwriters. His contention appears to have been that the cargo owner, to whose rights the Reliance was subrogated, was a party to the action right through, but not so as to be bound by any judgment.

The registrar reported: (1) That there was due to the plaintiffs in respect of their claim the sum and interest as stated in the schedule. The schedule gives the figures:—"Claim of owners of the *Worsley Hall*, 61,518*l.* 14*s.* and the cargo: 181,487*l.* 2*s.* 2*d.* making a total of 243,005*l.* 16*s.* 2*d.*; from this amount there has to be deducted the sum of 96,052*l.* 1*s.* 2*d.*, the amount realised by the sale of the damaged cargo." (2) At the foot of his reasons he says:—"I decide that the non-assenting underwriters are entitled to share in the 100,000*l.*" In his reasons he states the facts, and he holds that the non-assenting underwriters having refused to join in the action, would have barred their claim in the action, but that Hill, Dickinson, and Co., receiving claims from the owners and the assenting underwriters, had assented to the non-assenting underwriters becoming parties to the action in the second stage, and sharing in the 100,000*l.*, and that by reason of Messrs. Hill, Dickinson, and Co., receiving claims and documents from the non-assenting underwriters, the earlier clients were estopped from refusing to allow the non-assenting underwriters to share.

The owners of the *Worsley Hall* objected to this part of the report, and contended that there was no such agreement and no such estoppel. For the non-assenting underwriters it was not contended that there was either agreement or estoppel, as held by the registrar. One contention was that they were parties to the action from the beginning, and entitled to share in its net results. This was not pressed, and was clearly not according to the facts. Their real contention was that the plaintiffs to the action were the owners of the *Worsley Hall*, and no others, and that the owners sued and obtained bail as owners of the ship and bailees of the cargo, and had recovered as owners of the ship and bailees of the cargo, and could not be heard to say that they had not: for the cargo owners, on the faith of the statement that the owners had obtained bail to include claims for loss of cargo, had taken no action against the owners of the *Joannis Vatis*, and the limitation period had run out before the 26th July 1920, when for the first time the owners of the *Worsley Hall*, through Messrs. Hill, Dickinson, and Co., informed the non-assenting underwriters that they would not be entitled to share in the recovery, and they, therefore, contended that the bail being a fund in court, the non-assenting underwriters were entitled to intervene at any time before final decree. They said they had intervened at the reference, and, at any rate as to those represented by Messrs. Thomas Cooper and Co., it had been agreed they should, if necessary, they asked to be joined as plaintiffs.

For the owners and the assenting underwriters, it was agreed that the owners of the *Worsley Hall* sued as owners of the ship and bailees of the cargo—this was supported by affidavit—and that they recovered as owners of the ship and bailees of the cargo; that the non-assenting underwriters were not, and could not, become, and never became, parties; that the owners of the *Worsley Hall* had recovered a personal judgment against the defendants, and that the security in shape of a bail bond was a personal contract of suretyship, and there was no *res* or fund in court in which the non-assenting underwriters could have any interest so as to entitle them to intervene; and that the non-assenting underwriters at this stage ought not to be added as plaintiffs, for they had elected not to share in the burden of the litigation, and ought not to be permitted to share in the recovery. And that when the plaintiffs, the owners, recovered, they would not be bound to account to the non-assenting underwriters, and, in any case, could not be called upon to account in this court or in these proceedings.

Now, if, as both parties contend, the true view of the facts is that the only plaintiffs were the owners of the *Worsley Hall*, suing as owners of the ship and bailees of the cargo, and they alone recovered judgment, then, unless there was a fund in court and a right to cargo owners to intervene, it would seem that no one except the owners were entitled to be heard on the reference, and that the final decree for the amount of damages, as found by the registrar, should be a decree awarding those damages to the owners alone. If that be the true view of the facts, neither the assenting underwriters nor the non-assenting underwriters had any right to be heard; neither recovered any judgment of liability; neither is entitled to any finding of the registrar or judgment of the court in their favour. The judgment must be for the plaintiffs, the owners of the *Worsley Hall*. It must also be for the full amount of the damages proved, for, as bailees, they were entitled to recover from the wrongdoers the full value of the cargo lost, or the full amount of the damage to the cargo damaged. Having proved the amount, they would be entitled to have the report as to damages confirmed, and the judgment of liability converted into a final judgment. And to-day all the court would have to do would be to confirm the report as to the damages and order final judgment to be entered for the owners of the *Worsley Hall* for the amount paid, with interest, and say that the registrar had no power to decide anything as to the rights of the non-assenting underwriters or of the assenting underwriters. Plaintiffs, the owners of the *Worsley Hall*, would enforce the bail. When the 100,000*l.* was in their pockets, questions would arise as to whether they were, as to part of it, trustees for the assenting underwriters, or for the non-assenting underwriters, or for both of them. But that question would not arise in this action, or in this court. Nor could this position be displaced on the ground that there was an agreement to submit to this court the question of the non-assenting underwriter to participate. There was an agreement between Messrs. Hill, Dickinson, and Co. and Messrs. Thomas Cooper and Co. that the question of the non-assenting underwriters' right to participate in the bail should be submitted to the judge. But, as between Messrs. Hill, Dickinson, and Co. and Messrs. Weightman, Pedder, and Co. there was no agreement at all; and as to Messrs. Thomas Cooper and Co. the question to be submitted was the right to participate in the 100,000*l.* bail, not the liability of the owners of the *Worsley Hall* when they had got the 100,000*l.* in their pockets.

The contention of the owners of the *Worsley Hall* would, therefore, seem to be sound upon the agreed facts, if there is no fund in court and no right of intervention. It is, therefore, necessary to determine whether plaintiffs are right in contending that there is no fund in court. In my view they are wrong. It is true the ship was at Bizerta, and was not under arrest of this court nor capable of being presently arrested by this court. But the agreement was to give bail in this court, and bail was given in this court. The effect was that, as regards the claim for which bail was given, the bail took the place of the ship. It is much more common for an undertaking for bail to be given to prevent arrest than for bail to be given after arrest. That is contemplated by Order IX., r. 10: "In Admiralty action *in rem* no service of writ or warrant shall be required where the solicitor of the defendant agrees to accept service and to put in bail, or to pay money into court in lieu of bail." As a corollary of this, by Order CXXII. 1918, "a solicitor not entering an appearance or putting in bail, or payimg money into court in lieu of bail in an Admiralty action *in rem*, in pursuance of his written undertaking so to do, shall be liable to attachment." And, on the other hand, when the undertaking is accepted and, *a fortiori*, when the bail is accepted as sufficient, the right to arrest the ship for the same cause of action is at least suspended, if not altogether gone.

By giving bail, the defendants saved the *Joannis Vatis*, if she came within the jurisdiction, from arrest for the claim to answer which bail was given. I see no difference in principle between bail given when the ship is actually within jurisdiction and

bail given when it is not. And the bail was given in this court, and, by the terms of the bond, the sureties submitted to the jurisdiction of the court and consented that execution might issue against them if the defendants did not pay. It was suggested that these phrases in the bond were only survivals from the form in use when the Admiralty Court was not a part of the High Court of Justice. But they have to-day a meaning and effect. They enable the court to order execution to issue against the sureties immediately upon default of the principal debtors. It is said that in this case the bond is merely a personal contract of suretyship between the owners of the *Worsley Hall* and the sureties. In form it is not that at all. In substance, whatever else it is, it is an undertaking to the court, and in my view it is, for the present purpose, equivalent to the *res*, or a fund in court produced by the sale of the *res*. It is none the less a fund in court, because the judgment of the court of Appeal does not in terms condemn the bail. If, then, the bail is equivalent to a fund in court, it remains to consider whether the non-assenting underwriters had any right to intervene and claim an interest in it. By Order XII., r. 24, "in an Admiralty action *in rem* any person not named in the writ may intervene and appear as heretofore on filing an affidavit showing that he is interested in the *res* under arrest or in the fund in the registry." I take that to apply to a case where bail has been given. The bail is the equivalent of the *res* and of a fund in the registry.

On the assumption made by both parties that the only plaintiffs were the owners of the *Worsley Hall*, suing in respect both of ship and cargo, the non-assenting underwriters were persons not named in the writ. No affidavit was filed, but the facts have been proved.

That leaves only the question whether upon the facts proved the non-assenting underwriters were interested in the fund. The owners of the *Worsley Hall*, as they informed the cargo owners on the 27th Aug. 1917, obtained bail, "to include claims for loss of cargo as well as for damage to ship, and G.-A. expenses." They did not then say they had obtained it as bailees of cargo only; either they did or did not obtain the bail to include claims for loss of cargo. If they did, the cargo owners, the assenting underwriters and non-assenting underwriters alike are all interested in the fund. If they did not they cannot be heard to say that they did not, for they never withdrew or qualified that representation until after the period had expired within which the cargo owners could as of right bring an action against the owners of the *Joannis Vatis*. It is quite true that they invited the cargo owners to participate in the litigations, or the costs of it; but it was not until after the limitation two years had run out that they informed the non-assenting underwriters, on the 23rd July 1920, that the bail was not obtained for them. In the meantime, the non-assenting underwriters had altered their position, for they had continued to act on the basis that their claims would rank against the bail, instead of taking any steps to recover their own damages by separate action. In my judgment, both the non-assenting underwriters and the assenting underwriters were entitled to intervene at any time up to final judgment. And final judgment will not be until the report is confirmed. (*Duke of Buccleuch*, 67 L. T. Rep. 739; 7 Asp. Mar. Law Cas. 294; (1892) P. 201.)

When they intervene they must take the recovery as they find it. The first charge upon the 100,000*l.* will be the shipowners' costs of recovery, so far as they have not been paid by the defendants. But in the balance the non-assenting underwriters are, in my judgment, entitled to participate. In principle, the result is only what would have followed if no bail had been obtained in respect of cargo, and after judgment in an action in respect to the ship alone. The owners of the *Joannis Vatis* had obtained decree of limitation, and paid the limited amount into court. Under a decree so made, all the cargo owners would have been entitled to appear and become parties to the limitation action and to file claims.

The owners of the *Worsley Hall* are, in effect, seeking to put the non-assenting underwriters in a worse position than if bail for cargo damage had never been obtained, and the plaintiffs, the owners of the ship, and each of the cargo owners would have claimed, by virtue of the order of the court, a judgment for his proportion of the limited fund, and it would be immaterial that plaintiffs, the owners of the ship, had sued in the damages action for themselves alone, and that they had obtained bail for their own claim alone. In the reference under the limitation decree the registrar would have seen that the cargo damages were not included twice over in the award, first as damages to the shipowner as bailee, and secondly as damages to the cargo owners as cargo owners.

I have decided this case upon the ground, common to both sides, that the writ was in the name of the owners of the *Worsley Hall* alone, suing in respect of ship and cargo. But for that consensus, I confess I should have had some doubt whether the writ was not also in the name of the cargo owners. "Owners of the steamship *Worsley Hall* and cargo" seems to me an inapt description of owners of steamship *Worsley Hall* suing in respect of ship and cargo. And, though the writ was issued on the instructions of the owners of the *Worsley Hall* alone, and, as is proved, they intended they alone should sue, yet, if the writ was in the name of the owners of the cargo, I see no reason why owners of cargo could not by ratification make it their writ. *Keighley, Maxsted, and Co.* v. *Bryan Durrant and Co.* (84 L. T. Rep. 777; (1901) A. C. 240) throws no doubt upon the principle that an act done in the name of a person, though without authority, can be ratified by him, and it then becomes his act. *Ancona* v. *Marks* (31 L. J. Ex. 163). If the writ was, without authority, in the name of cargo owners, it may be that the assenting underwriters ratified and the non-assenting underwriters refused to ratify, and the assenting underwriters became and the non-assenting underwriters did not become plaintiffs to the action. But it is unnecessary to decide upon this. The case was not argued upon the footing that the writ was issued in the name of the cargo owners. Probably it was rightly argued, for in addition to the address of the plaintiffs given in the writ, the statement of claim at which I have looked alleges that the plaintiffs have suffered damage by reason of a collision between their steamship *Worsley Hall* and the steamship *Joannis Vatis*, and alleges that the *Joannis Vatis* struck the stern of the *Worsley Hall*, doing considerable damage. Except in the description of the *Worsley Hall* as carrying a general cargo, there is no reference to the cargo. And the true view may well be that neither the assenting underwriters not the non-assenting

underwriters were in a position to become parties to the action as plaintiffs without an order of the court, and no order was made, and their rights have to be determined, as I have determined them, as of interveners having an interest in the fund in court represented by the bail.

For these reasons I dismiss the motion in objection, with costs, and confirm the report, with this variation only, that the non-assenting underwriters are entitled to share in the 100,000*l.* after payment of the plaintiffs' costs in the damage action.

The owners of the *Worsley Hall* and the assenting underwriters appealed.

Aspinall, K.C., *Dunlop*, K.C., and *A. Bucknill* for the appellants.—Order XII., r. 24, does not give the non-assenting underwriters the right to intervene, for this is not an action *in rem*, where the bail or proceeds of sale are in court. Here there is no bail or fund in court, but merely an undertaking to provide bail, a mere contract of suretyship. The judgment is *in personam*, and the non-assenting underwriters have no claim against any *res*. Secondly, the non-assenting shareholders refused to join in the action and not entitled to the fruits of the appellants' diligence; nor are they bound by the judgment. The owners of the *Worsley Hall* are claiming as bailees, and can put forward such claims on behalf of the various cargo owners as they please. They referred to:

The Africano, 70 L. T. Rep. 250; 7 Asp. Mar. Law Cas. 427; (1894) P. 141;
The Dupleix, 12 Asp. Mar. Law Cas. 122; 106 L. T. Rep. 347; (1912) P. 8;
The Winkfield, 85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 259; (1902) P. 42;
The Marpessa, 66 L. T. Rep. 356; 7 Asp. Mar. Law Cas. 155; (1891) P. 403.

Stephens, K.C., and *Balloch*, and *Raeburn*, K.C., and *R. F. Hayward*, for non-assenting underwriters, were not called upon.

Bankes, L.J.—The short point raised on this appeal is whether a person, who has sued as owner of a vessel and cargo and has established the liability of the defendant to pay damages in respect of ship and cargo, can exclude certain cargo owners from any share in the benefit of that judgment, because they refused or elected not to take their share in the expenses connected with establishing the liability. That really is the issue, although it seems to have been decided in rather an irregular and informal way, but I think the decision was asked for by all parties, and it was right that the learned judge should have decided the point under the circumstances in which it was brought before him. [His Lordship stated the facts and continued:] The position of the plaintiffs was that they were owners of the *Worsley Hall*, and had a right, therefore, to maintain an action for damages in that capacity. They also claimed as owners of the cargo. They were not, in fact, owners of the cargo, but merely bailees; but as bailees they had a right of action against the wrongdoer, and the measure of the damages would be the value of the cargo or, of course, if they desired it and if they had some special cause of action as bailees, they might have limited their claim either in the indorsement on the writ or in the statement of claim to a limited claim—not a claim to the value of the cargo, but a limited claim to some damage to themselves by reason of the damage to the cargo. But they did not take that course. The action proceeded and continued to the end with the full claim for damages as bailees of the whole of the cargo. No amendment was ever made to the writ; no limitation was ever included in the statement of claim, and the action began and continued in that form. Certain of the underwriters did not agree to join in the action, in the sense that they did not agree to pay any of the expenses; but they never agreed to withdraw from the action. They never agreed that their claims were not included in the action. Their position was: "We are not prepared to allow our claims to be put forward by Messrs. Hill, Dickinson, and Co., nor are we prepared to pay part of the costs of the action, but we insist upon our right to bring in our claims in this action by our own solicitors." I gather that from a letter of the 26th Feb. 1921, in which Messrs. Hill, Dickinson, and Co. wrote to Messrs. Thomas Cooper and Co., who were the solicitors representing some of the non-assenting underwriters, in these terms: "As you know, Messrs. Weightman, Pedder, and Co. took over the claims of certain of the underwriters who did not consent to join in the legal proceedings and you represent other underwriters on cargo who took up the same position. We suggested without prejudice to this question that all claims should be assessed and the point subsequently dealt with by the judge, and you assented to this course, but Messrs. Weightman, Pedder, and Co. did not. We accordingly handed them the papers relating to the claims of the underwriters who had consulted them and they have been separately filed through Messrs. Botterell and Roche. . . . We intend at the reference to object to the claims represented by Messrs. Botterell and Roche on the ground that the parties interested in putting forward the claims declined to ratify the proceedings which had been taken on their behalf by the shipowners. As your clients are in the same position we shall take the same point, but we think the proper course will be to agree, as we did with you, that all claims should be assessed by the registrar without prejudice to this question, and it can then be afterwards decided." That seems to me to have been a most reasonable proposal.

The matter then came before the registrar. He was directed by the order of the Court of Appeal, which had been affirmed by the House of Lords, to ascertain the damages which the defendants were liable to pay to the plaintiffs, suing in the capacity in which they were suing, and the only way in which he could do that was to ascertain the proper amount of the claims which were brought before him. Those claims were the claim of the shipowners, the claim of the people who were called the assenting underwriters, and the claim of the people who were called the non-assenting underwriters. At the reference, as one would expect, the question was raised which had been raised in Messrs. Hill, Dickinson's letter, although it was suggested the matter should not come up for decision till the matter came before the judge. But it was argued by counsel and the registrar was apparently invited to come to a decision as to whether plaintiffs had any right to exclude the non-assenting underwriters from presenting their claims, and the registrar decided that the plaintiffs had no such right. The plaintiffs moved by way of objection to the registrar's report, and it would

seem from the notice of appeal that the only point to which objection was taken was that the registrar had said that the non-assenting underwriters were entitled to participate. There is a long notice of appeal, but I think the substance of it is contained in this paragraph: "That the owners of the *Worsley Hall* and the assenting underwriters were entitled to the full fruits of the bail and judgment which they obtained at their own risk and expense, and they ought not to be deprived thereof by the non-assenting underwriters who deliberately elected not to join in the action."

When the matter came before the learned judge he found ground for supporting the registrar's view by referring to Order XII., r. 24, and saying that in his view these non-assenting underwriters had a right under the circumstances of this case to intervene. But it does not seem to me necessary to decide the case on those grounds, or to look at the matter from any other point of view than what the position of the plaintiffs was. It is true it was not a representative action in the ordinary sense of the word, but it was a case of persons who were claiming as bailees—and they were bailees—the full value of all the cargo on this vessel and saying at the same time: "When we get the money, which is limited to 100,000*l.*, which is not sufficient to meet all claims, we intend to pay it over to a certain class of cargo owners and to exclude the other class, because they would not help us by sharing in the expenses of the litigation which was necessary to establish the liability." In my opinion, when once that fact comes to the knowledge of the court, it is the court's duty to stay the distribution of this fund until the rights of the parties have been established and until it has been determined whether or not the plaintiffs had the right they claimed; and that is really in substance what happened.

Mr. Butler Aspinall and Mr. Dunlop have argued that they are entitled to a judgment, and that it must be left to some future occasion to decide what is to be done with the money. That would be so, it seems to me, but for the fact that from the time the question first arose it has always been treated between the parties as a matter that had to be decided by the judge after the registrar had reported upon the amount of the damages. In my opinion, the court should treat this question as though with the assent of the parties the judge was asked to decide how this money had to be distributed, and to decide at the same time as he either affirmed or rejected the registrar's report.

Now all the registrar has done is to decide, for the reasons he has given in his report, that the non-assenting underwriters were entitled to participate, and, having done that, all he reports is that the claim of the owners of the *Worsley Hall* has been allowed at 61,518*l.* odd, and the claim of the cargo owners at 181,487*l.* odd, and that from this amount has to be deducted 96,000*l.* odd, the amount realised by the sale of the salved cargo. I do not think he professes to deal with the question as to which of the cargo owners' claims must be considered in reference to the amount to be deducted. He leaves that to be dealt with by the persons who have charge of this matter on behalf of all the cargo owners, and he does not in terms, as it seems to me, decide that as between the persons entitled to share in this fund that the amount is to be distributed *pro rata*. When the matter came before the learned judge, he affirmed the registrar's view that the non-assenting underwriters were entitled to participate. I do not think he in terms says that the amount is to be distributed *pro rata*. What he says is: "When they (the non-assenting underwriters) intervene they must take the recovery as they find it." Then he does say this: "The first charge upon the 100,000*l.* will be the shipowner's costs of recovery, so far as they have not been paid by the defendants. But in the balance the non-assenting underwriters are, in my judgment, entitled to participate," and it is, as it seems to me, from that point only that the appeal to this court is made. But it is said that in the Admiralty Court a judgment such as the learned judge has now pronounced is a decision that the cargo owners and the shipowners will participate rateably. I assume it is, and I see no reason to think that that view is wrong. That is not appealed from, but Mr. Dunlop has contended that it has not yet been decided, or that it ought to be decided hereafter. If, however, that is the correct view of the learned judge's judgment, I see no reason to doubt that that part of it is right as well as the part in which he agrees with the registrar, and I will only, in conclusion, refer to this sentence in the judge's judgment, which seems to me to sum up the result. He says: "In principle, the result is only what would have followed if no bail had been obtained in respect of cargo and after judgment in an action in respect to the ship alone, the owners of the *Joannis Vatis* had obtained a decree of limitation, and paid the limited amount into court. Under a decree so made, all the cargo owners would have been entitled to appear and become parties to the limitation action, and to file claims." In other words, it is not the practice of the Admiralty Court to allow money to be distributed until the claims on the money have been dealt with. That seems to me to be what was done in *The Glamorganshire* (59 L. T. Rep. 572; 6 Asp. Mar. L. Cas.344; 13 App. Cas. 454), and I think it is right. I see no reason whatever to interfere with the course taken by the learned judge, and this appeal must be dismissed.

Scrutton, L.J—I agree that this appeal must be dismissed, but, as these proceedings are a little complicated, I think it is best to express my judgment in my own way. The exact point on the notice of appeal which we have to decide is, as I understand, whether certain persons described as non-assenting underwriters—which is commercially accurate but technically quite wrong, because the Admiralty Court has nothing to do with underwriters—whether the cargo owners to whose rights the underwriters were subrogated have any right to share *pari passu* in the sum of 100,000*l.*, which sum was received from certain persons who have given a bail bond. I mention that as the only point to be decided, because Mr. Dunlop has raised a number of other points which are not in the notice of appeal, and which I am not purporting to decide, though I have a strong opinion on some of them.

The case arises in this way. [His Lordship stated the facts.] The question is, amongst whom is the bail in 100,000*l.* to be divided? In my view, the bail, when recovered, would be a substitute for the *res*. I am not expressing any opinion as to whether it would be possible to enter personal judgment against the owners of the Greek ship

for the amount of the damages which the registrar has found, or as to what steps the owners can take to limit their liability at all. But obviously the question will arise as to how this 100,000*l.* is to be divided. In my view the practice of the Admiralty Court has been, and should be, that when it has a fund under its control it should take care that it is divided among all the proper claimants on the record, and it should not let the fund be paid out to any party until it has been seen that all people who may properly claim on the fund have put forward, or have had an opportunity of putting forward, their claims.

I referred during the argument to the opinion expressed by the Privy Council in *The Glamorganshire* (59 L. T. Rep. 572, 6 Asp. Mar. Law Cas. 344; 13 App. Cas. 454), which seems to me to confirm what I have stated. In that case the owners of the cargo sued. Their interest was as shippers under a bill of lading which they had pledged for nearly the value of the goods with a bank, and the bank was not a party. What was the court to do with the fund when recovered? The Privy Council said "that the plaintiffs have an interest to maintain the suit to recover the money"—that is, the whole of the money—"for the benefit of those persons who on inquiry are proved to be entitled, and under circumstances in which the money will be not be paid out till the owners of *The Glamorganshire* are completely freed from all claims." That is to say, the money must be so appropriated that the defendants are not to be hit by further claims; and in my opinion the money must be so appropriated that no persons who have a claim on the fund can be shut out from sharing it.

What is the interest of the plaintiffs in this cargo? It is correctly said that they have a right to sue as against the wrongdoer for the full amount as bailees. That follows from the decision in *The Winkfield* (85 L. T. Rep. 668, 9 Asp. Mar. Law Cas. 259; (1902) P. 42). The leading authority cited in that case is the judgment of the Court of Common Pleas in *Turner* v. *Hardcastle* (1862, 5 L. T. Rep. at p. 750; 11 C. B. N. S. at p. 708): "The defendant is a mere wrongdoer, having no right either under Cooke, the mortgagee, or anyone else. The defendant, therefore, is liable to the plaintiffs for the full value of the goods; and the plaintiffs are liable to Cooke for his proportion." That is to say, in this case the plaintiffs would be entitled to recover the full value of the cargo against the wrongdoers, but would have to account over and would be liable to the owners of the cargo for their proper share. I express no opinion as to what their proper share is, because Mr. Dunlop has some point about general average, which I have not quite understood, and I did not think it was necessary to follow it up.

If I understood the figures correctly the ship put in a claim which the registrar assessed at the sum of 61,518*l.*, the solicitors for the plaintiffs put in cargo claims which were assessed at 163,000*l.* odd, and that 163,000*l.* included a large percentage of claims by underwriters who had assented and were ready to bear their share of the costs, and some proportion of underwriters who had not assented—the reference does not distinguish which. But the registrar stated that, against the total of 181,000*l.*, 96,000*l.* would have to be deducted as the value of the cargo salved and sold as damaged. He did not in any way apportion to which claims that salved cargo related. While, therefore, as against the fund it would reduce the amount claimed, as between the claimants the registrar's report did not in any way state what was the amount payable to each claimant.

It is not quite clear, exactly, what happened at the reference. As between some parties there had been a sort of agreement beforehand that the judge was to determine who was to share. Others parties did not agree to that. Then, apparently, in some way the point was taken before the registrar that certain non-assenting underwriters were not entitled to share in the 100,000*l.* at all, and the registrar gave a formal report, saying: "I find that there is due to the plaintiffs in respect of their claim the sum and interest as stated in the schedule." The formal report does not in any way decide the point which is the subject of this appeal. The registrar, however, gave some reasons for his report, which undoubtedly show that in his view, though it is not included in the formal report, he was deciding that the non-assenting underwriters were entitled to share in the 100,000*l.* Thereupon the shipowners appealed to the judge, and one of their reasons is that which has been read by my Lord, that the owners of the *Worsley Hall* and the assenting underwriters were entitled to the full amount of the bail, and that the registrar was wrong in including the non-assenting underwriters. The learned judge dismissed the appeal, and the view he seems to have taken was that on the 100,000*l.*, when recovered, the first charge would be the cost of recovery—which would be natural for a bailee accounting for a sum—but in the balance the non-assenting underwriters were in his view entitled to participate. It is against that part of the order declaring that the non-assenting underwriters were to be allowed to share in the 100,000*l.* that the appeal is brought, and that is the point we have to decide.

In my opinion it should be decided against the shipowners on the ground that it is the duty of the court, when by its process a sum has been recovered in the Admiralty, to see that it goes to the persons entitled to claim. It is the same principle, in my view, as is stated in *The Glamorganshire* (*sup.*), and it appears to be a principle which does justice between the parties concerned. When I heard Mr. Dunlop argue that the money should be paid to his clients, the shipowners, and that then they would first appropriate the whole to their claim and the cost of recovery, and then leave any balance to be divided, leaving the non-assenting underwriters out in the cold, it struck me as so manifestly unjust that if it were not already the practice of the Admiralty Court it was desirable it should be made its practice as soon as possible. But, in my view, it is the practice of the Admiralty Court, when it recovers a sum in lieu of the *res*, to see that all persons having a claim on the fund have the amount divided between them, and in my present view, though I have not heard the matter fully argued, it should be divided between them *pari passu*. Further than that I do not express any opinion, but I certainly must not be taken as giving any assent to the idea that the shipowners' claim for damages is to be alone first considered, and that the cargo owners are only to come in when the shipowner's claim has been fully satisfied.

For these reasons I think the contention that the non-assenting underwriters should not be allowed to share in the 100,000*l.* recovered from the

bail is erroneous, and that the appeal should be dismissed.

ATKIN, L.J.—I agree, but I think it advisable to add my reasons because of the arguments addressed to us, and because of the somewhat unusual complications that are to be found in this case.

This action was commenced in what is quite common form in the Admiralty Division by a writ which does not specify the names of any of the parties. It is between "the owners of the steamship *Worsley Hall* and cargo" and "the owners of the steamship *Joannis Vatis*." That is a proper mode of issuing a writ, as was held in *The Assunta* (86 L. T. Rep. 660; 9 Asp. Mar. Law Cas. 302; (1902) P. 150) which decided that the old practice of the Admiralty prevailed notwithstanding the provisions of the rules in the Judicature Act. The difference in the practice has led to confusion in this case, because it has been the contention on the one hand that "the owners of the ship and cargo," if written out at large, would include, first, the names of the shipowners, and secondly, the names of all the owners of the cargo and the different items of cargo that were damaged. The other view is that in using the words "the owners of the ship and cargo" only one set of persons were meant to be described, and those were the owners of the ship suing also as the owners of the cargo. It has been held by the learned judge, as he says by the common assent of the parties who argued it before him, that it was the latter view only that was intended, and that the owners of the ship intended to sue also as owners of the cargo. I think that is probably right, because the solicitors appeared to have had no authority to act for anybody at the date of issuing the writ except the owners of the ship, and they had a right to sue as owners of the cargo by reason of their being bailees of the cargo. Therefore the right view is that the writ was issued by the shipowners claiming in respect of their own ship, and claiming also by reason of their special property as the bailees of the cargo, and they eventually by negotiation procured the owners of the Greek ship to put in bail to the extent of 100,000*l*. Now when a bailee sues he is entitled to recover the full value of the article converted or the full amount of the deterioration of the value of the chattel wrongfully injured. It is not necessary to decide in this case whether he can confine himself, if he sues, to the value of his own particular interest or the deterioration in the goods to the extent to which he himself has suffered. It is plain, at any rate, that he is entitled to claim, and he clearly could recover in the action, the full value of the damage; and it is plain in this case that it is upon that footing that the shipowners sued. At one time they suggested the damages would be 150,000*l*., and it is sufficient to say that early in the action they sought to induce the other cargo owners, as they described them, to join in the action; and it is plain that they did so upon the footing that these cargo owners were entitled to share the expenses of the action, whether they won or it failed, and that could only have been on the footing that the action was brought to recover the values in which they would be interested. In other words, the claim went beyond the shipowners' own special interest, if they had any, in the fund. Under those circumstances the action was fought, some cargo owners accepting the invitation and some refusing, and the decree was made eventually by this court pronouncing for the claim of the plaintiffs. That claim was that the damages to ship and cargo should be assessed, and the decree went on to provide that the defendants should be condemned "in the said damage" and that "the said damage" should be assessed by the registrar and merchants.

It appears to me, therefore, that it clearly was the duty of the registrar to assess the whole of the damage to the cargo in respect of which the plaintiffs, as bailees, were suing. So far no question would arise, but when that order was made the cargo owners, who had not responded to the invitation to share in the expenses, put forward a claim, first to be represented at the assessment, and secondly to share in the proceeds of the judgment, and that claim was, it appears to me, repudiated by the plaintiffs. The rights of the bailee have been plainly determined, so far as this court is concerned, by the memorable judgment of the late Lord Collins in *The Winkfield* (85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 259; (1902) P. 42), and I need only read this passage, which, I think, sums up the whole of the law, so far as it is necessary to this decision: "As between bailee and stranger, possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee, the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor."

It appears to me to be plain that bailees, having recovered on the footing of the full amount of the damage done to the cargo, would have to account to the bailors for what they had received over and above their own interest as bailees. But the contentions that have been put forward by the bailees in this case were, first, that the registrar was not to consider in the assessing of the damages the claims that were made by the cargo owners who had in the course of the trial refused to make themselves at that stage responsible for the costs; secondly, that even if the whole of the damages were to be taken into account by the registrar, the non-assenting cargo owners were not to have any interest in the amounts that were so recovered; and, thirdly, they contended—at any rate, they contended it before us—that in any case, even if the non-assenting cargo owners had any rights, the proper procedure was to hand over the whole of the money to the bailees, who were repudiating the right of the non-assenting cargo owners to receive anything, and then leave them to formulate their rights against the bailees to account to them. I think the plaintiffs, the bailees, were wrong in every one of those contentions. It appears to me plain that it was the duty of the registrar to assess the whole of the damage as he had been ordered to do, and it appears to me also plain that the non-assenting cargo owners, being bailors, had a right to have the bailee account to them for so much as he would receive in respect of claims made in respect of their cargo. Those matters seem to me to be beyond dispute. One could well understand a man saying, this was an action that involved

some risk, and by your standing aside you have shown that you were prepared to take the benefits and have not been prepared to shoulder the burdens, and to some extent that is true. But, on the other hand, the bailor may say, you chose to sue as bailee for the whole of the damage, you recovered a sum of money, and if you did recover anything for me, then I have got my rights at law against you. I think that is the true view, and that the bailors cannot be shut out because they refused to bear part of the costs.

The question as to whether the proper procedure has been adopted is to my mind the only substantial question in this case—it is the only question on which there was any doubt—but on considering it I think we ought to have no hesitation in deciding that the proper procedure has been adopted. A sum of money is available to the bailee; it is not yet in court, but it undoubtedly represents the whole of the sum of money which can be enforced against the defendants in respect of the whole damage to the cargo, and when the bailee receives it he will be under an obligation to account to all the cargo owners.

Before he has received it, and before the court even has taken the necessary steps to enable the money to be paid, or given authority to him to collect it, he repudiates before the court the obligation to recognise the rights of his bailors. Under those circumstances it seems to me impossible that any self-respecting court could act in such a way as to enable that bailee to receive the whole of the money as long as the court had any control over it at all, and it appears to me perfectly proper that the court should allow the claimants against the bailee to come to the court to say that they seek in that action to establish their claim. That is what has been permitted in this case. If the sum of money were in court, such claim would be made under ordinary circumstances in the common law courts, and possibly an issue might be directed in respect of each claimant, or a general inquiry might be directed, and I think it is perfectly right that the registrar under the direction of the judge or with the assent of the judge, should have undertaken such inquiry in the present circumstances. I am not quite satisfied that the learned judge's decision under Order XII., r. 24, was necessary or even well-founded. That rule provides that: "In an Admiralty action *in rem* any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the *res* under arrest, or in the fund of the registry." I can understand that may apply where the claimant would come in the nature of a defendant, who would, therefore, ordinarily enter an appearance; and that would, no doubt, apply in the ordinary limitation suit, where the plaintiff is the person who provides the money, and where the writ is directed to all persons who have claims in respect of the damage in respect of which liability is sought to be limited. In that case the claimants are strictly and in form in the nature of defendants. I am not at all sure that that rule applies where claimants come in who really are claiming as being interested in what has been recovered by the plaintiffs. But that is merely form, and I am quite sure that there is ample jurisdiction in the court to give effect to claims which are made to the court to share in the fund, or the equivalent of the fund, before the money is released to persons whom the court may consider have no right to it all. Here it is quite plain that the amount for which bail has been found cannot be made available at all except by permission of the court, and I think the court has ample jurisdiction to say that it will have an inquiry as to who are the persons beneficially, and therefore truly, entitled to this money, and will only give permission to enforce the bail bond to the persons who are beneficially entitled to receive their money.

The only other point is, upon what terms are they entitled to receive it? It appears to me that the learned registrar meant to decide, and I think he will decide, that all the cargo claimants were entitled to share *pari passu*. In one event he says the claimants' solicitors are "estopped from refusing, at the eleventh hour, to allow the non-assenting underwriters to share *pari passu* in the fund available for all claimants." That means that the shipowners, in respect of the damage to the ship, and the cargo owners, in respect of the damage to the cargo, share in the fund available for all claimants. I think that the learned judge clearly was of the same opinion. He says: "The first charge will be the shipowners' costs of recovery, and in the balance the non-assenting underwriters are entitled to participate." That must mean, I think, *pari passu*, especially as he then makes a reference in principle to the proceedings by analogy for limitation of liability where, as we all know, the fund is under the statute distributed rateably to the claimants.

It appears to me, therefore, that the judgment of the learned judge below was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the respondents, *Botterell* and *Roche*, for *Weightman, Pedder*, and *Co.*, Liverpool; *Thomas Cooper* and *Co.*

Monday, Dec. 19, 1921.

(Before Lord STERNDALE, M.R., and ATKIN and YOUNGER, L.JJ.)

THE RAN; THE GRAYGARTH. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Limitation of liability—Tug and tow belonging to same owners—Tow navigated by tug—Collision of tow with another vessel—Negligent navigation of tow by tug—Owners liable on tonnage of tow—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

Where a tug and her tow belong to the same owners, and the tow is brought into collision with a third vessel by the negligence of the tug, the liability of the owners of the tug and her tow is not limited to a fund calculated upon the tonnage of the tug alone, notwithstanding that there was no negligence on the part of any person on board the tow. The owners are liable in respect of a sum calculated upon the tonnage of the tow.

A barge was damaged in collision with another barge; the latter barge at the time of the collision was being towed by a tug which belonged to her owners. In an action in rem *against the barge, her owners*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

were held liable in personam *on the ground that the collision was caused by the negligence of their servants on board the tug. The owners of the tug and tow then claimed to limit their liability under sect.* 503 *of the Merchant Shipping Act* 1894 *on the tonnage of the tug alone. Hill, J. held that they were entitled to do so.*

Held, that the judgment of Hill, J. should have been an ordinary judgment in rem *against the owners of the tow because of the improper navigation of the tow through the acts of the defendants' servants on the tug and that the tow and not the tug was the vessel in relation to which liability should be limited under sect.* 503 *of the Merchant Shipping Act* 1894.

Decision of Hill, J. reversed.

Appeals from Hill, J., in two actions, the first by the owners of the barge *Para* against Messrs. Rea, Limited, owners of the barge *Ran* and also of the steam-tug *Graygarth*, for damages for the sinking of the *Para* by collision with the *Ran*, and the second by the defendants in the first action against the plaintiffs in that action to limit their liability to 8*l.* per ton of the vessel whose navigation was at fault, under the Merchant Shipping Act 1894, s. 503.

The Merchant Shipping Act 1894, s. 503, sub-s. 1, provides :

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 . . . (*d*) Where any loss or damage is caused to any other vessel, or to any goods, merchandise or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship ; be liable in damage 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.

The following is taken from the written judgment of Hill, J. in the Admiralty Division :

" The plaintiffs in this limitation suit are Messrs. Rea, Limited. They are owners of the tug *Graygarth* and of the vessel or dumb-barge *Ran*. On the 29th Oct. 1919, while the *Graygarth* had in tow the *Ran* and two other craft in the river Mersey, the *Ran* was brought into collision with the laden barge *Para*, and the *Para* was sunk. The owners of the *Para* and her cargo suffered damage to the amount of about 3000*l.* By a judgment of this court Messrs. Rea, Limited have been condemned, in those damages. By the present action they seek a decree limiting their liability to 8*l.* per ton on the tonnage of the *Graygarth*.

" The defendants contend that Messrs. Rea are not entitled to so limit their liability, but are only entitled to limit it on the basis of the aggregate tonnage of the *Graygarth* and the *Ran*. The tonnage of the *Graygarth*, ascertained in accordance with the Merchant Shipping Acts, at 8*l.* per ton equals a sum of 1131*l.* ; and the tonnage of the *Ran*, ascertained in accordance with the Act, at 8*l.* per ton equals about 3000*l.* There has, so far, been no judgment against the *Ran*, and no decision that Messrs. Rea, are liable as owners of the *Ran*. At the trial that question was not discussed. The proceedings in the damage action were as follows : On the 5th Dec. 1919, the writ *in rem* against the owners of the barge *Ran* was issued. An appearance was entered. I infer there was an undertaking to put in bail, as a bail bond was executed on the 21st July 1920, the day following delivery of the statement of claim in the limitation action. The statement of claim in the damage action alleged that the collision was caused by the negligent navigation and (or) management of the *Ran* and (or) her tug or the flotilla of barges in which she was, by the defendants or their servants. The decree, dated the 10th Feb. 1920 was as follows : 'The judge doth pronounce the collision in question in this action to have been occasioned by the fault or default of the master and crew of the tug *Graygarth*, which was towing the barge *Ran*, and for the plaintiffs' claim for damages in consequence thereof ; and doth condemn the said defendants, the owners of the said barge *Ran*, in the said damages and costs.'

" That was a judgment *in personam* only against the persons who were the owners of the *Ran*, namely, Messrs. Rea. It does not condemn the *Graygarth*, against which no writ *in rem* was issued. It did not condemn the *Ran* or bail. It found fault in the master and the crew of the *Graygarth*, and therefore made it clear that Messrs. Rea, were liable as owners of the *Ran* for the fault of their servants on board the *Graygarth*. In my delivered judgment I said : I find fault on the part of the *Graygarth* and the defendants, who have appeared, being the owners of the *Graygarth*, there must be judgment for the plaintiffs against the defendants.

" Such being the judgment, the question whether Messrs. Rea, as owners of the *Ran*, were liable, has never been decided. As to whether it is open to the owners of the *Ran* now to raise the question in a proper proceeding, I say nothing. But in this action the plaintiffs, Messrs. Rea, are entitled to the relief which they ask for, namely, that their liability as owners of the *Graygarth* be limited to 8*l.* per ton on the tonnage of the *Graygarth*. There will be a decree that Messrs. Rea, Limited, as owners of the steam-tug *Graygarth*, are not answerable in respect of loss or damage to ships, boats, goods, merchandise, or other things occasioned by the said collision between the barge *Ran*, while in tow of the *Graygarth*, with the barge *Para* on the 29th Oct. 1919, beyond the aggregate amount of 8*l.* per ton on the tonnage of the *Graygarth*."

His Lordship gave leave to appeal. The owners of the *Para* appealed.

Inskip, K.C. and *J. B. Aspinall* for the appellants. —In the collision action the learned judge should have entered judgment *in rem* against the owners of the *Ran* and their bail. The collision was caused by the negligent navigation of the *Ran* by those on board the tug, who were the servants of the owners of the *Ran* :

The Quickstep, 6 Asp. Mar. Law Cas. 603 ; 63 L. T. Rep. 713 ; 15 Prob. Div. 196 ;
The Devonshire, 12 Asp. Mar. Law Cas. 314 ; 107 L. T. Rep. 179 ; (1912) A. C. 634.

The fact that the persons responsible for the negligence were on the *Graygarth* and not on the *Ran* does not excuse the *Ran*, as she was being navigated by her owners' servants on the *Graygarth* :

The Warkworth, 5 Asp. Mar. Law Cas. 194 ; 49 L. T. Rep. 715 ; 9 Prob. Div. 20 ;
The Umona, 12 Asp. Mar. Law Cas. 527 ; 111 L. T. Rep. 415 ; (1914) P. 141.

In *The American and The Syria* (2 Asp. Mar. Law Cas. 350; 31 L. T. Rep. 42; L. Rep. 6, P. C. 127) the facts were special, and that case is distinguishable. If the decree should have been against the *Ran*, the limitation proceedings should be in respect of her tonnage, and not the tonnage of the *Graygarth*.

Dunlop, K.C. and *Noad* for the respondents.—Those on board the *Ran* were not negligent; the negligence was not the *Ran's*, but that of those on board the *Graygarth*; the *Graygarth* was to blame, and judgment was rightly entered against the owners of the *Graygarth in personam*. The case is governed by *The American and The Syria* (*sup.*). Under the Merchant Shipping Act 1894, s. 503, it is the wrong-doing vessel, in this case the *Graygarth*, whose tonnage must be considered; the *Ran* did nothing wrong, and it is immaterial that she had the same owners as the *Graygarth*. The observation of Evans, P. in *The Umona* (*sup.*) were *obiter*; and in *The Warkworth* (*sup.*) the tow herself was at fault in not answering her helm.

No reply was called for.

Lord STERNDALE, M.R.—This case came before us during the last sittings on appeal from a judgment or decree in a limitation suit by Hill, J., and the circumstances out of which the matter arose may be stated, I think, fairly shortly. The collision action was brought by the owners of a barge named the *Para*, and the owners of her cargo, for damages sustained consequent on the defendants' barge *Ran* negligently colliding with the plaintiffs' barge in the river Mersey. Therefore it was an ordinary action *in rem* against the owners of the *Ran*. The writ was issued on the 5th Sept. 1919, and on the 30th Oct., the defendants' solicitors had given an undertaking to provide bail in respect of the claim. As a matter of fact the actual bail was not given until after the judgment in the collision action, but that, in my opinion, is immaterial. It is, I think, everyday practice that where an undertaking has been given to give bail, the actual bail is not given until after the decision in the action, and the matter must be taken as if the bail was given at the time at which the undertaking was given.

The action was brought for damages consequent on the defendants' barge *Ran* negligently colliding with the plaintiffs' barge, and the defendants are the owners of the *Ran*. The indorsement was made upon the writ by the defendants' solicitors: "We accept service herein, and we undertake in due course to give bail." Therefore they repeat the undertaking that had been given earlier before the writ was issued. Then the statement of claim was delivered, and the allegation was that the plaintiffs "have suffered damage by reason of a collision between their barge *Para* and the barge *Ran*, which was solely caused by the negligent and improper navigation"; then there follow a lot of and (ors), and then "or the flotilla of barges in which she was by the defendants or their servants as hereinafter appears." Then it states the facts, and in the charge it says: "Those on board the *Ran* and (or) her tug negligently" did a number of things—it is the ordinary statement of claim. The action went for trial, and it appeared that the *Ran* with a number of other barges was in tow of a tug called the *Graygarth*, and the *Graygarth* was a tug belonging to the same owners as the *Ran*. Whether they were the owners of the rest of the flotilla of barges I do not know, and that does not matter, but then, as they were coming up the Mersey, in consequence of the negligent navigation of the tug, the *Ran* was brought into collision with the plaintiffs' barge. The action was brought against the owners of the *Ran*, and as owners of the *Ran*, they, as represented by their bail, for which the undertaking had been given, could only be responsible if the *Ran* was improperly navigated, and by such improper navigation caused the collision. As owners of the *Graygarth* they might be liable also, but in the action in which they were sued as owners of the *Ran*, they could, as owners of the *Ran*, only be responsible if the *Ran* was improperly navigated.

The learned judge tried the case, and found that the plaintiffs' barge and her tug were not to blame, and that the defendants' barge was not to blame with regard to those who were on board of her. I do not know really how many were on board, or what they were doing, but we are told there was somebody on board the *Ran*, and she was abreast of another barge called the *Halibut*, and all the navigation she could possibly do was to follow the tug, and what this person or these persons on board the *Ran* were doing we do not know, or at least I do not, but in consequence of the negligent navigation of the *Ran*, the *Ran* was brought into collision with the plaintiffs' barge. The learned judge held that the defendants were responsible, and liable for that negligence because they were owners of the tug, and therefore the persons on board and navigating the tug, and also navigating the flotilla of barges of which the *Ran* was one, were their servants, and the decree was made in, I suppose, the ordinary form, and I am told that it was approved by the solicitors on both sides. But it strikes me as rather an odd form, because the learned judge says he meant it, not as a judgment *in rem* in the ordinary course against the defendants as owners of the *Ran*, but as a judgment *in personam* against them, because the master and crew of the *Greygarth* were their servants. The decree runs thus: "The judge doth pronounce the collision in question in this action to have been occasioned by the fault or default of the master and crew of the steam-tug *Graygarth* which was towing the barge *Ran* and for the plaintiffs' claim for damages in consequence thereof. And doth condemn the said defendants the owners of the said barge *Ran* in the said damages and in costs." The condemnation of them, as stated by the learned judge, had nothing to do with them as owners of the barge *Ran*, and I cannot see why these words "the defendants the owners of the barge *Ran*" were put into the decree, but the learned judge says that was his intention.

The defendants in that action subsequently began a limitation suit, asking that their liability should be limited to the value of 8*l.* per ton of the tug *Graygarth*, because they said, "there is no judgment against us in respect of any improper navigation of the *Ran*; the ship which was improperly navigated and which caused the collision was the *Graygarth*, and therefore the *Graygarth* is the ship according to which our liability ought to be measured under sect. 503 of the Merchant Shipping Act 1894." That was the position when the case first came before us, and as we thought the form of the decree was curious and to a certain extent embarrassing, and as there was a serious question whether the learned judge ought not to have given judgment against the *Ran*

in the ordinary way, and the owners of the *Ran in rem*, and against their bail, we gave leave to appeal against the judgment in the collision action in order to see whether the decision of the learned judge was right on the point that there ought to be judgment against them in the ordinary way as owners of the *Ran*. Now we have heard the arguments on that point, and in order that the case might not go down for a new trial certain admissions were made on the first hearing. They appear in the record, and they are these—that there was no personal negligence by anybody on board the *Ran*, that the collision damage was caused by the negligence of those on board the tug, or some of them; and that the barge and the tug belonged to the same person, and that the control of the navigation of the tug and flotilla was in the tug.

We have heard the appeal on these admissions, and on what appears in the judgment of the learned judge. In my opinion the judgment as given was wrong in this sense, that it ought to have been a judgment given against the owners of the *Ran* in the ordinary way, and against their bail, on the ground that the *Ran* was improperly navigated, and that the improper navigation of the *Ran* was improper navigation for which the defendants were responsible; and in that case, of course, the *Graygarth* would not be the ship according to which the liability would be measured, but it would be the *Ran*. Butt, J. said as long ago as 1890, in the case of *The Quickstep* (6 Asp. Mar. Law Cas. 603; 63 L. T. Rep. 713; 15 Prob. Div. 196) that in any such cases "the real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam-tug," and he cites with approval the decision of an American judge, in the case of *Sturgis* v. *Boyer*, who points out (24 Howard's Rep. at p. 122) that even if the crew of the tow was on board, that does not make any difference if the master and crew of the tow are not expected to participate in the navigation of the vessel. Now in this case it seems to be quite clear that those on board the tow were not doing so, and that their navigation was controlled by the tug; in fact, that the tug navigated the tow. What, then, is the position where the tug and the tow belong to the same owners? In my opinion, the tow is improperly navigated by the servants of the owners of the tow, although these servants may not be upon the tow at all, but upon the tug. If they are the servants of the owners of the tow, and are navigating the tow, then the owners of the tow are responsible for the negligence of the tow, and that is the vessel they are improperly navigating. The tug may be improperly navigated, but that does not prevent the tow being improperly navigated. It seems to me that that is the result of the cases cited—*The Quickstep* (*sup.*) and *The Umona* (12 Asp. Mar. Law Cas. 527; 111 L. T. Rep. 415; (1914) P. 141). In *The Umona* it may be a dictum, but it was a direct statement of the opinion of Sir Samuel Evans, P. in that case. It seems to me ordinary law and logic that if you have got a vessel which is in tow, and that vessel is improperly navigated by your servants, it does not matter where your servants are. If they are really the persons controlling the navigation, you are responsible for their doing it improperly. I should have thought that was quite clear on principle, and I think it is clear on authority. I think the cases of *The Devonshire* and *The Leslie* (12 Asp. Mar. Law Cas. 314; 107 L. T. Rep. 179; (1912) A. C. 634) in the House of Lords in 1912 show that, with what I have read from *The Quickstep* (*sup.*)

But there is said to be a decision against that, and that is the case always cited as *The American and The Syria*, although that is not its proper name, which is *Union Steamship Company* v. *The Aracan* (*Owners*) (2 Asp. Mar. Law Cas. 350; 31 L. T. Rep. 42; L. Rep. 6, P. C. 127). In that case the circumstances were odd. The *Syria* was a disabled vessel. The *American* was a tug belonging to the same owners, and without any orders from the owners, and without being asked to do so by the master of the *Syria*, the *American* took in tow, and while in tow an accident happened, both the *American* and the *Syria* coming into contact with another vessel. The Privy Council held that the owners of the *Syria* were not responsible for the negligence of those on board the *American*. I doubt very much if they had present to their minds the question whether the owners of the *Syria* were not responsible because those on board the *American* were their servants, and engaged by them for the ordinary navigation of the *American*. What they were discussing was which was in control. But as a matter of fact, they did refer to the very special circumstances in which the *American* took the *Syria* in tow. They said this, after going through a number of cases (31 L. T. Rep. at p. 51; L. Rep. 6 P. C. at p. 133): "The master of the *American* appears to have undertaken to tow the *Syria* under circumstances quite exceptional. Their Lordships collect that he determined to take home the *Syria* partly because he thought it was his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of the *Syria's* cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the *Syria*, or having acted in any way under the captain of the *Syria's* control. On the contrary, it would appear that the 'governing power' was wholly with the *American*." That case has been cited in *The Quickstep* (*sup.*) and in *The Devonshire and Leslie* (*sup.*) to which I have referred, and in the latter case Lord Atkinson, who was the only one who referred to that case, said that that meant that those on board the *American*, although generally servants of the owners of the *Syria*, were not in that case acting within the scope of their employment. I do not know whether that was right on the facts or not, but I think that is the explanation of that judgment. If it be not the explanation, then it is contrary, in my opinion, to the principles laid down in the House of Lords some years afterwards in *The Devonshire and The Leslie* (*sup.*). I think that is the explanation, and that was taken to be the correct explanation by the House of Lords and, therefore, in my opinion, that case does not prevent us in any way from following what I think is the ordinary and logical rule, and saying that this collision and damage was occasioned by the improper navigation of the *Ran*, and the improper navigation of the *Ran* was the improper navigation by the servants of the owners of the *Ran* although they happened to be, in fact, on board another vessel, and not on board the *Ran*. I think the judgment should have been an ordinary judgment *in rem* against the

owners of the *Ran* by reason of the improper navigation of the *Ran* through the acts of the defendants' servants on board the *Graygarth*, and that therefore the *Ran* is the vessel which should be alluded to under sect. 503 of the Merchant Shipping Act 1894 as the one in relation to which the liability should be limited, and not the *Graygarth*.

I think therefore that the appeal should be allowed in the collision action, and judgment given in accordance with what I have said. It follows that the decree in the action for limitation in relation to the value of the *Graygarth* is wrong and improper and must be dismissed, and I think it should be dismissed with costs. I think the appellants should have the costs of both appeals and the costs of the limitation action.

Atkin, L.J., stated the facts, and proceeded.—I do not intend to go particularly into the proceedings which have brought the case here, but the question we have now to determine in this action is: Was the judgment right or wrong? Now it appears to me, with great respect, to be wrong because I think that, on the findings of fact of the learned judge, he ought to have held that the *Ran* was to blame, and ought to have condemned the bail on the *Ran* on the ground that the *Ran* was improperly navigated by the servants of the owners, namely, the persons who were navigating the tug. It appears to me, in those circumstances, that the plaintiffs ought to be upheld in their statement of claim that the *Para* was damaged by the wrong navigation of the barge *Ran* by the servants of the owners. I think, for myself, that the principle is established sufficiently by referring to the cases. One is *The Quickstep* (*sup.*), and although it is true that in *The Quickstep*, and I think also in *The Devonshire* (*sup.*), the ultimate decision was to absolve the owners of the tow, the principles laid down expressly support what I have said as being the true rule of law to apply. I wish only to repeat the passage read by Butt, J. (63 L. T. Rep. at p. 715; 15 Prob. Div. at p. 201) from the judgment of the Supreme Court of the United States in *Sturgis* v. *Boyer*, delivered by Clifford, J. He said there (24 Howard's Rep., at p. 122): "whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels. . . ." Then he says: "Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel." That is quoted with approval by the Divisional Court, and it appears to me to be sound, with this qualification, that the master and crew of the tow are not expected to participate in the navigation of the vessel at the stage at which the collision took place. But subject to that it seems to me to state this: that there are circumstances in which the tow, whether she has people on board her or not, is not being navigated by the people on board her, but by the tug, and, under those circumstances, if she is being navigated so as carelessly or negligently to damage another vessel, then it is the barge which is being improperly navigated; and the only question then arising is: Are the defendants, the owners of the two, responsible for that improper navigation? That will depend on whether those on board the barge are, or are not, the servants of the owners of the tow to navigate the tow, and they may be so, because they are put in the ordinary position in which there is a skilled and expert crew on the tow and the tug has got to obey their orders. They are then taken to be the servants of the owners of the tow.

But another state of things may arise in which there is nobody on the tow to direct it at all, but the tug is provided by the owners of the tow, under such circumstances that the servants and crew of the tug, are, in fact, the servants and crew of the owners of the tow. Under those circumstances it appears to follow logically and necessarily that the improper navigation which, on the hypothesis, is the improper navigation of those on board the tug who are improperly navigating the tow, is the improper navigation of the servants of the owners of the tow for which they are responsible. That seems to me to establish the liability. The passage in Lord Atkinson's judgment in *The Devonshire and The Leslie* (*sup.*) accepts that view because he, in dealing with the case there, is setting out the effect of *The Quickstep* (*sup.*), and he says (1912, A. C., at p. 654): "in the judgment of the court composed of Sir J. Hannen and Butt, J., it was laid down that the real question on which the liability of the tow in such cases depends is whether or not the relation of master and servant existed between the owners of the tow and the persons in charge of the tug." Now in this case there is no controversy but that that relationship did in fact exist, and if it existed, it appears to me to follow that the tow was being improperly navigated by the servants of the owners of the tow.

I agree that the case of *The American and The Syria* (*sup.*) is a case where a similar question might have arisen. It appears to me that in that case in fact the judgment of the Privy Council was rather directed to the question whether, there being a master and crew on both vessels, the master and crew of the tow were in fact directing the master and crew of the somewhat smaller vessel that took the other vessel in tow for the purpose of salving it, and I do not think really was directed to the point of identity of ownership so as to make the servants of the tug the servants of the owner of the tug. But as it can be distinguished on those lines and on the lines suggested by the Master of the Rolls, I think it is plainly my duty rather to follow the decision in *The Quickstep* (*sup.*), as affirmed in the House of Lords, which decision is, I think, supported by the very weighty authority of the late President in *The Umona* (*sup.*).

For these reasons it appears to me that the plaintiffs were right in bringing their action *in rem* against the *Ran*, and I think they ought to have had a decree to carry that out, and it appears to me that in substance the notice of appeal asks for the right order, except this, which we may consider afterwards—I am not sure that it is right to ask for a pronouncement that the collision was occasioned by the fault or default of the owners and their servants. That might lead to trouble in the limitation suit as to the actual fault or privity. I think it would be sufficient and right to say: "By pronouncing the collision in this action to have been occasioned by the fault or default of the servants of the owners of the barge *Ran* and their servants, the crew of the steam-tug *Graygarth* in the navigation of the *Ran*, and by pronouncing for the plaintiff's claim for damages in consequence of the improper navigation of the barge *Ran*, and condemning them in the said damages and costs." I think that would be a proper order. I think that if that decree had been made, as it ought to have been made, it follows that the limitation suit must fail. I agree, therefore, that the appeal should be allowed in that case also.

Younger, L.J.—I am of the same opinion. I confess that the case of *The American and The Syria* (*sup.*), both as reported before Sir Robert Phillimore and in the Privy Council, leads to some trouble, but I think that that case should be distinguished from the present on the ground mentioned by my Lord.

Appeals allowed.

Solicitors for the owners of the *Para*, *Pritchard* and *Co.*, for *Collins*, *Robinson*, *Driffield*, and *Co.*, Liverpool.

Solicitors for the owners of the *Graygarth* and the *Ran*, *Botterell* and *Roche*, for *Weightman*, *Pedder*, and *Co.*, Liverpool.

Tuesday, March 7, 1922.

(Before Lord Sterndale, M.R. and Warrington and Scrutton, L.JJ.)

Peninsular and Oriental Branch Service *v.* Commonwealth Shipping Representative. (*a*)

Requisition—War Risk—Vessel requisitioned by Australian Government—Collision—Loss of vessel—Colliding vessel carrying ambulance wagons from one military base to another—Warlike operation—War risk or marine risk.

In 1916 *the claimants' vessel* G., *which had been requisitioned by the Australian Government under a charter-party by which the Government accepted war risks usually excluded by the f. c. and s. clause, collided with another vessel, which had also been requisitioned. The latter vessel at the time of the collision was carrying ambulance wagons between two war bases. Both vessels were travelling without lights in accordance with Admiralty instructions. The* G. *was not at the time of the loss engaged in hostilities or warlike operations.*

Held, (affirming the decision of Bailhache, J.) that having regard to the circumstances surrounding the date at which the collision occurred (of which the court took judicial notice) the colliding vessel was carrying out an operation of war at the time of the collision, and that the loss of the claimants' vessel was due to a war risk and not to a marine risk.

Appeal from an arbitrator in the form of a special case.

The facts as stated in the case by the arbitrator were as follows:

(1) On or about the 17th April 1915, the *Geelong*, belonging to the claimants, was requisitioned and taken for use by the respondents for transport purposes in connection with the war.

(2) The terms of requisition provided (*inter alia*) as follows: "The Commonwealth Government accepts full war risks and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

(3) It was agreed before the arbitrator and the case was argued on the basis that the effect of the foregoing clause was to make the respondents responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f. c. and s. warranty, including in such warranty all consequences of hostilities or warlike operations.

(4) On the 1st Jan. 1916, the *Geelong*, whilst under requisition as aforesaid, collided with the British steamship *Bonvilston* in the Eastern Mediterranean, and as the result of such collision was sunk and totally lost.

(5) At the time of the said collision the *Geelong* was bound from Port Said to Gibraltar for orders. She had come from Australia *via* the Suez Canal, and had discharged some troops at Suez. She was laden at the time of the collision with a part cargo of general goods, laden on Government account in accordance with the terms of the requisition, whereby cargo might be carried for stability purposes, and the profitable utilisation of such space as might not be required to accommodate troops, horses, stores, &c., the freight received by the owners for the carriage of such cargo to be credited to the Commonwealth Government.

(6) At the time in question the Mediterranean was the scene of considerable activity on the part of enemy submarines, and the *Geelong* was being navigated in accordance with confidential instructions received from the naval authorities at Port Said with a view to minimising the risk of submarine attack. These instructions prescribed the courses to be followed, and, in addition, provided that the vessel was at night to be navigated at best speed continuously and without showing any lights.

(7) The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government, and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). In accordance with the orders of the naval authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights.

(8) The collision occurred about 7.25 p.m. on the 1st Jan. 1916, in approximately lat. 32° 46′ N. long. 30° 5′ E., the vessels being in fact on crossing courses with the *Bonvilston* on the starboard side of the *Geelong*.

(9) In an action in the Admiralty Division between the claimants and the owners of the

(*a*) Reported by J. L. Denison, Esq., Barrister-at-Law.

Bonvilston arising out of the collision, Sir Samuel Evans, P. held that in the circumstances there was no negligence in the navigation of either vessel. This finding was not disputed before the arbitrator, and accordingly he found that the said collision occurred without negligence on the part of either vessel, and was solely due to the fact that both vessels were navigated at night under naval orders at full speed and without lights.

(10) The claimants contended: (*a*) That the service upon which each of the said steamers was engaged at the time of the collision was of a warlike character, or at any rate that the *Bonvilston* was engaged on a service of a warlike character, and that the operation of navigating on such service was a "warlike operation"; (*b*) that, given a warlike operation and the combination of circumstances causing the loss being unimaginable without the war, the loss was the consequence of hostilities or warlike operations.

(11) The respondents contended that the loss of the *Geelong* was caused by a marine peril, viz., collision, and not by any consequences of hostilities or warlike operations. [Having set out the facts and the contentions of the parties the arbitrator proceeded:]

(12) In so far as it is a question of fact I find, and in so far as it is a question of law (and in such case subject to the opinion of the court), I hold that the loss of the *Geelong* was caused by a marine peril and not by a war peril.

(13) I accordingly award, subject to the opinion of the court, that the respondents are under no liability to the claimants in respect of the loss.

(14) The question for the opinion of the court is whether I am right in holding that the loss of the *Geelong* was in the circumstances hereinbefore stated caused by a marine peril and not by a war peril.

(15) If the court should answer this question in the affirmative the award in par. 13 hereof shall stand. If the court should answer the question in the negative then I award that the claimants are entitled to be indemnified by the respondents in respect of the loss of the *Geelong*.

Mackinnon, K.C. and *G. P. Langton* for the claimants.

R. A. Wright, K.C. and *Claughton Scott* for the Australian Government.

Bailhache, J.—This is a case as to whether the *Geelong*, which was lost in collision with another steamer known as the *Bonvilston*, was lost as a war risk or a marine risk. The case is stated by Mr. Raeburn, and what he says about the facts is this. [His Lordship read pars. 4, 5, and 6 of the case, and continued:] Then he states that the collision took place, and he says it was found in the Admiralty Court there was no negligence, and then he sets out the contentions on the one side and the other, on one side that it was a marine risk and on the other side that it was a war risk, and then he finds that it was a marine peril and not a war peril. I thought till this case came before me that the whole of the ground had been already covered, but it looks as if this case was not absolutely covered by authority. The *Geelong* had only general goods on board. It is true that they were Government goods, and she was requisitioned, and had come from Australia to discharge troops at Suez. She had no troops on board at the time, and was not at the time of the collision so far as she was concerned, engaged in any warlike operation. The collision took place in the Mediterranean at a place where there was a good deal of submarine activity. The *Geelong* was sailing at night without lights, going full speed, but the mere fact that she was sailing without lights and going full speed ahead in the dark in obedience to Admiralty orders, would not in itself make her engaged in a warlike operation, or collision with her a war risk. The *Bonvilston* was proceeding from Mudros to Alexandria carrying ambulance wagons and other stores from one war base to another. She, too, was proceeding without lights and full speed ahead. In my opinion, a vessel engaged as the *Bonvilston* was in carrying Government stores and ambulance wagons from one war base to another war base is engaged in a warlike operation. That seems to me to be Lord Atkinson's opinion in the House of Lords in *The Petersham* case (*ante*, p. 58; 123 L. T. Rep. 721; (1921) A. C. 99) when, dealing with the *The St. Oswald* case (14 Asp. Mar. Law Cas. 270; 118 L. T. Rep. 640 (1918) 2 K. B. 879) he says: "In that case the vessel which was lost was requisitioned by the Admiralty, and bound to obey the orders given through its accredited officers. She was, at the time of her loss, employed in obedience to these orders on a service which was, and in its own nature, a 'warlike operation'—namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship, the *Suffren*, she had not got these troops on board. but she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board. This circumstance does not, in my view, alter the character of the operation she was at the time of the collision performing." If it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to convey munitions of war or ambulance wagons for the use of wounded soldiers from one place to another. It is very much a case of first impression, although one, of course, bears in mind the numerous cases which have been decided upon what is a war risk and what is a marine risk. I do not think this case is quite covered by authority; the nearest approach to authority seems to be the passage I have cited from Lord Atkinson's judgment in the House of Lords. In my opinion the *Bonvilston*, at any rate, was engaged in a warlike operation, and the collision between her and the *Geelong*, while they were both of them proceeding at night full speed ahead without lights, was a war risk and not a marine risk.

From this decision the defendants appealed.

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

Sir *John Simon*, K.C., *Mackinnon*, K.C., and *G. P. Langton* for the respondent company.

The following cases were refrered to:

Britain Steamship Company (*The Petersham*) v. *The King*, 14 Asp. Mar. Law Cas. 507; 123 L. T. Rep. 721; (1921) 1 A. C. 99;

Attorney-General v. *Ard Coasters Limited*, *ante*, *p.* 353, 125 L. T. Rep. 548; (1921) 2 A. C. 141;

Harrisons Limited v. *Shipping Controller*, *ante*, *p.* 270, 124 L. T. Rep. 540; (1921) 1 K. B. 122;

Atlantic Transports Company v. *Director of Transports*, 38 Times L. Rep. 160;
British and Foreign Steamship Company (*The St. Oswald*) v. *The King*, 14 Asp. Mar. Law Cas. 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879.

Lord Sterndale, M.R.—This is an appeal from a decision of Bailhache, J. on a special case stated by an arbitrator, and it raises the question of war risk or marine risk which has so often been in the courts. The arbitrator found that the loss of the ship, the *Geelong*, was caused by a marine peril and not by a war peril. The learned judge has found that it was a war peril, and the question arises in this way: The *Geelong* was a ship requisitioned by the Government of the Australian Commonwealth and by the terms of the requisition it was provided: "The Commonwealth Government accepts full war risks, and will indemnify the owners against any claim arising from the requisition in this connection; but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

The vessel with which the *Geelong* came into collision was a vessel called the *Bonvilston*. What she was doing is stated in this way: The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government, and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). She was steaming at her best speed and was showing no lights.

I think Mr. Mackinnon is probably right in saying that the arbitrator was not addressing his mind very much to any particular difference in the facts of this case and those of other cases, but he did find as I said as a question of fact, so far as it was one, that the loss was caused by a marine peril and not by a war peril.

The learned judge has reversed that decision and said that the collision was caused by a war peril, and he has decided that, in a great measure, upon what was said in Lord Atkinson's speech in the House of Lords in *The Petersham* case (*sup.*), when dealing with *The St. Oswald's* case (*sup.*). The learned judge stated his judgment in this way: "Now in my opinion a vessel engaged as the *Bonvilston* was in carrying Government and British stores and ambulance wagons from one war base to another war base is engaged in a warlike operation," and he must state that as a conclusion of law because otherwise he does not get away from the finding of fact of the arbitrator.

I am not prepared myself to assent to such a broad proposition as that. I can quite conceive that a merchant vessel may be carrying ambulance wagons and other Government stores from one war base to another war base and still in certain circumstances may not be engaged in a warlike operation, and I think, if left to myself, I should have said that we have not sufficient information here or sufficient findings of fact to determine whether the learned judge is right in his decision or not, and I should myself personally have been inclined to ask for a more distinct finding as to what this vessel was in fact doing and for this reason: she was carrying these goods from Mudros to Alexandria—she was carrying them upon the 1st Jan. 1916, and I suppose, at any rate, we may take judicial notice of this, that that was about the time that the evacuation of the troops from Gallipoli was taking place. Now if what she was doing was a part of the operation of the evacuation of Gallipoli I think she would be carrying out a warlike operation just as much as she would have been if she had been carrying things for the purpose of the landing upon Gallipoli. It seems to me that it is just as much a warlike operation to withdraw in the face of the enemy (it may not be as pleasant a one) but it seems to be, at any rate, consistent with what is stated in the special case that she might have been doing these things independently of the evacuation of the troops from Gallipoli altogether. Therefore, I should personally have liked to have had a more complete finding as to what she was really doing and what the incidents and the circumstances of her particular occupation were at the time, but both the other members of the court are of opinion that we have sufficient material upon which to deal with this matter and that we are entitled to consider the fact that this evacuation was going on and to consider the neighbourhood and the position of the two bases between which these goods were being moved, and therefore we have enough to lead us to the same conclusion to which the learned judge came that this was a warlike operation—*i.e.*, that the *Bonvilston* was engaged in a warlike operation at the time she came into collision with the *Geelong*. If so, then upon the authorities in the House of Lords this arose from a warlike operation and was a war risk, and not a marine risk. That being so, I think the appeal fails and must be dismissed, because I do not dissent (although I think for myself I should have required further information if I had had to decide it entirely myself) from the opinion of the other two members of the court.

Warrington, L.J.—I am of the same opinion.

The question really is whether the *Bonvilston* which ran down and sank the *Geelong* was at the time of the collision engaged in a warlike operation, because if so the loss of the *Geelong* would be a consequence of a warlike operation, namely, the particular voyage of the other ship the *Bonvilston*.

The collision happened on the 1st Jan. 1916 in the Eastern Mediterranean; the *Geelong* was bound outwards from Port Said and was certainly not herself engaged in a warlike operation. It was true that she was carrying a cargo on account of the Government, but that it was on account of the Government was a purely immaterial fact, and there is no question about it, her voyage was not a warlike operation. The *Bonvilston* was in a different position; she was bound from Mudros to Alexandria, and her cargo consisted of ambulance wagons, and some other Government stores which were being transported from Mudros to Alexandria. Now, Mudros is found by the arbitrator to have been a war base; Alexandria also is found by the arbitrator to be a war base, and he has found, therefore, that the *Bonvilston* was at the time of the collision engaged in carrying ambulance wagons and other Government stores from one war base to another war base. Upon that state of things, taken as he expressed it, the arbitrator came to the conclusion and found as a fact, so far as the question was one of fact, and held at last so far as the question was one of law, that the risk incurred by the *Geelong* was a marine risk and not a war risk. The learned judge has come to the opposite conclusion and has founded his judgment upon the fact that the *Bonvilston* was engaged in carrying equipment

consisting of the ambulance wagons from one war base to the other war base. I express no definite opinion as to whether on that state of facts I should have come to the same conclusion as the learned judge, but I think we are at liberty to look at the facts from a rather wider point of view.

The collision happened, as I have said, on the 1st Jan. 1916. I think we are at liberty to take notice of the main historical facts surrounding what happened. Now of those facts two I think are material. First that that was about the time when the evacuation of the Gallipoli Peninsula was going on—I think the first part of the evacuation had been completed so far as troops were concerned, the evacuation of Helles I think took place a few days later, but, at any rate, it was in the middle of the operations connected with the evacuation of the Gallipoli Peninsula; not only that, but it is a notorious fact that Mudros was the advanced base for the operations in Gallipoli. Now, bearing that in mind—and I think we are at liberty to bear that in mind—I think the conclusion is almost inevitable that the *Bonvilston* was carrying warlike equipment from Mudros which had been the base for the Gallipoli operations to Alexandria, which was then and afterwards the base both for the Palestine and Salonica operations. The *Bonvilston* was employed in carrying warlike equipment from base to base in connection with the evacuation.

I now turn to look at what Lord Atkinson says about a similar operation, namely, that as a consequence of which the *St. Oswald* was lost. That is the ship which was the subject of the *British and Foreign Steamship Company* v. *The King* (*sup.*). That was a case which it was necessary to distinguish from *The Petersham* case (*sup.*), for this reason: that the loss of the *Petersham* happened by reason simply that two merchant ships had been sailing under Admiralty orders at night without lights, and that, first, owing to the form of an admission which had been made in *The St. Oswald* case (*sup.*), it would appear that the decision in *The St. Oswald* case (*sup.*), was exactly contrary to the decision at which the House of Lords were arriving in *The Petersham* case (*sup.*). Accordingly it was necessary for Lord Atkinson to distinguish it. One of the distinctions which he points out is this: "She was at the time of her loss employed in obedience to these orders"—that is, the Admiralty orders—"on a service which was in its own nature a 'warlike operation'—namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship, the *Suffren*, she had not got these troops on board, but she was under Admiralty orders, hurrying at full speed to the port at which she was to take them on board." There is, in my opinion, no material distinction between carrying the actual combative forces of the Crown and carrying the equipment which will be necessary for their effective use in the field. Now, the equipment which the *Bonvilston* was carrying consisted of the ambulance wagons, which were part of the equipment for troops operating in the field. It seems to me, therefore, that if, as Lord Atkinson thought, the *St. Oswald* was engaged on a service which was in its nature a warlike operation, so in this case, looking at it in the broader way in which I have ventured to do, as connected with the evacuation of Gallipoli, I think the *Bonvilston* was engaged on a service which was in its nature a warlike operation.

If that is so, then I think we are at liberty to hold that the arbitrator came to a wrong conclusion in finding that the risk was a marine risk, and that the judgment of Bailhache, J. was correct, and the appeal ought, therefore, to be dismissed.

Scrutton, L.J.—The exact question in this case is whether a particular ship was lost in the Mediterranean by a marine risk or a war peril. That turns on the question whether the loss would have been recovered under the main body of a Lloyd's policy, or would have been excluded by a warranty free of all consequences of hostilities or warlike operations. The question, therefore, is whether the loss was the consequence of hostilities or warlike operations. The vessel was sunk by a collision at night, without negligence and without lights, with a vessel called the *Bonvilston* which, under the requisition of the British Government was carrying ambulance wagons and other Government stores from one war base, Mudros, to another war base, Alexandria. I am prepared to hold that carrying ambulance wagons and Government stores from one war base to another in time of war was a warlike operation. I notice that some of the noble Lords have seen that the definition of "warlike operations" is a very difficult matter, and have postponed it till various indefinite periods. It is possible that our decision in this case may anticipate the opportunity they have been looking for and give them an opportunity of defining it there. If I am right that the carrying of war stores from one base to another war base was a warlike operation, then I am bound by the second set of decisions in the House of Lords, there being no negligence, to hold that the sinking of the ship by a collision with a vessel engaged in such a warlike operation does make the matter a war risk; it makes the matter a consequence of warlike operations. I also think, though, of course, it is not necessary for my decision on the view I take, that we are at liberty to take from *The St. Oswald* case (*sup.*), the fact that Gallipoli was being evacuated on the 31st Dec. 1915 and the 1st Jan. 1916, and to conclude that this voyage from Mudros to Egypt on the 1st Jan. was part of the warlike operation of the evacuation of Gallipoli which, of course, if correct, makes the case much stronger. I, therefore, agree that the decision of Bailhache, J. should be affirmed.

Appeal dismissed.

Solicitors: *Parker, Garrett*, and *Co.*; *Ince, Colt, Ince*, and *Roscoe*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 8 *and* 14, 1922.

(Before McCardie, J.)

Adelaide Steamship Company *v.* The King. (*a*)

Charter party—Requisitioned ship—Charter T. 99 *—War risks undertaken by Admiralty —Collision —Negligence—Marine risk—Hospital ship conveying wounded—"Warlike operation."*

The suppliants were an Australian steamship company carrying on business in Australia. In

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

Aug. 1915, *the suppliants' ship* W. *was requisitioned by the Australian Government for transport service. In the following year, the suppliants' same ship was taken over by the British Admiralty for use as a hospital ship. The British Admiralty took her over on the terms of the well-known charter T.* 99, *whereby the British Government accepted liability for all war risks, and the suppliants took all the marine risks. In March* 1918, *while the steamship* W. *was still under requisition to the British Admiralty, she was carrying wounded soldiers from Havre to Southampton. While so doing on a dark and hazy night, and being navigated without masthead lights, and with dimmed side-lights, by order of the British Admiralty, the suppliants' steamer came into collision with another steamer (the steamship* P.), *and both steamers suffered much damage. The suppliants claimed damages from the Crown, on the ground that the collision was a consequence of warlike operations. An action had been brought by the owners of the steamship* P. *against the suppliants, and in that action the collision was held to be due to the negligence of the suppliants' vessel.*

Held, (1) *that the suppliants' vessel was not engaged in a warlike operation, and was not a warship at the time of the collision; and* (2) *if she were held to be engaged in a warlike operation the loss was due to the suppliants' vessel's own negligence, and the question of negligence being, on the authorities, material, the suppliants could not succeed, and there must be judgment for the Crown.*

PETITION OF RIGHT tried by McCardie, J., without a jury, in the Commercial Court.

The suppliants were an Australian steamship company at Melbourne. In Aug. 1915 the *Warilda*, belonging to the suppliants, was requisitioned by the Australian Government for transport service. In July 1916 she was taken over by the British Admiralty for use as a military hospital ship under the terms of a charter party known as T. 99, which provided that the Admiralty should accept liability for war risks while the suppliants continued to take the marine risks. She was described as an "ambulance transport to be treated as a troop transport." She was armed with one twelve-pounder gun and had instructions to ram any submarine sighted. On the 24th March 1918, the *Warilda* was carrying wounded men from Havre to Southampton when, about 4 a.m., she came into collision with another steamer, the *Petingaudet*, and both vessels suffered considerable damage. The night was dark and hazy, and the sea smooth. By order of the Admiralty the *Warilda* was being navigated at full speed without lights, and the *Petingaudet* was being navigated without masthead lights and with dimmed side lights. The suppliants claimed damages on the ground that the collision was a consequence of warlike operations; the Crown in their plea asserted that the collision was due to the negligent navigation of the *Warilda*, and was the result of a marine risk.

The owners of the *Petingaudet* had brought an action against the suppliants, and in that action the collision was held to be due to negligence of the *Warilda*; and the suppliants were made liable for the damage to the *Petingaudet*. The *Warilda* herself was withdrawn for repairs after the collision, so the suppliants had suffered in three ways: they had had to pay the cost of their own repairs, they had had to pay for the repair of the *Petingaudet*, and they had lost the hire which would have been payable to them during the time while the *Warilda* was undergoing repairs.

MacKinnon, K.C., *Dunlop*, K.C. and *Dumas* for the suppliants.—It is submitted that the loss was due to a warlike operation, because at the time of the collision the steamship *Warilda*, though not a warship, had the status of a warship, and was engaged in a warlike operation. At the time of the collision the master was obeying the orders of the Admiralty. Any service rendered to the fighting forces was a warlike operation. The test was, what was the vessel doing at the time of the collision. She was conveying wounded soldiers to Southampton, and that was as much a military operation as the conveyance of unwounded troops. The suppliants were entitled to judgment.

Raeburn, K.C. and *Balloch* for the Crown.—The collision was not due to a warlike operation, and the claim failed. The loss was not caused by a warlike operation. The steamship *Warilda* was a hospital ship, and she had never lost her status as such: Hall's International Law, 6th edit., p. 395. A hospital ship cannot be a warship: *The Ophelia* (1915) P. 129, affirmed in P. C. (13 Asp. Mar. Law Cas. 377; 114 L. T. Rep. 1067; (1916) 2 A. C. 206). The purpose for which the wounded soldiers were being carried on the *Warilda* was not a warlike purpose. She was not engaged in a warlike operation, and therefore the suppliants claim failed. They referred to:

Busk v. *Royal Exchange Assurance Company*, 2 B. & Ald. 73;
Trinder, Anderson v. *Thames and Mersey Marine Insurance Company*, 8 Asp. Mar. Law Cas. 373; 78 L. T. Rep. 485; (1898) 2 Q. B. 114;
Marine Insurance Act 1906, s. 55.

Dunlop, K.C. replied.

Cur. adv. vult.

Feb. 14. — McCARDIE, J. read the following judgment.—This case raises anew the meaning of the words "all consequences of hostilities or warlike operations." The petition of right claims a large sum of money in respect of damage to the steamship *Warilda* of which the petitioners were owners. In 1915 she was requisitioned by the Australian Government for use as a transport for bringing Australian troops to England. On the completion of that service in July 1916 she was taken over by the British Government for use as a military hospital ship. It is agreed that the rights of the parties are governed by the terms of charter-party T. 99—a well-known form.

The following clauses must be cited: Clause 18: "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." Clause 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.'" Clause 22: "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 instructions for masters of colliers and oiler transports, but he shall be solely responsible (on behalf of the owners) for the management, handling and navigation of the steamer." Clause 25: "If from deficiency of men or stores, breakdown of machinery or any other cause the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of whatever duration during which the vessel is inefficient." Clause 26: "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, viz., the act of God, perils of the seas . . . negligence, default or error of judgment of the pilot, master or crew or other servants of the owners in the management or navigation of the steamer."

The *Warilda* was for some time used as an ordinary military hospital ship; she was painted white, she carried lights, and she bore the white flag with a red cross as provided by the Geneva Convention of 1907: (see *The Ophelia*, 1915, P. 129) at pp. 138-140, affirmed in P.C. (13 Asp. Mar. Law Cas. 377; 114 L. T. Rep. 1067; (1916) 2 A. C. 206), and Higgins on the Hague Peace Conferences, pp. 383-4.) Then occurred the outrages on hospital ships by German submarines, which awoke the indignation and horror of men. The British Admiralty was compelled to adopt protective precautions. On the 26th April 1917 the following letter was written by the Ministry of Shipping to the petitioners: "I beg to inform you that circumstances have rendered it necessary to take steps for the protection of vessels engaged in cross-channel hospital service, and arrangements have accordingly been made for the *Warilda* to be armed and painted grey. The vessel has been removed from the list of hospital ships and will in future be known as an ambulance transport, and will be treated in the same manner as a troop transport so far as her actual sailing is concerned."

Pursuant to the change of circumstance the *Warilda* was painted grey with dazzle markings, the Red Cross flag ceased to fly and she steamed without lights. A 12-lb. gun was placed aft and two or three Royal Navy men were taken aboard for the purpose of working the gun if the need arose. She became subject to certain Admiralty orders and instructions made under the Defence of the Realm Regulations. Briefly put they were these. Her master was informed of the imperative necessity of showing no lights when at sea. She was to proceed without navigation lights. No unnecessary delay was to take place in effecting a passage from one port to another.

The following was a specific instruction: "As far as possible the passage is to be made during the hours of darkness and at maximum speed compatible with safe navigation in order to elude submarine attack." And this also: "You are not to reduce speed in a fog except when near the land or approaching shoal water unless you consider it is absolutely imperative for the safety of the ship to do so." And this too: "If a submarine is sighted by the escorting destroyer she will turn to attack. The transport is at once to turn away from the submarine and steer a zigzag course unless she has an exceptional opportunity of ramming the submarine which she should at once take advantage of." Finally this: "You are warned that safety very largely depends on the absolute darkness of the ship and not showing a glimmer of light." These were the instructions under which she worked at the time of the collision which gave rise to this litigation.

The *Warilda* was a twin-screw steamship of 7713 tons gross register and 426ft. in length. At the time of the collision her duties were to carry wounded from Havre to Southampton and occasionally to carry nurses or medical staff from Southampton to Havre. At about four o'clock on the morning of the 24th March 1918 the *Warilda* (acting under the instructions I have referred to) was proceeding at her full speed af about 15 knots, and without any lights showing from Havre to Southampton. The weather was somewhat dark and hazy. She had on board about 600 wounded men with the usual staff of doctors and nurses.

Henceforward I need only summarize very briefly the facts as found by Hill, J. in the Admiralty action of *Owners of Steamship Petingaudet* v. *Owners of Steamship Warilda* (unreported), heard in Dec. 1918. His decision was affirmed by the Court of Appeal and the House of Lords.

Whilst the *Warilda* was steaming at full speed she sighted on the starboard bow the *Petingaudet*, which was steaming at high speed with side lights dimmed. The *Warilda* saw the *Petingaudet* about half a mile away. She did not alter her course or speed till too late. She struck the *Petingaudet*. The ships (it has been held) were "crossing" ships, and the *Warilda* (it has also been held) was the "give way" of the two vessels.

Reg. 23 of the Collision Regulations 1910 (see Temperley on the Merchant Shipping Acts, 3rd edit., p. 634) provides: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed or stop or reverse."

It was suggested in the Admiralty action that the instruction I have stated, viz., that "As far as possible the passage is to be made during the hours of darkness and at maximum speed compatible with safe navigation," was in conflict with reg. 23. Hill, J. held that "there was nothing in the Admiralty instruction which justified the maintenance of the speed of the *Warilda* in the way in which it was maintained." In the result he ruled that the *Warilda* was guilty not of a mere error of judgment but of negligence, and that she alone was to blame for the collision. This view was also adopted by the House of Lords. The matter is therefore finally settled. Both the *Warilda* and the *Petingaudet* were seriously injured by the collision.

The *Petingaudet* was an ordinary British steamer of about 2540 tons gross register. She was on a voyage under Admiralty requisition from Shields to Rochefort laden with a cargo of coke. No German warship was seen by either vessel. There is no suggestion that any submarine was about to attack.

Upon these facts two broad questions were raised and ably argued before me:—(1) whether the *Warilda* at the time of the collision was engaged in a warlike operation within clause 19 of the charter party T. 99; (2) whether (should the answer to the first question be yes) the injury to the *Warilda* arose

as a consequence of warlike operations or whether it may more properly be described as a consequence not of warlike operations but of the negligence of her master. I recognise the difficulty of these questions, and the wide range of possible consequence which they may involve. I frankly confess my diffidence in expressing a view upon matters which have caused embarrassment to the ablest judges, and which have led to a striking conflict of opinion.

The second question, I may say, seems to me to be conspicuously distinct in some ways from the first.

Now, was the *Warilda* engaged in a warlike operation? It is plain that the words "warlike operation" have a wider reach than the word "hostilities": (see per Atkin, L.J. in *Britain Steamship Company Limited* v. *The King* (*The Petersham* case) (14 Asp. Mar. Law Cas. 507, at p. 511; 121 L. T. Rep. 553, 559; (1919) 2 K. B. 670, at p. 695; and per Lord Atkinson in *The Petersham* case (in the House of Lords) (*ante*, p. 58, at p. 62; 123 L. T. Rep. 721; (1921) 1 A. C. 99, at p. 115). The phrase, it may be noted, is "warlike operations" and not "operations of war." Each phrase, indeed, is ambiguous in its stretch. In *The Petersham* and *The Matiana* cases (123 L. T. Rep. 721; (1921) 1 A. C. 99, at p. 133) Lord Wrenbury said in referring to words like those now in question: "All the decisions have, I think, proceeded, and in my judgment have rightly proceeded, upon the footing that the word 'hostilities' does not mean 'the existence of a state of war,' but means 'acts of hostility' or (to use the noun substantive which follows) 'operations of hostility.' The sentence may be read 'all consequences of operations of hostility (of war) or operations warlike (similar to operations of war) whether before or after declaration of war.' To attribute to the word the longer meaning—namely, 'all consequences of the existence of a state of war'—would give the expression a scope far beyond anything which one can conceive as intended. To define the meaning of 'operation' in this connection is, no doubt, a matter of great difficulty, and for the purpose of these cases is not, I think, necessary."

The difficulty of definition acutely arises here. In this litigation the whole point is as to the idea denoted or connoted by the words "warlike operations." Lord Sumner said in *Attorney-General* v. *Ard Coasters Limited, Liverpool and London War Risks Insurance Association Limited* v. *Marine Underwriters of the Steamship Richard de Larrinaga* (*ante*, p. 353, at p. 356; 125 L. T. Rep. 548; (1921) 2 A. C. 141, at p. 153): "Operations in war and operations of war are not necessarily the same things." This is a pointed and guiding remark.

Now a primary question to decide is whether the *Warilda* was a warship. The importance of this question arises from the decision of the House of Lords in the *Ard Coasters* and *Larrinaga* cases (*ante*, p. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141). Those cases decide, I think, (in substance) that practically every movement of a warship for the purpose of carrying out her war duties, is a warlike operation. This seems to follow the view of Atkin, L.J. in the *Petersham* case (14 Asp. Mar. Law Cas. 507; 121 L. T. Rep. 553, 559; (1919) 2 K. B. 670) where he said: "I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties whilst exercised in the area of war could be included in the phrase warlike operations." See, too, the language of Lord Atkinson in *The Petersham* case (*ante*, p. 58, at p. 62; 123 L. T. Rep. 721; (1921) 1 A. C. 99, at p. 114). Thus a British warship patrolling the seas for German submarines is engaged in a warlike operation. So, too, if a warship be proceeding on a voyage to pick up another convoy: (see *The Ard Coasters* and *Larrinaga* cases (*ante*, p. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141). If the *Warilda* was a warship and was, at the time of the collision, fulfilling her duties as such, she was engaged in a warlike operation.

What is the test to apply? I can think of no other test than that which I humbly stated in *Harrison's* v. *Shipping Controller* (*ante*, p. 270; 124 L. T. Rep. 540; (1921) 1 K. B. 122, at p. 134) when I ventured to say: "The dominant features of the ship and the dominant object of her voyage must, I humbly venture to think, be looked at."

It is true that the *Warilda* was painted grey and with dazzle colours. But so also were the majority of merchantmen. It is true that she sailed without lights. So also did the majority of ordinary merchantmen. It is also true that she had a gun. But so, too, had the majority of ordinary merchantmen. She also carried a few Royal Navy men. But as I said in *Harrison's* case (*ante*, p. 270; 124 L. T. Rep. 540; (1921) 1 K. B. 122, at p. 134): "Many merchantmen during the war carried several Royal Navy men for the purpose of serving the protective guns, or for other reasons. Such fact would not, I conceive, turn a merchantman into the equivalent of a man-of-war."

See also the striking facts in *The Matiana* case (*ante*, p. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99). It is true that she might have tried to ram a submarine in order to save herself from a terrible fate. If she had actually done so then the words of Lord Atkinson in that case (*ante*, p. 62; 123 L. T. Rep. 721; (1921) 1 A. C., at p. 115) would have applied. He said: "Of course, if a merchantman chose to take combative action, such as attempting to ram an enemy submarine, that action would, while it lasted, be a 'warlike operation.'"

I may venture to say that a civilian does not become a soldier merely because he protects himself from an attempt at murder. Looked at broadly, the features of the *Warilda* were those of a hospital ship only. She was fitted as such, and she carried 600 wounded with doctors and nurses. In hull, fittings, crew and arrangements she was nothing but a hospital ship.

What was the object of her voyage? Was it offence? Clearly not. Her one aim was to carry the wounded safely to England. To borrow the language of Lord Cave in *Britain Steamship Company Limited* v. *The King* (*ante*, p. 59; 123 L. T. Rep. 721; (1921), A. C. 99, 108). She was proceeding upon a peaceful mission and her desire was not to engage in but by all means to avoid warlike operations. I do not overlook the Admiralty instructions under which she sailed. But was the object of those instructions to turn her into a vessel of offence? I think not. The object was the very opposite. Their very aim was to enable her to reach England as peacefully and expeditiously as she could—and to give her the greatest possible safety as a hospital ship. The character of the ship was not changed. Everything done was to secure her a greater immunity. To alter slightly the wording of Duke, L.J. in *The Matiana* case (14 Asp.

Mar. Law Cas. 507, at p. 510; 121 L. T. Rep. 553; (1919) 2 K. B., p. 690) she never lost her character of a hospital ship carrying wounded. The nature and purpose of the vessel is, I think, rightly described in p. 5 of the petition of right as follows: Par. 5: "The *Warilda* was afterwards employed by the British Government in carrying wounded from Havre to Southampton and occasionally carrying nurses or medical staff from Southampton to Havre; the navigation of the ship was in charge of the master, but he received orders from the Admiralty, or their authorized officers as to light, speed, and route." If the *Warilda* had been a transport in the ordinary sense, I presume that she would either have acquired the status of a warship, or at all events be engaged in a warlike operation. But a transport filled with armed men seems wholly different from a hospital ship filled with wounded men. That an ordinary transport may be deemed a warship, see per Lord Atkinson in *The Petersham* case (*ante*, p. 62; 123 L. T. Rep. 721; (1921) 1 A. C. 99, at p. 114), where he says: "The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another part, for combative purposes, would, I think, be a warlike operation." (See also *Harrison's* case, *ante*, p. 270; 124 L. T. Rep. 540; (1921) 1 K. B. 122, at p. 133.) The *Warilda*, I hold, was not a transport in any fair sense of that word. So far as her belligerent features were concerned they seem to me to be less marked than those of many a merchantman in the course of the war.

The case of *The British Steamship Company* (*The St. Oswald*) v. *The King* (14 Asp. Mar. Law Cas. 270, 404; 118 L. T. Rep. 640; (1918) 2 K. B. 879) was referred to in the argument before me. That case is fully dealt with by Lord Atkinson in *The Petersham* case (*ante*, p. 62; 123 L. T. Rep. 721; (1921) 1 A. C. 99, at p. 116). As the noble Lord there points out, the *St. Oswald* was, at the time of her loss, engaged in a warlike operation, namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. She collided with the French warship *Suffren*, which was itself engaged at the very time in carrying out warlike operations in an area of naval warfare. *The St. Oswald* case (*sup.*) is, therefore, wholly different to the present.

Mr. Dunlop, in the course of his argument for the petitioners, presented an ingenious contention. Briefly put it ran thus. To remove the wounded from the area of active war eases the position of the belligerent. It leaves him freer for action. To cure the wounded (if cure can be made) turns an inefficient unit into a fighting man. Therefore the conveyance of wounded for the purpose of cure is a warlike operation.

I appreciate the argument but I cannot adopt it. It seems to me to reject the distinction between warlike operations and acts done in the course of a war. If the contention be correct then every ship which carries doctors, nurses or medical stores is engaged in a warlike operation. For the object of those persons and things is to restore wounded soldiers to health. Indeed, it would follow that every hospital ship is necessarily engaged in a warlike operation. So, too, every chaplain who gives solace to the wounded, and every entertainer who brightens the camp with humour would legally be engaged in a military operation. They help to restore health and spirits. I cannot so hold. I recognise the difficulty of defining where warlike operations end and other operations begin: (see the illustration given by Lord Atkinson in *The Petersham* case (*ante*, p. 62; 123 L. T. Rep. 721; (1921) 1 A. C. 99, at p. 114), and by Atkin, L.J. in *The Petersham* case (14 Asp. Mar. Law Cas. 507, at p. 511; 121 L. T. Rep. 553, 559; (1919) 2 K. B., at p. 696). But if Mr. Dunlop be right his ratio can only be that indirect assistance given to the furtherance of British war interests is in itself a warlike operation.

Take, however, the case of *The Petersham* (*ante*, p. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99). She was under Admiralty requisition when lost. She carried a cargo of iron ore. For what purpose was the ore to be used? Mainly, I conceive, for the purposes of the war. But can it be said that she was, when carrying the cargo, engaged in a warlike operation? Surely not. If Mr. Dunlop be right, then, the decision of the House of Lords in *The Petersham* case (*sup.*) must have been erroneous. So, too, of *The Matiana* case (*ante*, p. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99). She carried cotton. Cotton can be used for the clothing of troops. Indeed, in the very case now before me, the *Petingaudet* was under Admiralty requisition and was carrying a cargo of coke which I presume was for the use of the Navy. Yet even the ability and ingenuity of Mr. MacKinnon, K.C., Mr. Dunlop, K.C. or Mr. Dumas has not led them to suggest that the *Petingaudet* was engaged in a warlike operation. Investigations analogous to those in *The Kim* (14 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215) have not as yet been made in litigation like the present.

It follows from what I have said that I find myself unable to adopt the view apparently taken by Bailhache, J. in *P. and O. Branch Service* v. *Commonwealth Shipping Representative* (38 Times L. Rep. 93; affirmed in C. A. 38, Times L. Rep. 93) He there held that a merchant vessel carrying ambulance wagons was engaged in a warlike operation. I entertain a very deep respect for the opinion of that learned and experienced judge, but I feel bound to form a different opinion after considering the able arguments addressed to me. I fully share the doubts expressed by Rowlatt, J. in *Atlantic Transport Company* v. *Director of Transports* (38 Times L. Rep. 160).

I hold that the *Warilda* was not a warship, and that she was not engaged in a warlike operation. It is therefore not strictly necessary to determine the materiality of the question of negligence. That question, however, was so fully argued before me by counsel for the petitioners and by Mr. Raeburn, K.C. for the Crown, that I ought briefly to express my opinion upon it. The material words are "All consequences of hostilities or warlike operations." The word "consequence" is closely interwoven with the notion of causation.

It was submitted by the petitioners that if the *Warilda* suffered injury whilst engaged in a warlike operation, the question of negligence was immaterial. It seems that in certain cases negligence may be, for some purposes, immaterial; for example, if an ordinary merchantman be struck by a warship whilst the latter is patrolling for submarines, it may be immaterial (for the purpose of such words as those now in question) that the warship was also guilty of some act of negligence contributing to the injury to the merchantman. Compare the judgment of Roche, J. in *Charente Steamship*

Company v. *Director of Transports* (38 Times L. Rep. 148; affirmed in C. A., 38 Times L. Rep. 434).

But the present facts are quite different. The question does, I think, arise directly as to whether it was the warlike operation (if the *Warilda* was so engaged) or the negligence of the master which led to her injury. Now, if Hill, J. and the House of Lords held that the *Warilda* was guilty of negligence, and was alone to blame for the collision, is this finding of negligence material? No express decision on the point exists. It is of value, however, to observe the cases where the point arose incidentally.

In the *St. Oswald* case (*sup.*) the Attorney-General expressly abandoned any charge of negligence against either of the vessels concerned: (see per Swinfen-Eady, M.R., 14 Asp. Mar. Law Cas. 270, at p. 272; 118 L. T. Rep. 640; (1918) 2 K. B., at p. 883). Duke, L.J. clearly points out in the same case that no case of negligence on the part of either vessel was set up by the Crown. In *The Petersham* and *Matiana* cases (*sup.*) it was stated in plain language by the noble lords, that none of the vessels concerned were guilty of negligence: (see, for example, per Lord Cave and Lord Atkinson, *ante*, p. 58; 124 L. T. Rep. 540; (1921) 1 A. C. 99, at pp. 101, 105, and 117). So, too, in the *Ard Coaster's* case the arbitrator had expressly found that neither vessel was to blame: (see per Bankes, L.J., *ante*, p. 46, at p. 47; 123 L. T. Rep., at p. 487; (1920) 3 K. B., at p. 70).

It would appear, therefore, that the highest authority regards the question of negligence as material, and this, I think, was the view of the Court of Appeal in the unreported case of *Inui Gomei Kaisha* v. *Bernardo Attolico*, on the 7th Feb. 1919. The reason was, I conceive, put clearly by Scrutton, L.J. in *The St. Oswald* case (*sup.*) where he said that the military operation must be the direct or dominant cause of the loss. If the petitioners were correct in their argument, then it would matter not how gross the negligence was which led to the injury. It seems to me that the contention of the petitioners here is opposed to the principle of the basic decision of *Ionides* v. *Universal Marine Insurance Company* (1 Asp. Mar. Law Cas. (O. S.) 253; 8 L. T. Rep. 705; 14 C. B. N. S. 259), and the principle there indicated. I do not gather that the reference by Erle, C.J. (1 Asp. Mar. Law Cas. (O. S.) 253; 8 L. T. Rep. 705; 14 C. B. N. S., at p. 286) to "unskilful navigation" was dissipated (as to the materiality of negligence) by Lord Sumner (*ante*, p. 62; 123 L. T. Rep. 721; (1921) 1 A. C., at p. 130). The noble lord, I think, merely explains the dictum of Erle, C.J. If, then, negligence be material (as I hold) in such a case as the present, the only question seems to be whether the hurt to the *Warilda* was caused through the negligence of the master or through a warlike operation—if such was the operation (contrary to my own view)—in which the *Warilda* was engaged. The question of "cause" may often be difficult. As Lord Shaw felicitously said in *Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited* (14 Asp. Mar. Law Cas. 258, at p. 263; 118 L. T. Rep. 120; (1918) A. C. 350, at p. 369): "Causation is not a chain, but a net." A concise statement of several weighty dicta with respect to causation will be found in the judgment of Duke, L.J. in the *St. Oswald* case (*sup.*). It is well said by Sir Frederick Pollock in his work on Torts, 11th edit., p. 36, that "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." See, too, per Bankes, L.J., in *Polemis* v. *Furness, Withy, and Co. Limited* (*ante*, 398, at p. 399; 126 L. T. Rep. 154; (1921) 3 K. B. 560, at p. 570).

In the present case, I respectfully adopt the words of Lord Sumner in *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 593; (1920) A. C. 956, at p. 983), and I ask the question what was the "direct cause" of the injury to the *Warilda*? In my opinion, the direct cause was the negligence of her master. Unless this be so I do not see how the House of Lords could have held that she was responsible for the whole damage to the *Petingaudet*. The warlike operation (if it was one) did not cause the loss. The negligence of the master was more than a *causa magna et gravis*. It was the new, independent dominant, and directly operative cause of the collision.

For these reasons, I hold that the petitioners fail.

Judgment for the Crown.

Solicitors for the suppliants: *Parker, Garrett, and Co.*

Solicitor for the Crown: *The Treasury Solicitor.*

House of Lords.

Thursday, Dec. 15, 1921.

(Before Lords BIRKENHEAD, L.C., CAVE, FINLAY, SHAW, and PHILLIMORE.)

ADMIRALTY COMMISSIONERS *v.* OWNERS of STEAMSHIP VOLUTE; THE VOLUTE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL, ENGLAND.

Collision—Contributory negligence—Maritime Conventions Act 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1 (*a*) (*b*).

The question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it.

In establishing liability for collision at sea, if a clear line can be drawn between the acts of negligence of two vessels, the subsequent act of negligence is the only one to look to. There are cases where the two acts of negligence come so closely together and the second act of negligence is so mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame under the rule in The Bywell Castle, *might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.*

A collision occurred between the V., *an oil tank vessel, the leading vessel of a convoy, and the* R., *a destroyer, the escort on the starboard hand. If the* V. *had signalled as she should have done before she ported, there would have been no collision; if the* R. *had not gone full speed ahead after the position of danger brought about by the action of the* V. *arose there would have been no collision.*

Held, that there was not a sufficient separation of time, place, or circumstance between the negligent navigation of the R. *and that of the* V. *to make it*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

right to treat the negligence of the R. *as the sole cause of the collision and that both ships must be held to have been equally to blame.*

The law of contributory negligence at sea reviewed and applied.

Judgment of the Court of Appeal, holding the R. *alone to blame, and affirming the judgment of the President, reversed.*

APPEAL from the judgment of the Court of Appeal affirming the judgment of Duke, P., who found the *Radstock* alone to blame.

STATEMENT OF CLAIM.

1. The plaintiffs have suffered damage by reason of a collision between H.M.S. *Radstock* and the defendants' steamship *Volute*, which was solely caused by the negligent navigation of the *Volute* by the defendants or their servants as hereinafter appears.

2. Shortly before 3.51 a.m. on the 12th April 1918, the *Radstock*, a destroyer of 1173 tons, 276ft. long, and fitted with engines of 27,000 H.P.I., and manned by a crew of eighty-five hands all told, was, whilst engaged as one of two escorts to three vessels of which the *Volute* was one, in about lat. 55° 35′ N. and long. 7° W. The wind was W. by S., force 1; the weather was calm; and the tide was setting to the N.W. of a force of about one knot. The convoy was proceeding on a course of N. 44° W., and was making about eight knots. The *Volute* was leading the convoy with another vessel on her port beam and a third astern of her. The *Radstock* was proceeding on a course of N. 44° W. by compass at a speed of about eight knots and was about two points abaft the starboard beam of the *Volute* and about three cables distant from her. The *Volute* carried a dim stern light only, which at the material time was not open to the *Radstock*; the *Radstock* carried no lights. A good look-out was being kept on board the *Radstock*.

3. In these circumstances those on board the *Radstock* observed the *Volute* altering her course to starboard without sounding one short blast as she had been directed to do when making an alteration of course. The helm of the *Radstock* was immediately ordered hard-a-port. When the helm had been got over ten degrees the steering gear jammed. The revolutions of the engines of the *Radstock* were increased so as to give her speed of twenty knots, but the *Volute* coming on at a considerable rate of speed with her stem struck the port side of the *Radstock* in the way of the engine-room, doing her considerable damage.

4. A good look-out was not being kept on board the *Volute*.

5. The *Volute* improperly failed to indicate by the appropriate signal, which she had been directed to give, that she was making an alteration of course.

6. The *Volute* improperly failed to slacken her speed or to stop or reverse her engines or to do so in due time.

7. The *Volute* improperly failed to comply with arts. 28 and 29 of the Regulations for Preventing Collisions at Sea.

DEFENCE.

1. The defendants deny that the collision mentioned in the statement of claim was caused or contributed to by the negligent navigation of the *Volute*, and say that the same was solely caused by the negligent navigation of H.M.S. *Radstock* by those in charge of her, as hereinafter appears. Save as is hereinafter expressly admitted, the defendants deny each and every allegation in the statement of claim contained.

2. Shortly before 2.56 a.m. on the 12th April 1918 the *Volute*, a steel screw steamship belonging to the Port of London, of 4500 tons gross and 3290 tons net register, of 347ft. in length, fitted with engines of 357 H.P. nominal, and manned by a crew of forty-five hands all told, was off Oversay Light on the West Coast of Scotland in the course of a voyage from Hampton Roads, Chesapeake, to Scapa Flow, laden with a full cargo of oil. The weather was fine and clear, the wind variable of little or no force, and the tide unknown. The *Volute*, together with two other vessels, was proceeding in convoy escorted by two destroyers, of which one was H.M.S. *Radstock*. Instructions had been received that the *Volute* was to be responsible for the navigation of the convoy, and that a course was to be set from a position one and a half miles East Magnetic from Altacarry Head to pass at least twelve miles West True from Oversay Light, and to continue to a given position, from which a course should be set for the South Coast of Mull. The *Volute*, having passed Oversay Light at the required distance, was on a course to comply with the above instructions, and was making about eight knots. According to instructions, no vessels in the convoy were exhibiting lights, with the exception of the *Volute*, which was exhibiting a shaded stern light only. A good look-out was being kept on board the *Volute*.

3. In these circumstances, when Oversay Light was observed to be distant about seventeen miles, and and bearing S. 85 E. true, the whistle of the *Volute* was sounded one short blast, and after receiving a reply of one short blast from the other vessels in the convoy, her helm was ported. At about the same time H.M.S. *Radstock* was seen distant about a quarter of a mile, and bearing on the *Volute's* starboard bow, but her movements were not specially observed, as instructions had been received that the *Volute* was not to pay heed to the movements of the escorting destroyers. The other vessels in the convoy ported their helms to conform with the course of the *Volute*, and the *Volute*, having got on her appropriate course, her helm was steadied, but shortly afterwards it was seen that H.M.S. *Radstock*, instead of altering her course to starboard to conform with the course of the convoy and to keep out of the way of the *Volute*, was shaping to cross the bows of the *Volute*, causing imminent risk of collision. The engines of the *Volute* were immediately stopped and put full steam astern, and her helm was starboarded, but notwithstanding these measures, the port side of H.M.S. *Radstock* abaft the midship line struck the stem of the *Volute*, doing considerable damage.

4. Those in charge of H.M.S. *Radstock* negligently failed:—(*a*) To keep a good look-out; (*b*) to conform with the alteration of helm made under instructions by the *Volute*; (*c*) to keep clear of the *Volute*; (*d*) to ease, stop, or reverse her engines in due time or at all; (*e*) to port her helm in due time to avoid a collision; (*f*) to indicate her manœuvres by the appropriate or any whistle signal; (*g*) to comply with arts. 27 and 29 of the Regulations for Preventing Collisions at Sea.

5. Alternatively the said collision was due to the conditions under which the vessels were navigating, and could not have been avoided by the exercise of ordinary and reasonable care and nautical skill on the part of those in charge of the *Volute*.

The following statement of facts is taken from the judgment of Duke, P., in the Admiralty Division:

"The collision which is in question in this case occurred under circumstances which illustrate, as vividly as any set of circumstances could do which have come under my notice for a long time, the conditions under which the commerce of this country was being carried on at the height of the war. It is impossible that a story such as we have had here to-day in the course of this trial should not excite the sympathies of all who heard it, for both the men of the Navy and the men of the Merchant Service who were engaged in the services which were being performed on the night of the 11th April of last year, or, rather, in the early morning of the 12th April, when this collision occurred. The Atlantic Convoy had reached the north east coast of

Ireland upon the night of the 11th April and during the day of the 11th April it had warded off, at any rate, nine submarine attacks. The point on the Irish coast to which the course of the Atlantic Convoy was directed was a point to which it was notorious at that time, among those who knew of the movements of merchant ships, that mercantile traffic was customarily directed; and during the day of the 11th April there had been nine submarine attacks which were known of at that point, as the result of which vessels of His Majesty's fleet had been either disabled or sunk as well as other serious damage inflicted by torpedo attack. The commanding officer of the torpedo boat destroyer *Radstock*—which is a boat under the control of the Commissioners of the Admiralty, who are plaintiffs in the suit—had been on his bridge for forty hours, and then when night fell, and the convoy here in question had been detached from the Atlantic Convoy and was making its way to the west coast of Scotland in comparatively narrow waters, he was able to lie down on his settee in his chart room for a short time, kept awake, as he was, by wireless signals and by all the variety of duties which called for his attention. As far as the commander of the merchant vessel is concerned, he had been vice-commodore of the Atlantic Convoy on his way over and he had come through the perils of the 11th April. He was a man who evidently had suffered in his health by the strain which he was undergoing at that time, and at the time in question he also was lying down in his chart room, taking a short spell of rest during a time when the zigzagging had ceased because of the comparative relaxation of risk, and the smaller convoy which was here in question was making its course under the orders which Commander King had given on the evening of the 11th April.

"It is under circumstances of that kind that the facts occur of which witnesses come here to-day to speak with a recollection particular enough and certain enough to make the basis of a legal decision. I am quite sure that neither on the one side nor the other would it be supposed that, having come to a conclusion upon questions of fact here, on the narrow difficult problem, I have any doubt at all about the integrity of those who have come to give, according to their belief, their respective accounts of the events which transpired in connection with this collision. I have no doubt about the integrity of the witnesses in this case; and that, as may be supposed, adds to the difficulties of the case. But I should not like that men who come here, and in a court of law have their evidence examined, and invite a decision on the facts one way or another, should suppose that the enormous difficulties of the service which they were rendering at that time—difficulties which might affect the capacity of other men for particular observation in critical circumstances—were not fully appreciated by the judge whose duty it is to give a decision in the face of a direct conflict of fact.

"The material facts with regard to this matter may be set forth without any very great difficulty. The flotilla which is here in question, as I have said, had broken away from the Atlantic Convoy on the 11th April. The escort was in charge of Commander King of the *Radstock*; and that small convoy of three oil tank ships was making its way up the west coast of Scotland in order to come round to Scapa Flow. A point had been given at which there was to be a change of course. Two courses have been spoken of which had been set—one a course of N. 32 W., and the other a course of N. 44 W. At a point on the S.W. of the Island of Islay, and within a certain distance of it, it was the business of the Commodore of the small convoy of three ships to change the course of the convoy, and to change his course which was very little different from N.W.—into a course which was practically N.E. Those were the instructions he had, and he had received those instructions by semaphore from the *Radstock* on the previous evening. The instructions had been written down in the signal book of the *Radstock* and the commander of the *Volute* had them definitely written down as he received them. It is to the credit of the merchant ship as well as of the ship of the Fleet, that there is not the least discrepancy as to the instructions which were then given. The master of the *Volute* afterwards communicated by one of his officers—the officer of the watch at the moment—with the officer of the watch at the moment on board the *Radstock* with regard to the movements of the escort during the night, and received an answer. I have said in the course of this hearing that in my opinion—with the concurrence of my assessors—that was an answer which did not absolve those responsible on the *Volute* from taking all proper and necessary care in their navigation to see that they did not put themselves and the *Radstock* into a position of mutual peril. It was a perfectly natural inquiry to make, and a perfectly natural answer to give; but it did not absolve those in charge of the *Volute* from any of their obligations to take care with regard to the *Radstock*. The orders which were given so far as they are material, were first of all as to the courses which I have indicated, and then to the effect that upon reaching the indicated point the *Volute* should signify to the other vessels of the convoy her intended change of course by the proper steam signal. The intended change of course was a course to starboard; she was going to change from a course which was very nearly N.W. to a course of N.E., and she was to give the suitable indication of her intention to change that course. The relative positions of the vessels were defined, and the position of the *Radstock* was on the starboard side of the convoy. The exact position is not material at this moment. The *Volute*, it was defined, 'will lead, *Laurel Leaf* on port beam, and *Thermidor* astern of *Volute*. Destroyers will zigzag either side'—that is during the day—'*Volute* is to be responsible for navigation and has to sound necessary blasts when altering course. Ships are to keep as close to each other as possible and are to show no light except *Volute*, who is to show a shaded stern light. Ships will not zigzag after dark, speed will be eight knots.' The appointed place was reached and it was the business of the officer who was in charge of the navigation of the *Volute* to give his steam signal and to change his course moderately in the manner in which a change of course must be made by those who are in charge of vessels in convoy.

One of the questions in this case is as to whether the *Volute* before making the change—which she undoubtedly made—gave the steam signal. I will deal with that presently. There is no question that the *Volute* made the change of course, and she completed the change of course for all practical purposes. It may be that there was a point or something less than a point lacking of the complete change of course, but for all practical purposes—so far as the event of the collision is concerned—she completed her change of course. When she had completed her

change of course she found herself in a position with regard to the *Radstock*, and the *Radstock* found herself in a position with regard to the *Volute*, in which a collision was inevitable. There was some management of the vessels on each side—some skilful management—and as the result of the combined operations, and of the courses on which the vessels were, the *Volute* struck the *Radstock* opposite her engine room. Her stem penetrated almost to the port engine of the *Radstock*, and the *Radstock* was very seriously damaged. Fortunately she got into a port of refuge under the steam of her starboard engine, but had not there been management at the point of time immediately before the collision, there seems to be very little doubt that she must have been sunk. She was struck with a blow of the force that would be delivered by a tank steamer of, it is said, 7000 or 8000 tons burden, being as she was fully laden, but at any rate by a vessel having a very great weight to impart momentum to any blow which might be struck by it, a blow which in this case fell short of running the *Radstock* down, but which penetrated to the proximity of her port engine.

The President held the *Radstock* alone to blame on the ground that her look-out was defective, and that, when the course of the *Volute* was observed, the *Radstock* failed to take proper measures to prevent the collision.

The Court of Appeal (Lord Sterndale, M.R., Atkin and Younger, L.JJ.) affirmed the decision of the President.

Raeburn, K.C. and *Balloch* for the Admiralty.

Stephens, K.C. and *Carpmael* for the respondents, the owners of the *Volute*.

The House, having taken time to consider, gave the following judgments allowing the appeal.

Lord BIRKENHEAD, L.C.—This action was brought by the Lords Commissioners of the Admiralty against the owners of the steamship *Volute* for damage suffered in a collision between the *Radstock*, a destroyer, and the *Volute*, an oil tank ship, which occurred shortly before 4 a.m. on the 12th April 1918 off the West coast of Scotland.

On the occasion in question, the *Radstock* was one of two destroyers in charge of a convoy of three oil tank vessels, and the ships were proceeding in this order: The *Volute* was the leading merchant vessel, having one of her consorts on the port hand and one astern. The *Radstock* was the escort on the starboard hand, and the *Undine*, another destroyer, was the escort on the port hand. The station distances between the merchant vessels were two cables and between the destroyers, and the merchant vessels three cables. The *Volute* was made the leader of the convoy and had instructions when to alter her course. She was to be responsible for the alteration and was to sound the necessary short blast helm signals when altering course. She was directed to alter course to port a little before midnight, and she starboarded her helm and blew the appropriate signal of two blasts, which was answered as intended by the other vessels of the convoy, and the course was altered without mishap.

On this altered course. N. 44 degrees W., the vessels then proceeded till a particular bearing of the Oversay Light was reached, when it would be right for the course to be altered about seven points to starboard, from N. 44 W. to N. 32 E., and this the *Volute* proceeded to do. She ought to have signified this very striking alteration by the blowing of a short blast of her whistle. Whether she did so was a serious matter in dispute at the trial. The night was dark, and no lights were being carried except that each vessel in the convoy carried a shaded stern light.

The *Radstock*, whose officer and crews said that they heard no whistle, did not alter course when the *Volute* ported her helm and the result was that a position of danger arose. Only the master of those on board the *Volute* was examined, and he, though awake and in the chart room, was not on the bridge till the last moment; their Lordships do not precisely know at what stage and in what circumstances those on board the *Volute* realised that there was going to be a collision. But there was some evidence which will be dealt with later that she stopped and reversed her engines before the collision. She also pleaded that she hard-a-starboarded. Her master says that when he came to the bridge the helm was amidships, but it is hardly possible that she checked her port helm as the collision is agreed at a right-angled blow, and the *Radstock*, though her helm jammed, had ported somewhat.

As far as the *Radstock* is concerned, the evidence was that the first they knew of the approach of the *Volute* was a report about two minutes before the collision from the port look-out that the *Volute* was altering to starboard. She was then seen to be at a good distance—three to four points on the port bow; the helm of the *Radstock* was altered hard-a-port, but jammed when it had got to ten degrees, and the officer in charge then gave the order to increase the speed of the *Radstock*, which had been proceeding at the convoy speed of eight knots, up to a speed of twenty knots. It was agreed that the two vessels came into collision at about right angles, the port side of the *Radstock* in the engine room, just abaft amidships, and the stem of the *Volute*, the *Radstock* having at the time of the collision attained to a speed of about eighteen knots. Great damage was done to the *Radstock*, but she did not sink, and ultimately got into port.

As the trial of the case proceeded, it became clear that there were only two questions of fact in dispute, though there might be much discussion as to the actual or probable consequences of the various manœuvres. These two facts were whether the *Volute* did or did not blow a whistle as the appropriate helm signal, and whether she did nor did not stop and reverse her engines and if she did, when.

I will take the latter point first. It was urged on behalf of the *Volute* that she must have reduced her speed and reduced it considerably. Otherwise, with her momentum and a right-angled blow, and the not very stout scantling of the *Radstock*, she would have cut so far as to cause the *Radstock* to sink. This is a very unsafe point to rely on, unless there has been some careful scientific calculation of forces, and one of the assessors who assisted your Lordships has stated on consideration that he thinks no conclusion could safely be drawn from the fact that the *Radstock* was not sunk. But there is the evidence of the master of the *Volute*, who says that he heard the telegraph ring before the collision, and that of the captain of the *Radstock*, who says, in answer to Question 78, "The *Volute* appeared to me to be stopped, nearly stationary, and I believe going astern." It was suggested,

and is possible, that as he came on deck on the impact, he may have meant to refer to her action after the blow was struck, but upon the whole, I think it would be safer for your Lordships to conclude that the *Volute* did stop and reverse her engines in sufficient time to save her from blame in this respect, particularly as this was the view both of the learned President who tried the case and of the members of the Court of Appeal.

As to the other issue of fact about the whistle signal, the matter stands in this way: The President believed that the signal was given and he therefore held the *Radstock* to blame. He also held that she was to blame for going full speed ahead. The judges of the Court of Appeal were evidently in great difficulty on the subject of the whistle. The Master of the Rolls dealt with the case on the assumption that the whistle was not sounded, while at the conclusion of his judgment he thought it best to express no opinion as to the conclusion of fact which the President came to on that point. The Lords Justices did not decide the point, but gave a very strong indication of their opinion that the whistle was not blown. It became unnecessary, however, in the opinion of all three members of the Court of Appeal, to come to a decided conclusion as to the whistle, because they thought that even if it was not blown, nevertheless the *Radstock* was to blame and alone to blame for the collision.

Your Lordships, after a careful examination of the evidence, are all, I believe, convinced that the signal was not given. The only witness for the *Volute* was the master. He no doubt said that the second officer, whom he had left in charge, had instructions to blow one blast, to listen to the other steamships to see that they answered before the course was altered and to port slowly, and that he in his chart room heard one blast blown and answered by the other steamships. He further says that after the impact he stopped his engines, which were working astern to keep the two ships together, and then when he backed out he blew three short blasts, the appropriate signal for going astern, no such signal having been given before the collision. There is no entry of any whistle signal in his log book.

On the other hand seven witnesses were called from the *Radstock*: the officer of the watch, the captain, who was in the chart house and had just received a signal from the wireless operator and therefore was awake, the signal man, one of the look-out men, the helmsman, and two other seamen on deck, who all said that there was no port helm signal and no whistle blown till just after the collision, when there was a prolonged blast. Some of them also said, in agreement with what was said by the master of the *Volute*, that she blew three short blasts when she was backing out. Others did not mention these three blasts, but counsel for the *Volute* intimated in the course of the trial that he conceived what happened after the collision to be immaterial. There was an eighth witness, a leading seaman on deck, who did not speak to the long blast but only to the three short blasts. The learned president thought that this imported some discrepancy between the witnesses of the *Radstock*. I think your Lordships have failed to find any such discrepancy. There were no witnesses from either of the other convoy ships, but one witness, the officer of the watch, was called from the other destroyer. He was expecting a short blast. He never heard one, but he did hear a long blast, and as he expected the convoy to alter course about that period, he began to turn under his port helm, when he saw a morse light flash as a signal from the *Radstock* and went up to her assistance. As he did not hear the shock of the collision all that he can say is that the long blast preceded the signal with the Morse lamp, and that it was the only signal he heard. The log books of the *Radstock* were put in and they did not help the case of the *Volute* on this point.

As the learned president said in his judgment that he believed that the witnesses from the *Radstock* came to tell the truth, the matter resolves itself into an inference which can be nearly as well drawn by your Lordships as if you had seen the witnesses yourselves. As I have already stated, there can be no doubt in your Lordships' minds, when the matter comes to be carefully considered, that the conclusion on this point at which the learned president arrived was incorrect. And here it should be observed that though the destroyers were supposed to look after themsleves and the convoy ships to pay no attention to their movements in a general way as they might wish to range ahead, or astern, converge or diverge, yet the captain of the *Radstock* had protected himself by instructing the other vessels of the convoy to answer the signal of the *Volute*, and was entitled, therefore, to expect a triad of short blasts. In fact, no blasts were sounded. Your Lordships will therefore, I apprehend, hold that the *Volute* was negligent and to blame in not blowing a short helm blast. Whether it was negligence which should be held in law to have contributed to the collision or not is a matter of greater difficulty.

As regards the alleged negligence of the *Radstock*, the president, while exculpating her on the charges of not stopping and reversing, did, with the concurrence of his assessors, find her to blame for increasing her speed which, as has been stated, reached eighteen knots at the time of the collision. The Master of the Rolls, with the concurrence of the Lords Justices and following the advice of their assessors, came to the same conclusion, and your Lordships have been advised by your assessors to the same effect. There is no doubt that the officer in charge was influenced by the fear lest he should be struck forward, where he carried depth charges, or in the boiler room. But it seems that if he had not increased his speed there would have been no collision at all; and though no doubt he was put in a position of some difficulty by the action of the *Volute* in porting and bringing herself on a crossing course without whistling, it is, in the eyes of all nautical men who have dealt with this matter, so patent that it was wrong to put the engines full speed ahead, that your Lordships cannot do otherwise than agree with both courts below and hold the *Radstock* at least partly to blame for the collision.

The matter therefore rests in this way. On the one hand, if the *Volute* had signalled or had postponed her porting unless and until she signalled there would have been no collision. On the other hand, if the *Radstock* had not gone full speed ahead after the position of danger brought about by the action of the *Volute*, there would have been no collision.

In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing

for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full. See among other cases *Spaight* v. *Tedcastle* (4 Asp. Mar. Law Cas. 406; 44 L. T. Rep. 589; 6 App. Cas. 217) and *The Margaret* (5 Asp. Mar. Law Cas. 371; 52 L. T. Rep. 361; 9 App. Cas. 873).

At the other end of the chain, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails: (*The Bywell Castle*, 4 Asp. Mar. Law Cas. 207; 41 L. T. Rep. 747; 4 Prob. Div. 219; *Stoomvart Maatschappy Nederland* v. *Peninsular and Oriental Company* (*The Khedive*) 4 Asp. Mar. Law Cas. 567; 43 L. T. Rep. 610; 5 App. Cas. 876).

In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

Lord Blackburn, in *The Margaret* (*sup.*), was of opinion that the area of this middle space was the same for Admiralty as for common law, and his opinion may be accepted subject to a possible qualification arising out of the subsequent passing of the Maritime Conventions Act 1911.

How, then, are its limits to be ascertained? Contributory negligence certainly arises when the negligence is contemporaneous, but are the only cases of contributory negligence cases where the negligence is contemporaneous? Is it to be the rule in all cases if the tribunal can find a period at which A.'s negligence has ceased and after which B.'s negligence has begun that then the negligence of A. is to be disregarded? If such should be the rule it will be found that the cases of contributory negligence would be few.

If two roads intersect each other at right angles and there is a large building at the point of intersection, and two people are running or riding or driving at a reckless pace, one down each street, and meet at the corner, it would be easy to say that both were in fault and equally so. If the courses of two motor-cars cross and there is no rule of the road such as that at sea requiring one to give way and the other to keep her course and both hold on both are equally to blame. In *The Margaret* (4 Asp. Mar. Law Cas. 375; 44 L. T. Rep. 291; 6 Prob. Div. 76), a badly navigated barge came into collision with a schooner which was improperly carrying her anchor over her bows in a dangerous way contrary to the rule. An impact ensued which would have done no damage but for the fact that the fluke of the anchor knocked a hole in the barge. Sir Robert Phillimore put the whole blame on the badly navigated barge, but the Court of Appeal thought that though the collision was solely due to her the damage was due to both, and divided it.

But even this class of case was varied by the subsequent decision of Gorell Barnes, J., in *The Monte Rosa* (7 Asp. Mar. Law Cas. 326; 68 L. T. Rep. 299; (1893) P. 23), where he distinguished *The Margaret* (*sup.*), saying that the collision there occurred at night and the anchor could not be seen and held the badly navigated vessel alone to blame for the collision because those on board of her might have seen the dangerous position of the anchor.

It is very difficult, except in the cases just mentioned, to think of any cases where there is strictly synchronous negligence. And if that be the rule the application of the doctrine of contributory negligence to collisions, whether on land or sea, would be rare. Still rarer would be cases where the more minute calculations required by the Maritime Conventions Act could find place. In *Dowell* v. *General Steam Navigation Company* (1855, 5 E. & B. 195) a collision between a sailing vessel which had taken in her light and a steamer, the questions put to the jury were: "(1) Was there negligence on the part of the plaintiff with respect to the light which led to the collision? (2) Could the defendants have avoided the collision with ordinary skill and care? (3) Was the damage occasioned by the accident the result of circumstances for which more blame attaches to the one side or the other?" And the jury answered—(1) We find there was fault on the part of the collier in not continuing the light till the danger was past. (2) It is the opinion of the jury that the steamer was going at too great a speed on so dark a night, in which respect there was want of caution; but that it was impossible to have avoided the accident when the steamer was within two or three of the collier's lengths. (3) We are much inclined to think the preponderance of blame to be with the steamer."

On these answers the judge entered a verdict for the plaintiffs, giving the defendants leave to move.

But the court set this aside and said that the answers of the jury to the questions put to them amounted, in point of law, to a verdict for the defendants.

In the course of his judgment, Lord Campbell, who delivered the judgment of the whole court (himself, Coleridge, Erle and Crompton, JJ.) said: "The jury appear to have come to the conclusion . . . that the collier did show a light . . . but did not continue to show it for a reasonable time, and that while the danger still existed, and the light ought to have been shown, the collier was in fault and broke the regulations by not continuing to show it.

"We likewise think that the jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained.

"According to the rule which prevails in the Court of Admiralty in a case of collision if both vessels are in fault the loss is equally divided, but in a court of common law the plaintiff has no remedy if his negligence in any degree contributed to the accident. . . .

"In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident, and in these cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident notwithstanding the negligence of the plaintiff as in the often quoted donkey case, *Davies* v. *Mann* (1842, 10 M. & W. 546). There, although without the negligence of the plaintiff, the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant to his gross

negligence it is entirely ascribed he and he only proximately causing the loss. But in the present case the jury appear to have concluded . . . that the negligence of the master of the collier in not properly complying with the Admiralty regulations directly contributed to the accident although there was negligence on the other side, and the preponderance of blame was upon the steamer."

"We have further to consider whether the answer of the jury to the first question is at all neutralised or qualified by their answer to the second and third questions. On the contrary, by these the finding against the plaintiff seems to be strengthened. . . .

"To the second, the jury say that the steamer was going at too great a speed on so dark a night; in which respect there was want of caution; but that it was impossible to have avoided the accident when the steamer came within two or three collier lengths. While the jury here impute blame to the steamer they do not retract or vary anything they had before said about the non-observance of the Admiralty regulations by the collier and the concluding part of the answer beginning with the word 'but' may be explained by the jury having believed . . . that the collier was not seen by the steamer till within two or three lengths, and that this arose from the fault of the collier in not continuing the light till the danger was past.

"The answer to the third question is unequivocally unfavourable to the plaintiffs. . . ."

It is not necessary for the court to determine whether both vessels were in fault or only the sailing vessel, but the whole trend of the judgment seems to me to point to the idea that both were in fault and that if it had been a case in Admiralty, the damages would have been divided.

This case has been cited at length because it seems to be an instance of acts of negligence close together, but still in sequence.

For the purpose of considering the Admiralty doctrine of both to blame a mass of cases occurs where both ships have been held to blame in collisions before the passing of the Merchant Shipping Act of 1876, which may be put on one side. That Act provided that if a collision occurred and a ship was found to have broken one of the regulations for preventing collisions at sea she should be deemed to be in fault, and the courts generally and this House in particular construed this as meaning that if the bad navigation could be shown to have contributed to the collision it was to be deemed contributory negligence. This, however, did not prevent the tribunals from determining where the real fault lay, and if it was of opinion that it lay with the other ship in holding both to blame.

This law prevailed from 1876 till it was repealed by the Maritime Conventions Act of 1911. During the period from 1876 to 1911 the only cases useful to consider are cases at sea where, owing to the peculiar circumstances, no regulations applied, or cases in rivers and inlets to which neither the regulations nor the statute applied.

By the Martime Conventions Act 1911, sect. 1, it is enacted that: "Where by the fault of two or more vessels damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. Provided that (*a*) If having regard to all the circumstances of the case it is not possible to establish different degrees of fault the liability shall be apportioned equally, and (*b*) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed."

Effect was given to this last provision in *The Peter Benoit* (13 Asp. Mar. Law Cas. 203); 1915, 114 L. T. Rep. 147.

In *The Westmoreland* (24 Federal Rep. 703, cited in Marsden p. 37), a schooner, contrary to regulations, brought up opposite a launching slip and refused to move. The launch attempted to get under way and fouled her, and both were held to blame. But on the other hand in this country in *The Andalusian* (39 L. T. Rep. 204; 2 Prob. Div. 231), and *The George Roper* (5 Asp. Mar. Law Cas. 134; 49 L. T. Rep. 185; 8 P. Div. 119) the launch was held wholly in fault, and the American case probably goes too far.

The following are cases of negligence in sequence.

In *The Sans Pariel* (9 Asp. Mar. Law Cas. 78; 82 L. T. Rep. 606; (1900) P. 267) where a tug with a vessel in tow was crossing the line of a squadron of warships, the tug and tow were held in the Court of Appeal to blame for persisting in trying to cross the Fleet. But it having been admitted by the Attorney-General acting for the Queen's ship in the court of first instance that there was negligence in the managment of the *Sans Pariel* in acting for the tug only and not noticing the tow as she was crossing, the *Sans Pareil* was held alone to blame. But, as one of your Lordships pointed out in the course of the present argument, the admission by the Attorney-General made in the way in which it was, might partly account for this decision.

In *The Hero* (12 Asp. Mar. Law Cas. 108; 106 L. T. Rep. 82; (1912) A. C. 300) the House of Lords, in a not dissimilar case, held that without applying the penal clause of the Merchant Shipping Act both vessels must be held in fault, the *Hero*, because, having improperly ported, she ran across the bows of three destroyers and "in the ordinary plain common sense of this business the *Hero* not only contributed but mainly contributed to this accident." On the other hand, the King's ship was not held free from fault, because an order to port which had been given by the navigating officer and which would have saved the vessels from collision was countered by an order to starboard, given by the commander when he came on deck.

This case was decided by the Court of Appeal upon the breach of the statute by the merchant ship, but the point was made that the statute did not apply, and your Lordships in this House appear to have decided upon common law principles. It would seem that in chronological sequence there would have been no collision but for the negligence either of the navigating officer in not informing the commander that the helm was a-port or of the commander in countering the port order. This, therefore, seems a case where the two acts of negligence were not synchronous but in sequence.

In *The Ovingdean Grange* (9 Asp. Mar. Law Cas. 242; 87 L. T. Rep. 15; (1902) P. 208), a collision in the Thames where the statute did not apply, Sir Francis Jeune and the Court of Appeal held that a steamship proceeding down the river against the tide and having under the Thames rules to wait under the Point till the up-coming steamer passed clear, was partly to blame, although the actual fault was in the up-coming steamer, for not keeping a proper look-out and for turning

without a proper regard to the passing traffic. There again the negligence seems to have been in sequence.

In *Cork Steamship Company Limited* v. *Kiddle* (1920, 2 Ll. L. Rep. 505), which was recently before your Lordships' House and is not reported in the regular reports, there was a division of opinion among your Lordships on this question. But it was finally held by the House that it was a case where the subsequent negligence was the only material one to be considered. In that case, which happened during the war, the King's ship *Active* committed a negligent act in proceeding out of Dover Harbour on a cross-channel course with lights necessarily shaded, at great speed, thereby bringing about risk of collision with vessels proceeding down channel. But the *Ousel*, a vessel proceeding down channel, could, as it was held, if she had had a proper look-out, have seen the red light of the *Active* in time. Your Lordships disregarded the prior negligence of the *Active* and treated the two vessels as being, at the material time, however they had got into the position, ships crossing so as to involve risk of collision. This being so, the *Ousel* became the give way ship and ought to have ported; and for her failure to port and her bad look-out she was held alone to blame.

In this connection the numerous cases of collision between two steamships, where A. is held to blame for bad look-out and wrong helm action, but B. also to blame for not stopping and reversing, must not be disregarded.

Some of them can be explained on the footing that A.'s action made the collision unavoidable, but B.'s speed increased the damage. This may well be if B. goes stem on into A. But if B. is hit in the side or flank it is frequently the case that it will not even be suggested that B.'s speed had any effect on the damage. If these cases be analysed in chronological sequence, either A.'s action made the collision unavoidable or brought about such a sudden peril that B.'s people had not time to think out properly what they should do and A, is alone to blame (such decisions have been given).

Or, on the other hand, notwithstanding A.'s prior negligence it was the subsequent negligence of B. in not reducing speed which caused the collision and B. should be alone to blame. It would be difficult to find an instance of such a decision; but many decisions will be found of both to blame.

Mr. Marsden, writing before the Maritime Conventions Act passed, suggests as matters of contributory negligence, acts or omissions either concurrent in time or identical in character or equal in degree of fault.

If this be correct, the acts of negligence need not be synchronous.

Upon the whole I think that this question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it. And while no doubt where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame under *The Bywell Castle* (41 L. T. Rep. 747; 4 Asp. Mar. Law Cas. 207; 4 Prob. Div. 219) rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

Your Lordships have now to apply these considerations of law to the facts of the present case.

As already stated, if the *Volute* had not neglected to give the appropriate whistle signal when she ported there would have been no collision. On the other hand, if the *Radstock*, in the position of danger brought about by the action of the *Volute* had not gone full speed ahead, there would have been no collision.

The case seems to me to resemble somewhat closely that of *The Hero*. In that case, as in this, notwithstanding the negligent navigation of the first ship, the collision could have been avoided if proper action had been taken by the second ship. Indeed, that case is remarkable because the proper order was actually given, but unfortunately countermanded. In that case this House held both vessels to blame, apparently considering the acts of navigation on the two ships as forming parts of one transaction, and the second act of negligence as closely following upon and involved with the first. In the present case there does not seem to be a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision.

The *Volute*, in the ordinary plain common sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision. And accordingly I move your Lordships to reverse the order appealed from, and to pronounce the *Volute* partly to blame for the said collision, with the usual consequential directions. And I think that there should be no costs in the courts below, but that the plaintiffs should have the costs of the appeal to your Lordships' House, and I so move. Lord Cave has signified to me his concurrence with the conclusions of this judgment.

Lord FINLAY.—I concur, and I have nothing to add beyond this one sentence, that I regard the judgment to which we have just listened as a great and permanent contribution to our law on the subject of contributory negligence, and to the science of jurisprudence.

Lord SHAW.—I have had, in considering this case, much difficulty. In the end I have resolved my difficulties by adhering, as I now fully do, to the judgment which your Lordship has just read. I would venture to concur with my noble and learned friend on my left as to the quality of that judgment.

Lord PHILLIMORE.—I concur.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *Waltons* and *Co.*

Feb. 2, 3, *and* 27, 1922.

(Before Lord BIRKENHEAD, L.C., ATKINSON, SUMNER, PARMOOR, and BUCKMASTER.)

THE TURID. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Expense of unloading timber—"Cargo to be taken from alongside at charterers' expense as customary"—Custom of port—Custom inconsistent with term of charter-party.

By a charter-party of the 1st Oct. 1914, *it was agreed between the plaintiffs the owners, and the defendants the charterers, that the steamship* T. *should load a cargo of timber at Soroka for carriage to Yarmouth, and deliver there "as ordered, or so near thereunto as she may safely get, always afloat"; and that the cargo should be "taken from alongside the steamer at charterers' risk and expense as customary." The* T. *was ordered to discharge at a part of the quay occupied by the charterers, to which she was "always afloat" unable to get nearer than about* 13*ft., and the cargo was there discharged by stagings slung from the ship's side to the quay, the stevedore's men working in two gangs, one carrying the timber to the ship's rail, and the other carrying it ashore.*

It was proved that there was a custom of the port of Yarmouth that the whole of this work should be done by and at the cost of the ship. The shipowners objected that the alleged custom was inconsistent with the terms of the charter-party; and sued the charterers to recover the costs of discharge over and above the rate for delivery at the ship's rail.

Held, that the custom was inconsistent with the terms of the charter-party, and that the shipowners were entitled to recover from the charterers the cost of discharge over and above the rate for delivery at the ship's rail.

Holman *v.* Wade (*Times*, 11*th May* 1877) *applied.*
Stephens *v.* Wintringham (3 *Com. Cas.* 169) *overruled.*
Decision of the Court of Appeal (*reported ante, p.* 184; 125 *L. T. Rep.* 154; (1921) *P.* 146) *affirmed.*

APPEAL by the defendants, the charterers, from a decision of the Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), (reported *ante*, p. 184; 125 L. T. Rep. 154; (1921) P. 146).

The defendants, who were timber merchants, carrying on business at Great Yarmouth, chartered the plaintiffs' steamship *Turid* to carry a cargo of timber to Great Yarmouth. By the charter-party which was dated the 1st Oct. 1914, it was mutually agreed between the plaintiffs as owners of the *Turid* and the defendants as charterers, that the said steamship should proceed to Soroka and there load, always afloat, from the agents of the charterers, a full and complete cargo of mill-sawn deals, battens, boards, and ends and being so loaded, should therewith proceed to Great Yarmouth as ordered, or so near thereunto as she might safely get, and deliver the same, always afloat, on being paid freight as specified.

By clause 3 it was provided "the cargo to be loaded and discharged 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. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The *Turid* arrived at Great Yarmouth with the cargo consisting of 576 standards on the 8th Nov. 1914. Her draught was such that in order to be afloat at Great Yarmouth she could not come nearer than within about 13ft. of the quay at which she was to discharge. In order to discharge the cargo a staging was erected between the ship's side and the edge of the quay abreast of the several holds, such staging being constructed of baulks of timber carried from the quay to the ship's side at a level of 4ft. or 5ft. below the bulwarks, with planks resting upon the baulks. This method of discharge was in accordance with a custom of the port of Yarmouth, and was as follows: That a wooden staging should be erected between the ship about to discharge and the quay, and that stevedores employed by the shipbrokers for and on behalf of the shipowners should carry the cargo from the ship's rail over the said wooden staging and dump the same at not less than 10ft. from the quay side, and that the cost of so discharging the cargo and erecting the said staging should be borne by the shipowners.

The plaintiffs said that if the alleged custom existed it was inconsistent with an express term of the charter-party which required the defendants to take the cargo from alongside at their own risk and expense, and was not admissible in evidence to vary such express term. The plaintiffs under protest carried the said standards from alongside over the said staging and stacked the same on the defendants' quay as directed by the defendants accordingly. The plaintiffs' claim was for the cost incurred by them in erecting the said staging and having the timber carried across it and deposited on the quay in the above manner.

The Court of Appeal held (*ante*, p. 184) that the case was indistinguishable from *Holman* v. *Wade* (*Times*, the 11th May 1877) and that the court was bound by that case to hold that the custom was inconsistent with the terms of the charter-party, and that the plaintiffs were entitled to recover from the defendants the costs of discharge over and above the rate for delivery at the ship's rail.

The defendants appealed.

F. W. Mackinnon, K.C. and *E. A. Harney*, K.C. for the appellants.—The word "alongside" is not a word of such precise meaning as to exclude any evidence of custom of a particular port defining or explaining what, in the customary methods of discharge in that port, is its meaning. It does not mean "at the ship's rail," as claimed by the plaintiffs. *Holman* v. *Wade* (*ubi sup.*) was wrongly decided, and should be overruled.

Raeburn, K.C. and *Trapnell* for the respondents were not called upon.

The House took time for consideration.

Lord BIRKENHEAD, L.C.—The amount in dispute in this case is very small, 46*l.* 17*s.*, but the main, if not, indeed the only, point for decision is of some importance and requires careful consideration. It may be shortly stated: Whether the proved custom of the port of Great Yarmouth touching the discharge and delivery there of a cargo of timber, such as that in fact carried by the steamer *Turid*, is inconsistent with the contract in writing binding on the parties to this appeal and dealing with the same matter, or is only explanatory of the terms of this contract.

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

The facts are few and simple. By a charter-party dated the 1st Oct. 1914, it was agreed that the owners of the *Turid* should load on that ship at Soroka a cargo of deals, battens, boards, and short ends, and thence carry the same for the appellants to Great Yarmouth as ordered, or so near thereunto as she might safely get, and deliver the said cargo to the appellants always afloat on being paid the freight therein mentioned in full and all port charges and pilotage. Clause 3 of the charter-party runs as follows: "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, the money shall be paid at 25*l.* per day, and pro rata for any part thereof. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The *Turid* arrived at Great Yarmouth on Sunday, the 8th Nov. 1914, and was berthed about 12ft. from the appellants' quay, but her draught was such that while afloat she could not be brought into a position in which her bulwarks would be nearer than 13ft. out from this quay. To discharge her cargo a staging was necessary between the ship's side and the quay abreast of her several holds in order to bridge over the separating space. This staging was constructed with baulks of timber carried from the quay to the ship's side at a level of 4ft. or 5ft. below the bulwarks, with planks resting upon these baulks. The cargo was discharged in this way under directions given by the stevedores.

The appellants refused to pay the extra cost of erecting the staging, amounting to 46*l.* 17*s.*; whereupon the owners of the *Turid*, the respondents, instituted a suit in the County Court of Norfolk holden at Great Yarmouth to recover this sum as damages for breach of the charter-party, or alternatively as money paid at the appellants' request. In the statement of claim it was averred that the *Turid* was always ready and willing to deliver her cargo alongside in accordance with the charter-party; that the appellants refused to accept delivery alongside as so provided, but compelled the owners of the ship to place the cargo on the appellants' quay, to which access could only be obtained by carrying the cargo over a wooden staging, which it became necessary to erect and which they did erect accordingly between the steamer and the quay in order to take delivery; that the respondents under protest carried the cargo from alongside their vessel over this staging and stacked the same on the appellants' quay as directed by the latter.

The real defence pleaded in answer to this claim was that by clause 3 of the charter-party it was agreed that the *Turid* should be discharged according to the custom of the port, and that the cargo should be taken from alongside the steamer at charterers' risk and expense as customary; that it was the custom of the port of Great Yarmouth that a wooden staging should be erected between the ship about to discharge and the quay, and that stevedores employed by the shipbrokers, as agents for and on behalf of the shipowners, should carry the cargo from the ship's rail over the said wooden staging and dump the same at a place not less than 10ft. from the quay's edge; that the cost of thus discharging the cargo and erecting this staging should be borne by the shipowners; and that the cargo of the *Turid* was discharged according to this custom.

To this defence a reply was filed which, after denying that the custom relied on existed, and also denying that the cargo of the *Turid* was discharged in accordance with it, alleged that the custom was inconsistent with the express terms of the contract between the parties, which required the appellants to take the cargo from alongside the steamer at their own risk and expense, and that it was not admissible to vary them. The case was tried before Judge Mulligan, the learned County Court judge. Evidence was tendered to prove the custom relied on; it was objected to by counsel for the shipowners, but was admitted subject to objection. Several authorities were cited to the learned judge, including *Holman* v. *Wade* (*Times*, the 11th May 1887). He held that the custom as pleaded flatly contradicted the express terms of the charter-party, viz. (i) that the cargo was to be brought to and taken from alongside the steamer at the charterers' risk and expense as customary; (ii.) that the words "as customary" related to the means of doing the work and not to the expense of doing it, the incidence of the expense having been fixed by the preceding words; and (iii.) that the evidence of the custom was therefore not admissible. The learned judge, therefore, gave judgment for the shipowners. On the 23rd Dec. 1919 the defendants in the action (the present appellants) gave notice of appeal to the Divisional Admiralty Court. The appeal was heard by the President and Hill, J. (*ante*, p. 155), who differed in opinion. The President, after an elaborate review of the relevant authorities, was of opinion that the custom pleaded was inconsistent with the charter-party, and Hill, J. was of opinion that it was not so, and said that if he had not felt himself bound by the case of *Holman* v. *Wade* (*ubi sup.*) he would have decided in favour of the defendants. The appeal was accordingly dismissed. The defendants then appealed to the Court of Appeal. The case was heard on the 17th Jan. 1921, by a court composed of the Master of the Rolls and Warrington and Scrutton, L.JJ. (*ante*, p. 184). The Master of the Rolls, in delivering judgment, said:—"In my judgment the case is governed by the decision to which we have been referred in *Holman* v. *Wade* (*ubi sup.*), and, that being so, I do not think it necessary, or indeed advisable, to express any opinion of my own as to what my decision might have been if I had not thought the case to be governed by this authority."

He points out that the two learned judges in the Divisional Court differed in the manner already stated, and then adds:—"There is a great deal to be said on both sides, and I do not think it necessary or right to express any opinion upon it." He then utters a regret, which everyone must feel who has to deal with the case *Holman* v. *Wade* (*ubi sup.*), that it is not well and fully reported. He points out that no opinion was ever delivered about it by the Court of Appeal in England, but that it has often been cited in courts of first instance and, so far as he was aware, no disapproval of it had ever been expressed. He then states the facts of the case as disclosed in the pleadings, and points out that the custom relied on in the defence was stated in that case in the following words:—"It is the customary and recognised mode of discharge of the Victoria

Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof," which, though strangely expressed, he thought meant that when the cargoes had been discharged upon the quay, but not till then, had the vessel been discharged "alongside," and that the consignees, taking it thence, were taking it from "alongside." He says it would appear as though the custom put to the jury was not exactly in the terms pleaded, because from the associate's certificate it appeared that "the jury found that according to the terms of the charter-party (apart from the question of usage or custom) the cargo was not to be taken by the shipowners from the ship's rail by means of a stage supplied by him to the quay and there stacked by and at the risk and expense of the shipowners; that was to be done by and at the risk and expense of the merchants." The jury also found that "the alleged usage or custom was proved to their satisfaction."

Upon these findings Manisty, J. he says, entered judgment for the plaintiff on the ground that the custom was inconsistent with the charter-party, and his decision was affirmed by the Court of Appeal. The Master of the Rolls concludes his judgment by saying that in his opinion the case before them could not be distinguished from *Holman* v. *Wade* (*ubi sup.*), and that therefore the appeal failed and should be dismissed with costs. The Court of Appeal which affirmed Manisty, J. was composed of Lord Coleridge, Lord Bramwell, and Brett, L.J. The judgment was delivered by Lord Bramwell, who stated that both Lord Coleridge and Brett, L.J. concurred with him.

Warrington, L.J. in delivering judgment, said: "I am of the same opinion. I think we are bound by the decision in *Holman* v. *Wade* (*ubi sup.*). It is quite true that the report of *Holman* v. *Wade* (*ubi sup.*) is a somewhat unsatisfactory one, and the rest of the materials for considering the case are afforded only by the record. But this, at all events, is clear both from the report and from the record that the question between the parties was, who was to pay for the expenses of the process by which, according to the alleged custom, the cargo was to be discharged? The shipowner said 'By the terms of the contract you, the charterers, are to pay the expenses of discharging from alongside.' The charterers said, 'By the custom which we have proved you, the shipowner, are not only to perform the operation of landing the cargo in the way we say the custom prescribes, but you must pay the expense of it.' The ultimate decision was that that part of the custom, at all events, which was said to throw the expense upon the shipowner was inconsistent with the terms of the contract, which provided that the cargo should be taken from alongside the ship at the risk and expense of the charterers." The learned Lord Justice then expressed the opinion that in the case of *The Nifa* (7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56; (1892) P. 411), and in that of *Aktieselskab Helios* v. *Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83), the view taken by Lord Esher was that the mode of discharge was to be regulated by the custom, and that the payment of the expense was an absolute obligation thrown by the contract on the charterers, and therefore was not capable of being thrown upon the shipowner by any such custom as is alleged. On the whole, however, for the reasons given by the Master of the Rolls, he was of opinion that they were bound by *Holman* v. *Wade* (*ubi sup.*), and held that the appeal should be dismissed.

Scrutton, L.J. found great difficulty in holding himself bound by a decision in a case about which they knew so little as they did about *Holman* v. *Wade* (*ubi sup.*), but ultimately came to the conclusion—not without considerable doubt—that they were bound by it, and held that the appeal should be dismissed.

The words of the charter-party in this case are: "Taken from alongside of the steamer at charterers' risk and expense." I am, myself, of opinion that the word "alongside," if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation. It will be observed that the custom proved in this case does not refer at all to the extent of the distance which may separate the ship from the quay. A vessel with a greater draught than the *Turid* might, in order to keep always afloat, have to be berthed at over 8 yards distance from the quay instead of, as in this case, about 4 yards from it. There was no evidence given upon this point. All that was proved is that the *Turid* could not get nearer to the quay if she was to keep always afloat, as the charter-party provided. The custom relied upon was proved by two witnesses examined on behalf of the appellants. Their evidence, as given in the note of the learned County Court judge, was as follows: "William Summers Wharton, manager of defendant company, was then sworn, and said: It was the custom to erect a wooden staging between the ship and the quay, and for stevedores to be employed by the shipbrokers to carry the cargo for the shipowners from the ship's rail over the wooden staging, and to put it down 10 or 12ft. from the edge of the quay. This was all done at the cost of the shipowners. That had been the practice for the thirty-three years he had been in the trade. William Brown, shipbroker, with thirty years' experience of Yarmouth, and Richard Jewson, President of the Timber Trade Federation, with thirty-six years' experience of the timber trade at Yarmouth, gave evidence to the same effect as Wharton. They were not cross-examined."

Hill, J. when giving judgment, said, when dealing with this evidence: "The method of discharging was that a staging was slung from the ship's side abreast of each of the three holds, and the stevedore's men, working in two gangs, carried the timber from the ship's deck and holds across the staging and on to the quay, and stacked it on the quay, leaving a space of 10 to 12ft. between the edge of the quay and the outer edge of the stack. One gang broke out the timber and carried it to the ship's rail, the other received it on the staging and carried it to the place of stacking on the quay, and there stacked it. The contention of the charterers was that, by the custom of the port of Yarmouth, the whole of this work was done by and at the expense of the shipowners; the contention of the shipowners was that the custom was inconsistent with the express terms of the charter-party and that their obligation was to deliver at the ship's side; that the work of the first

gang was ship's work, but the work of the second gang, including the erection of the staging, was charterers' work. The amount in dispute was the difference between the cost of the whole of the work and the cost for delivery at the ship's rail."

In *Humfrey* v. *Dale* (7 E. & B. 266) Lord Campbell, C.J. at p. 279, states the rule of law as to the admission of evidence of a custom to contradict or qualify the tenor of the terms of a written contract. He says: "Neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract." And, at p. 274, he says: "Whether this evidence be treated as explanatory of the language used or as adding a tacitly implied incident to the contract beyond those which are expressed is not material. In either point of view it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument." (Of these words, "or as adding a tacitly implied incident to the contract," more presently.) On the following page he apparently suggests a test by which the repugnancy or non-repugnancy of the something sought to be introduced may be determined. He says: "To fall within the exception of repugnancy the incident must be such as if expressed in the written contract would make it insensible or inconsistent." I shall endeavour presently to apply this test, for I accept and agree with it.

The case of *Humfrey* v. *Dale* went to the Exchequer Chamber (El. Bl. & El. 1004) and was argued before seven learned judges, of whom four, Cockburn, C.J., Pollock, C.B., Williams, J., and Crowder, J. affirmed the judgment of the Queen's Bench that the evidence of custom tendered was admissible, and three, Willes, J., Martin, B., and Channell, B. were of a contrary opinion. None of these learned judges, however, seemed to disapprove of Lord Campbell's statement of the principle or of the test suggested by him to determine the question of repugnancy. They differed as to the result of the application of those principles to the facts of the particular case, which was not a case touching ships or charter-parties. In *Southwell and another* v. *Bowditch* (35 L. T. Rep. 196; 1 C. P. Div. 3741), Jessel, M.R. whose judgment is much more fully reported in 45 L. J., Q. B. 630, said that the difference of opinion in *Humfrey* v. *Dale* (*ubi sup.*) depended on this—the Statute of Frauds required a contract in writing, and of course, usage could not be contradictory to the contract or it would not be binding. It must be explanatory of the contract, and the point upon which the judges differed was whether the usage was explanatory or contradictory. They all agreed that if explanatory it might be admitted, if contradictory it could not be admitted. He then proceeds: "The real point, as I have said before, was whether in that particular instance the usage was contradictory or explanatory. I know some of the judges attempted to get over the difficulty by saying it was additional; but addition, if pure addition, is not explanation. It is a new contract, and therefore a pure addition would require to be in writing; but, again, there could have been no difficulty in saying this, that though, in an action upon the written contract, the mercantile usage might not be admissible for the purposes of contradicting the contract because it would be additional, the contract implied by usage might still be available for the purpose of charging the defendant."

Let me now apply the test suggested by Lord Campbell, and write in after the words "as customary" in the charter-party words describing the custom relied on in this case. The clause in the charter-party will then run somwehat thus: "The cargo to be taken from alongside the steamer at charterers' risk and expense as customary; that is to say, at the shipowners' risk and expense be carried from the rail of the vessel, over a wooden staging bridging the distance between the ship's rail and the quay constructed at the risk and expense of the shipowners, and dumped at a place on the quay not less than three yards from its edge." These added words seem to me to be absolutely inconsistent with the tenor of the language of the charter-party. Whatever may be the locality indicated by the words "alongside the steamer always afloat," it can hardly be a spot on dry land, in this instance about eight yards away from the ship's rail and about 3½ yards from the water on which she floats. The operation of taking the cargo from "alongside the steamer" is, according to the charter-party, to be conducted at the risk and expense of the charterers; but according to the custom nothing is to be done at the risk and expense of the charterers unless it be the taking away of the timber from the place at which it is dumped upon the quay. Therefore the taking of it from that dump must be the removal of it from "alongside the steamer" within the meaning of the custom. The risk and expense of bringing it there is to be borne by the shipowner just as in the ordinary case would be the risk and expense of bringing it to the ship's rail. To satisfy the condition in the charter-party as to this risk and expense one must, in order to reconcile it with the custom proved, hold that the dump on the quay about eight yards away from the rail of the ship is the "alongside the steamer," and that the taking of the cargo away from the dump is the taking of it "from alongside the steamer" within the meaning of the charter-party. I cannot reach such a conclusion.

With one exception, namely, the case of *Stephens* v. *Wintringham* (1898, 3 Com. Cas. 169) the cases cited on behalf of the appellants on the hearing of this appeal support the case of the respondents rather than that of the appellants. The other cases cited are easily distinguishable from the present case. The first of the former class is *The Nifa* (*ubi sup.*), the second is *Hayton* v. *Irwin* (4 Asp. Mar. Law Cas. 212; 41 L. T. Rep. 666; 5 C. P. Div. 130), In the case of *The Nifa* (*ubi sup.*) the charter-party provided that her cargo, composed of deals, should be brought to and taken from alongside the ship at the merchant's risk and expense where she could lie always afloat, and further, that being so loaded therewith she should proceed to Yarmouth or so near thereto as she could safely get and deliver the same always afloat. The following additional clause was then written in: "The cargo to be supplied as fast as the steamer can load and stow same." On arrival at Yarmouth the ship was moored 15ft. from the edge of the quay, which was as near to it as she could always lie afloat, and in consequence of this 9*d.* per standard extra cost was incurred in the discharge of the cargo. In an action brought by the shipowner to recover this extra cost the County Court judge admitted evidence of a custom

that the shipowners must deliver on the quay and therefore should bear the extra cost of bringing the timber from the ship's rail to the quay. The shipowner appealed to the Admiralty Division. The appeal was heard by Sir Francis Jeune, P., and A. L. Smith, J. They held on the authority of *Holman* v. *Wade* (*ubi sup.*) and *Hayton* v. *Irwin* (*ubi sup.*), that evidence of the custom was not admissible, as it was inconsistent with the written contract. In *Hayton* v. *Irwin* (*ubi sup.*) by the terms of the charter-party the vessel was to deliver the cargo at Hamburg or as near thereto as she could safely get, to discharge as customary, the cargo to be brought to and taken from alongside the ship at the merchant's risk and expense. The draught of the vessel with the cargo on board would not allow her to proceed to Hamburg. The point nearest to Hamburg which she could reach was Stade. The merchants refused to take delivery of any part of the cargo there. In order to lighten the vessel part of the cargo was discharged into lighters at Stade and was sent in them to Hamburg. The shipowner sued the charterer to recover the lighterage expenses, and the case was heard on appeal by Bramwell, Brett, and Cotton, L.JJ., who held (confirming the decision of Grove, J.) that the defence alleging that by the custom of the port of Hamburg the defendant was not bound to take delivery elsewhere than at Hamburg was bad on demurrer inasmuch as it sought to set up a custom inconsistent with the written contract.

The first of the cases which are distinguishable from the present case is *Aktieselskab Helios* v. *Ekman and Co.* (*ubi sup.*). There, as here, the words of the charter-party were "brought to and taken from alongside the ship at merchants' expense." Barges were sent by the consignees alongside the ship to take the cargo, and the point in controversy was whether by the custom of the Port of London the shipowner was bound not only to deliver the cargo into these barges but to stow it on them. The consignees asserted that by the custom of the Port of London in the case of ships discharging timber at that port an obligation lay upon the shipowner to stow the long lengths of timber, of which the cargo in question was partly composed, in lighters brought alongside the ship by the consignees for the purpose of receiving the cargo. Collins, J., who tried the case, found that upon the evidence there was a custom of the Port of London by which, in the case of a ship discharging long lengths of timber, the shipowner was bound to put the timber into lighters in such a way and to such an extent that the lighters might fairly be deemed to be loaded, but he found it unnecessary for the purposes of the case to decide whether the obligation imposed by the custom embraced stowing the timber in the barges in the sense of so arranging it that a barge might be conveniently navigated and should be loaded to her full capacity, and held that the custom so found by him to exist was not inconsistent with the charter-party.

The Court of Appeal, composed of Lord Esher, M.R., A. L. Smith and Chitty, L.JJ., held that the custom was not inconsistent with the provisions of the charter-party. Chitty, L.J. put the reason for the decision neatly in these words:—"The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed it is the duty of the merchants, in accordance with the charter-party, to take from alongside the cargo thus delivered."

The second of these distinguishable cases is *Glasgow Navigation Company Limited* v. *Howard Brothers and Co.* (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172). In it the charter-party provided that the cargo was "to be brought to and taken from alongside the steamer at charterer's risk and expense," and provided further that "if discharged in London cargo shall be discharged as customary with customary steamer dispatch in accordance with the custom of the port as fast as the steamer can deliver during ordinary working hours of the port, Sundays and holidays (unless used) excepted." The bill of lading contained the following clause:—"If discharged in London cargo shall be discharged as customary with customary steamer dispatch."

The question in dispute between the parties was the extent to which the custom of the Port of London affected the mode in which the timber constituting the cargo should be stowed and arranged in the craft which the merchant sends alongside. It was held by Hamilton, J., (as he then was) that by the custom and practice of the Port of London in the case of cargoes of timber the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein; that the shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable.

It is apparent, therefore, that the matter in controversy in that case was not that now under debate before your lordships, but, to a large extent, as the learned judge said, the controversy was what was included in the word "discharging" used in the documents.

The decision in the case of *Northmoor Steamship Company* v. *Harland and Wolff* (1903) 2 Ir. 657) is not directly in point; but the judgment of Palles, C. B., is well worth perusal, especially in view of his criticism of the judgment delivered by Bigham, J., in the case above mentioned, *Stephens* v. *Wintringham* (*ubi sup.*). The charter-party in *Stephens* v. *Wintringham* (*ubi sup.*) provided, as does the charter-party in the present case, that the cargo should be taken from "alongside" the ship at the merchant's risk and expense according to the custom of the port. And the custom of the port was that after the cargo was raised from the hold by means of winches and slings it was taken by stevedores employed and paid by the shipowner and carried to the only place on the quay fit to receive it, which was about 60 or 70 feet from the vessel's side, and there dumped in piles. The merchant did not interfere in any way with these stevedores. The learned judge held that this mode of discharge amounted to "taking the cargo from alongside and nothing more than alongside." The Chief Baron said: "I think the ground of that decision was that according to the custom of the port the shipowner was bound to discharge on the quay, and that the only part of the quay on which he could discharge was a place which was 60 or 70 feet from the ship's side, so that he did no more than perform his

obligation, although the mode of performance was rendered more expensive and onerous to him by the acts of those over whom neither he nor the merchant had control. This is the only view of the case which is consistent with *Holman* v. *Wade* (*ubi sup.*) and *The Nifa* (*ubi sup.*)." This observation suggests, I think, that the learned Chief Baron approved of the decision of these two last-mentioned cases. I concur in this criticism of *Stephens* v. *Wintringham* (*ubi sup.*). As to the case of *Holman* v. *Wade* (*ubi sup.*), I may for myself say that, on the additional facts, which, by the helpful industry of the Master of the Rolls, we are now in a position to consider, the case was rightly decided. For these reasons I think the appeal must be dismissed with costs, and I so move. My noble and learned friend, Lord Parmoor, concurs in the opinion I have just expressed.

LORD ATKINSON.—I concur.

LORD SUMNER.—All the Courts below have felt themselves bound to follow and apply the decision of the Court of Appeal in *Holman* v. *Wade* (*ubi sup.*), which your Lordships are free to overrule. The first question is, how far would it be expedient to do so; for no one suggests that it can be distinguished. It is a decision on words which have long been common in timber charters, and it regulates the relation of such charters to established customs in a number of places of great importance. It was, indeed, only reported in the *Times* newspaper, but, so far from being lost sight of by those interested in timber charters and timber cargoes, it has all along been set out in one at least of the classic treatises on the subject—Carver on Carriage by Sea; it has been cited in argument over and over again, in the cases of *The Nifa* (*ubi sup.*), *The Helios* (*ubi sup.*), and *Stephens* v. *Wintringham* (*ubi sup.*), to name no others; and in particular was relied on as an authority which they applied in their judgments by both Sir Francis Jeune and A. L. Smith, J., in *The Nifa* (*ubi sup.*). The Master of the Rolls in the Court below says that *Holman* v. *Wade* (*ubi sup.*) "is only reported in a most unsatisfactory manner, that is to say, it is only reported as a piece of news in the newspaper . . . the only difficulty about it is the difficulty of ascertaining exactly what it decided." As for this, if it had not been reported at all it would still have been a decision which when brought to light by any means must have been regarded as an authority. I have often wondered what would happen if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House, and the transcripts of your Lordships' opinions preserved in the Parliament Office, a selection of "Unnoticed Cases in the House of Lords." The results might be somewhat unexpected, but the decisions themselves all courts, your Lordships' House included, would be bound to follow wherever they applied. As for the actual report of *Holman* v. *Wade* (*ubi sup.*), it turns out on reference to the original pleadings to be very correct, and I think it is plain what was decided. It is true the report is very brief, and I wish this model were more often followed. We, who deliver judgments, would alone regret it.

I should not in these circumstances have thought it necessary to inquire whether this decision, now forty-four years old and never doubted, was or was not right, had it not been that Hill, J., and Scrutton, L.J., whose opinions command the greatest attention, would have been inclined, if free, to decide the other way. *Holman* v. *Wade* (*ubi sup.*) is in line with all other cases on this kind of point except *Stephens* v. *Wintringham* (*ubi sup.*), which cannot in my opinion be distinguished unless on the ground that "taken from alongside" gave a greater latitude in determining where "alongside" was than the words "from alongside the ship" would have done. This is not the ground taken in the judgment. The learned judge seems to have merely dealt with the case as a question of fact, and if so it is not of general importance. He apparently put to himself the question, "If the captain whose ship is at the quay delivers the cargo in, at any rate, the customary method, when does he get it to a place that can be called 'alongside' the ship so as to complete the performance of his duty?" His answer on the facts was, "When he has got 70 ft. away." As this involved the ship in extra and special expenses, I think it was not in accordance with the charter.

In *The Nifa* (*ubi sup.*), on the other hand, the Divisional Court held that this very custom of Great Yarmouth was inconsistent with the express words of the charter, because in imposing on the ship the cost of doing something after the cargo was clear of the ship (which in the case of long lengths of timber is what I suppose A. L. Smith, J., meant by "putting the goods on the ship's rail") it contradicted the charter, which said that whatever was done thereafter the merchant must pay for it. On the other hand, in *Aktieselskab Helios* v. *Ekman and Co.* (*ubi sup.*), to which A. L. Smith, L.J. was a party, *The Nifa* (*ubi sup.*) and *Holman* v. *Wade* (*ubi sup.*) were cited but were not commented on, the case being regarded, and rightly, as being quite different from them. The question was not "How far off from the ship can a spot be said to be alongside the ship?" but "Is it inconsistent with such a charter to require the ship when lowering a long length of timber out of the ship into a lighter alongside to get the piece of timber fore and aft of the barge before releasing it." And as this was a question of the mode of handling the goods when delivering in the agreed place it fell within the custom to which the charter referred. The decision in *Northmoor Steamship Company* v. *Harland and Wolff* (*ubi sup.*) follows the same reasoning as that adopted in *The Nifa* (*ubi sup.*).

The views of Hill, J. in the present case, that the place in question was "reasonably along the side of the ship" and so was within the express contract, and of Scrutton, L.J. who, agreeing with Hill, J. further says that the custom simply explains what the delivery of the cargo alongside is, are based on an examination of the locality denoted by "alongside." Presumably they thought that if the place of delivery was alongside, though 23ft. away, no question of expense arose. Conversely, in *The Nifa* (*ubi sup.*) and *The Northmoor* case (*ubi sup.*) I presume the court would have said that the spot of which they spoke was not alongside, and therefore the prescriptions of the charter as to expense were paramount.

I do not think that the two considerations of place and expense can be so completely severed. Doubtless the words "alongside the steamer" may be satisfied though the apparatus of reception, be it barge or cart or what not, may not be in actual contact with the ship's side. It may well be that the ship can be required to deliver to the full reach of her tackles; but here not distance only but cost, also conditions, the customary mode

of delivery, and the question of being alongside depends not only on the distance to be traversed to reach the customary place of alongside delivery, but also on the trouble, which is, of course, commercially convertible into the expense, of getting there. Here an extemporised pier had to be built out at the ship's expense, although no one says she could have got any nearer to the quay or was not an arrived ship. The quay was the defendants' quay, and there was not enough water at it for the ship to lie alongside of it always afloat. The quay was one which, from circumstances affecting the receivers only, had to be clear of timber piles to a depth of 10ft. from its edge, and along or behind that 10ft. line the custom required the ship to deliver her timber.

Though the ship was in a position in which she was entitled to require the process of delivery to begin, the merchants say that they were duly taking the cargo from alongside the steamer, though they could not reach the steamer from their selected spot, nor could the ship's stevedores reach it from the steamer without the interposition of a temporary structure, and of a new form of transport by man-handling the timber. I am unable to reconcile this with being alongside the steamer, the steamer being where she was entitled to be at the commencement of the process of delivery. The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13ft. of water bridged by a staging, and at least 10ft. of quay, traversed by porters, I think the spot is too far away.

Accordingly in my opinion the appeal fails.

Lord Buckmaster.—My Lords, I concur.

Appeal dismissed.

Solicitors for the appellants, *Trinder, Capron, Kekewich,* and *Co.*

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

Friday, March 10, 1922.

(Before Lords Buckmaster, Dunedin, Atkinson, Sumner, and Carson.

L. French and Co. Limited *v.* Leeston Shipping Company Limited.(*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Broker—Commission on hire paid and earned—Sale of ship during currency of charter by shipowner to charterer—Claim for commission for whole period.

The appellants carried on the business of shipbrokers, and the respondents were shipowners. By a charter-party made between the respondents and J. H. and Co. as charterers, it was provided that a commission of 2½ per cent. on the hire paid and earned under the charter, and on any continuation thereof, should be payable to the shipbrokers, the present appellants. The charter was a time charter for the period of eighteen months. After four months had expired the owners sold the vessel to the charterers, with the result that the charter came to an end.

In an action by the shipbrokers against the shipowners to recover commission in respect of the period subsequent to the sale of the vessel,

Held, that if it had been intended on the part of the shipbrokers to provide for the continuance of their commission in any event, they could and ought to have arranged for that in express terms. There was no evidence that the shipowners had sold the ship for the express purpose of relieving themselves from liability for payment of any further commission. The action therefore failed.

Decision of the Court of Appeal affirmed.

White *v.* Turnbull, Martin and Co. (8 *Asp. Mar. Law Cas.* 406; 78 *L. T. Rep.* 726) *approved and followed.*

Appeal by the plaintiffs from the decision of the Court of Appeal (reported 26 Com. Cas. 337). The plaintiffs were shipbrokers carrying on business in London. The defendants were owners of the steamship *Clematis.* In May 1919, the plaintiffs were employed by the defendants as brokers in connection with the chartering of the said vessel, and after considerable efforts they succeeded in arranging a charter for the said vessel to Messrs. John Holt and Co. Limited, for eighteen calendar months for the sum of 28*s.* 9*d.* on the steamer's dead weight on summer marks. The said charter-party was made on the 30th May 1919. By clause 30 of the said charter-party it was provided that "a commission of 2½ per cent. on the hire paid and earned under this charter and on any continuation is payable to L. French and Co. for division." The defendants, having paid to the plaintiffs commission on four months' hire of the said vessel at 2½ per cent., negotiated with the charterers for the sale of the said vessel and eventually sold the said vessel to the charterers. As a consequence the charter-party was cancelled and no further hire was paid or earned thereunder. The plaintiffs accordingly brought the present action claiming to be entitled to recover from the defendants 2,876*l.* 6*s.*, being commission at 2½ per cent. on hire for the remaining fourteen months of the charter-party period. The appellants contended that the respondents having received the full benefit of the appellants' services were not entitled so to act as to deprive the appellants of part of their remuneration for such services, and the commission claimed was the agreed and/or fair and reasonable remuneration. The appellants further alleged that there was an implied term in the charter-party that the respondents would not by their wilful act prevent any commission from becoming payable thereunder, and that the chartered hire for the fourteen months was taken into account in fixing the sale price of the steamship.

Roche, J., gave judgment in favour of the respondents and held that the payment of commission was contingent upon the question whether hire under the charter-party had been earned and that no term could be implied that under no circumstances would the parties to the charter-party by mutual consent terminate the charter. This judgment was affirmed by the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ) on the authority of *White* v. *Turnbull, Martin and Co.* (8 Asp. Mar. Law Cas. 406; 78 L. T. Rep. 726).

The plaintiffs appealed.

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

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

F. D. MacKinnon, K.C. and *W. A. Jowitt*, for the respondents.

Lord BUCKMASTER.—The appellants are a company that carry on the business of shipbrokers, and the respondents are a shipping company owning a line of steamers. The action out of which this appeal has arisen was brought by the appellants against the respondents claiming commission upon freight that ought to have been earned by one of their steamships known as the *Clematis*. The commission was payable under a charter-party dated the 30th May 1919, and made between the respondents as the owners and John Holt and Co. as charterers of the vessel. The charter was a time charter for the period of eighteen months, and it contained among other clauses a clause No. 30, which provided that "A commission of 2½ per cent. on the hire paid and earned under this charter and on any continuation" was to be payable to the present appellants. There are other provisions in the charter to which it is not necessary to refer, for none confer any larger rights upon the appellants. There is no other document in the case and no claim made or indicated by the evidence based upon any other contract. The rights, therefore, as between appellants and respondents are to be found in the terms of that document and nowhere else, and the initial difficulty due to the fact that the appellants are suing on a contract to which they were not parties has been overcome by assuming that the charterers were trustees for them of the benefits of it. I accept, without any opinion for the purpose of this appeal, that that assumption is well founded. Freight was earned under the charter-party and commission was paid, but on the 16th April 1920, the vessel was sold and from that time no further freight was earned and no further commission was paid. It is to recover the balance of commission for the remainder of the term that proceedings were originally brought.

Those proceedings have met with uniform ill success. The plaintiffs' action failed before Roche, J., and an appeal from his decision was dismissed by the Court of Appeal. The Court of Appeal have, quite rightly, based their judgment upon the fact that the case of *White* v. *Turnbull, Martin and Co.* (8 Asp. Mar. Law Cas. 406; 78 L. T. Rep. 726) is a complete and conclusive authority upon the point which, at any rate, bound their judgment. My lords, that decision does not bind your lordships' House, and it becomes necessary to consider whether you agree with its effect. I have no hesitation in saying that I agree entirely with the conclusion that was then reached and with the reasoning upon which it was based. It is pointed out by Chitty, L.J., in that case, in which the facts were closely similar to the present, and where the charter-party had been cancelled, though under different conditions from the conditions which have caused the cessation here, that in order to enable the plaintiff to succeed it would be necessary to introduce into the charter-party an agreement by which the shipowner must be taken to say, "I will not terminate the charter-party under any circumstance by agreement," and he adds, "It seems to me that that implication cannot be maintained."

I agree that it is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the courts excepting under the pressure of conditions which compel the introduction of such terms for the purpose of giving what Lord Bowen once described as "business efficacy" to the bargain between the parties. There is no need whatever in the present case for the introduction of any such term. The contract works perfectly well without any such words being implied, and if it were intended on the part of the shipbroker to provide for the cessation of the commission which he earned owing to the avoidance of the charter-party, he ought to have arranged for that in express terms between himself and the shipowner.

I have not referred, in what I have said, to the circumstances that would need to be regarded provided it were established that the destruction of the position upon which the right to commission arose was expressly effected by the person bound to pay the commission for the purpose of relieving himself from liability for payment. There is no evidence of anything of the kind before your lordships in this case; we only know that in the exercise of the undoubted rights of ownership which the respondents possess, the vessel in this case was sold, and the charter-party came to an end.

Lord DUNEDIN.—I concur. I would only like to add one observation as to the reservation which was made in *White's* case, and which seems to have rather troubled Bankes, L.J. in this case, as to wilful default. I think that wilful default would only arise if it could be shown that the act which had been done and which should have had as its sequel the non-earning of further commission, had been done by the doer of it, not *primâ facie* for a purpose of his own, but simply and solely to avoid payment of the commission.

Lord ATKINSON.—I concur.

Lord SUMNER.—The words which define the subject-matter, on which this commission is to be paid, are to be found in the print in clause 30, namely, "On the hire paid and earned under this charter." As no hire was paid and earned in respect of the period in question, it appears to me to be clear that debt could not lie for the sum sued for. It must, therefore, be damages, that is to say, the plaintiff must satisfy your lordships that there has been a breach by the defendants of some obligation in his favour to be implied from the charter. That obligation virtually is that the shipowner will not sell his own ship during the chartered term. No authority has been produced for the implication of such a stipulation. It would be all the more curious, because it is not suggested that there is any stipulation that the other parties, the charterers, to whom, on behalf of the plaintiffs, the promise to pay commission is given, will not buy the ship during the term of the charter, and the odd part of it is that, there being no direct contract between the brokers and the shipowner (the contract being made on their behalf by the charterer), it is supposed that the undertaking arises only between the shipowner, who is deemed to be the employer, and the charterer, who is neither broker nor employer, although the charterer equally with the shipowner puts an end to further commission by joining in the purchase and sale.

I see no reason to doubt that *White* v. *Turnbull, Martin and Co.* (*ubi sup.*) was correctly decided, or to think that it can be distinguished from the present case.

I agree that the appeal fails.

Lord CARSON.—I concur.

Appeal dismissed.

Solicitors for the appellants, *Charles Lightbound and Co.*

Solicitors for the respondents, *Holman, Fenwick, and Willan.*

Thursday, March 16, 1922.

(Before Lords BUCKMASTER, ATKINSON, SUMNER, WRENBURY, and CARSON.)

HANSSON *v.* HAMEL AND HORLEY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—C.i.f. contract—"Through" Bill of Lading—Goods shipped from Norway to Japan—Transhipment at Hamburg—Tendering "through" bills of lading issued at Hamburg—Rejection by buyer.

The appellant in Sweden sold to the respondents in London 600 *tons of cod guano to be shipped from Norway to Japan c.i.f. Kobe or Yokohama, payment net cash against documents in London. The guano was shipped in April* 1920 *from three Norwegian ports, and was carried by a local steamer to Hamburg under a bill of lading of the* 22*nd April* 1920, *and was there transhipped to a Japanese steamer, the* A. M., *which carried it to Japan. L., the agent of the* A. M. *at Hamburg, issued through bills of lading as soon as the goods came into his possession in the following form: "Through bills of lading from Braatvag according to bill of lading on the* 22*nd April* 1920. *Shipped in apparent good order and condition by Messrs. Hamel and Horley Limited, on board the steamship* Kiev *lying in or off the port of Braatvag, and bound to Hamburg for transhipment into the . . .* Altas Maru 1500 *bags cod guano . . . to be delivered . . . at . . . Yokohama unto order." The respondents refused to accept these bills of lading as not fulfilling the conditions of a c.i.f. contract.*

The Court of Appeal (reversing Bailhache, J.) held, without deciding whether the bill of lading would have been a through bill of lading or not had it been issued at the proper time, the fact that it was not issued at a proper time entitled the defendants to refuse to accept it in satisfaction of their c.i.f. contract.

Held, that the bills of lading were not a good tender. They were the contract of the subsequent carrier without any complemetary promises to bind the prior carrier in the through transit; the buyer being left with a considerable lacuna in the documentary cover to which the contract entitled him. Further, a bill of lading issued thirteen days after the original shipment at a port in another couniry many hundreds of miles away was not duly procured "on shipment"; and the so-called through bills of lading were too late in point of time.

Judgment of the Court of Appeal (infra) *affirmed.*

APPEAL from an order of the Court of Appeal in England reversing a judgment of Bailhache, J., whereby he ordered judgment to be entered for the appellant against the respondents, for 4683*l.* 2*s.* 11*d.* The appellant was a Swedish subject carrying on business as a merchant at Gothenburg. The respondents were an English company carrying on business as merchants in London. The question on the appeal arose under contracts for the sale of goods on c.i.f. terms and was whether the through bills of lading tendered were proper bills of lading and in compliance with the contract. The appellant's claim was for the price of certain bags of cod guano.

By his points of claim the appellant alleged that by two contracts contained in contract notes signed by him dated the 9th and 14th Feb. 1920, and a letter from the respondents dated the 5th March, 1920, the appellant had sold to the respondents the cod guano shipment March-April from Norway c.i.f. Kobe or Yokohama payment net cash against documents in London, that the appellant had shipped between the 20th and 22nd April from Norwegian ports by the steamship *Kiev* for transshipment *via* Hamburg by the steamship *Atlas Maru* to Kobe or Yokohama five parcels of cod guano totalling 5650 bags or 565 tons, that the appellant procured to be issued at Hamburg on the 5th May 1920 by the Osaka Shosen Kaisha Steamship Company the owners of the steamship *Atlas Maru* five through bills of lading relating to the said five parcels respectively covering the entire voyage from the Norwegian ports to Kobe or Yokohama showing on the face thereof, as the fact was, that the goods were shipped from Norway within the contract period on board the steamship *Kiev* for transhipment into the steamship *Atlas Maru*, that the shipments under through bills of lading were made in accordance with the universal custom obtaining in Norway well known to the respondents when goods are sold c.i.f. Japan or the East and in accordance with the course of dealing between the parties in previous transactions of the same kind, that the shipping documents were duly tendered and refused by the respondents, and the appellant claimed the agreed price or alternatively damages.

By their amended points of defence the respondents said that the appellant were bound to ship the guano c.i.f. to Japan without transhipment and to tender documents for such direct shipment, that the bills of lading tendered were not such through bills of lading as were regular and valid tender under the contracts, and that the policy of insurance tendered with the shipping documents was irregular and insufficient in that it covered transit in the steamship *Kiev* and the steamship *Atlas Maru*, and in no other vessel. They also said that there was unreasonable delay in the transhipment by the *Atlas Maru* as that vessel did not leave Hamburg until the 5th June and that such delay entitled the respondents to refuse to accept the documents. They also denied the alleged custom and its validity and the alleged course of business.

Bailhache, J. held that the shipments had been duly made in accordance with the established practice at a Norwegian port for transhipment at Hamburg and in accordance with the contracts, that at the time of shipment the appellant had a contract which covered the goods from the port of origin to the ultimate port of destination, and held that the through bill of lading by which the Japanese company took upon themselves liability for the whole voyage was a proper document and was properly tendered and complied with the contractual obligations of the seller.

The buyers appealed.

BANKES, L.J.—I differ from the learned judge who gave the judgment in this case on a matter such as has been discussed before us with great hesitation, and I should desire to have time to

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

consider my judgment had it not been that I have formed quite a clear opinion on the matter. The question is whether or not the plaintiff tendered to the defendants the documents to which they were entitled under a c.i.f. contract of purchase which they had entered into with the plaintiff. The contract was made in Jan. 1920, and it is contained in letters that passed between the parties, the sellers being Scandinavian merchants, and the buyers being a firm carrying on business in London. The contract was for 600 tons of cod guano to be shipped 300 tons March-April and the balance May-June at a price c.i.f. Kobe or Yokohama: the terms of payment were to be net cash against documents in London. What happened was that in anticipation of the fulfilment of this contract the plaintiff entered into a contract with Mr. Lind representing a Japanese steamship company in reference to the carriage of the goods from Hamburg to their destination in Japan. It appears that there was no through line of steamers from Norway to Japan, and therefore goods intended for Japan from Norway had to be transhipped somewhere, and one customary place of transhipment was Hamburg. The plaintiff made this contract with Mr. Lind with reference to that part of the transit which lay between Hamburg and the final destination, and it is contained in letters which passed between Lind and the plaintiff on the 17th and the 23rd Feb. Lind quotes a freight from Hamburg to the destination of the goods, and he says the transhipment is to take place to a direct port in Japan, either to Kobe or Yokohama, the freight of 80*s.* is to be understood according to the contract, and so forth, and then he says: "I will sign the through bill of lading as soon as the goods are in my possession. That is, I will either take them over in lighters on your behalf or direct into the vessel." That was the contract which the plaintiff made in February. On the 22nd April the plaintiff shipped a quantity of these goods by a vessel which called at different Norwegian ports, and in respect of those goods bills of lading were given by the captain of that vessel which covered the transit from the port at which the goods were taken on board to Hamburg. The plaintiff's position, therefore, having shipped those goods, was this, that he held a bill of lading which covered the goods until their arrival at Hamburg. There was then a hiatus (if I may use that expression) which was not, as far as we know, covered by any particular contract, but there was another contract which affected those goods as soon as Mr. Lind or his firm took the goods over in lighters or direct into the ocean vessel in which they were to be carried to Japan. That was the position. The Japanese shipowners, when the goods were taken on board at Hamburg, issued a bill of lading dated the 5th May. It is a curious document, because it is dated the 5th May, and it purports to be issued to the buyers, Messrs. Hamel and Horley, and it purports to cover the goods from the time they were shipped upon the local steamer *Kiev* at the original port of shipment and bound to Hamburg until the goods arrived at their ultimate destination. On the face of it, therefore, it purports to be a through bill of lading from the port of shipment to the port of destination. As a matter of fact, it came into existence after the goods had been carried by the local steamer from the port of shipment to Hamburg and is dated some considerable time after the goods had started.

It is said that that document constitutes a through bill of lading, and that was a matter upon which Bailhache, J. expressed an opinion. He accepted the contention that this was a through bill of lading which gave the defendants a right of action as against the Japanese shipowners in respect of anything that occurred on the voyage from the port of shipment to Hamburg. He seems doubtful as to what the rights under this document may be of the defendants in respect of the interval between the goods being taken out of the coasting ship or the vessel which brought them down to Hamburg and the time they were put upon the ocean vessel, but the general conclusion he seems to arrive at is that this must be treated as a good through bill of lading. Mr. Wright contests that view, and he says the document bears on the face of it an intimation that the goods were in fact shipped under a local bill of lading of the 22nd April 1920. I think if it had been necessary to decide that point, I should have felt very considerable hesitation in accepting the view expressed by Bailhache, J. But it does not seem to me necessary to decide that point, and for this reason: The shipment to be a good shipment under the contract must at latest have taken place by the end of the month of April. This document comes into existence for the first time and is dated the 5th May and in my opinion it comes into existence too late to satisfy the obligation of the seller of the c.i.f. contract in regard to the documents which he has to bring into existence and hand over to his buyer. The reason I say that is because I think it has been clearly established by authority what the obligation of the seller of a c.i.f. contract is. I will read a passage from a judgment of Scrutton, J. in *Landauer's* case (12 Asp. Mar. Law Cas. 182; 106 L. T. Rep., at p. 301; (1912) 2 K. B., at p. 105) in which he quotes the judgment of Hamilton, J. in *Biddell Brothers* v. *E. Clemens Horst Company* (12 Asp. Mar. Law Cas. 1; 103 L. T. Rep., at p. 662; (1911) 2 K. B., at p. 220): "The first two duties of the seller c.i.f. are as follows: 'A seller under a contract of sale containing such terms is, firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract.'" Then the learned judge goes on to say: "I should add to the first requisite the words 'within the time named in the contract' and to the second that such a contract must be procured on shipment."

These goods were shipped at the port of shipment within the contract time, but the question is whether the seller in this case did procure a contract of affreightment on shipment. What is meant by the expression "contract of affreightment"? In my opinion to satisfy the requirements with reference to a contract of affreightment, the seller must bring into existence a contract embodied in a form capable of being transferred to the buyer and which when transferred will give the buyer two rights: (1) a right to receive the goods; and, secondly, a right against the shipowner who carries the goods should the goods be damaged or not delivered. If that is a correct view of what is meant in this case and other cases by a contract of affreightment, no such contract ever came into existence on shipment or within the period fixed by the contract for shipment. It is said that that is not the correct view, because of this contract which

was entered into between the sellers and Lind in February, and Bailhache, J. has accepted that contention, but I am unable to take that view. It seems to me that for this purpose it is quite immaterial that that contract was entered into at all. It was not a contract which gave the buyers any rights at all. It is true it is a contract which might have been assigned to the buyer, but if it had been assigned to the buyer, it would not have given him any right as against the shipowner who carried the goods from the port of transhipment to Hamburg, and it seems to me that you cannot have a contract of affreightment which satisfies the obligation of the seller under a c.i.f. contract unless it gives a right to the purchaser of the goods as against the shipowner in respect of the whole of the transit. I am unable to follow the reasoning which suggests that the seller's position in this case is in any way improved by reason of the contract that he entered into with Lind. From the point of view of the buyer, it is no more effective than what Scrutton, J. describes in *Landauer's* case (*sup.*) as an intention to enter into a contract of affreightment. Giving the matter the best consideration I can, I have come to the conclusion that in tendering this document of the 5th May the sellers, if they were tendering a contract of affreightment at all, were tendering a contract of affreightment which came into existence too late to enable them to comply with their obligations under their c.i.f. contract.

I wish to make this further observation only: If the contention with reference to the value or efficacy of the contract which Lind made in February is correct, it would seem necessarily to follow that if, instead of electing Hamburg as the port of transhipment, the sellers had selected Hongkong and had then entered into a contract with Mr. Lind or some firm representing the Japanese shipowners at Hongkong for transhipment at Hongkong, that such a contract would equally avail the sellers as the present one, and to say that seems to me to indicate the extreme difficulty from a business point of view, apart altogether from the legal aspect of the matter, of contending that the seller under a c.i.f. contract of goods from Norway to Japan can keep his buyer waiting for the documents until the vessel has arrived at Hongkong, because until the vessel has arrived at Hongkong the documents will not have come into existence. For these reasons, in my opinion, the appeal must succeed, and the judgment which was entered for the plaintiff be set aside and judgment entered for the defendants with costs.

WARRINGTON, L.J.—I am of the same opinion.

If Bankes, L.J. differs with hesitation from a judge so experienced in these matters as Bailhache, J., I need not say with what hesitation I venture to differ also from that learned judge. Still I do differ. I have formed a clear opinion upon the matter, and I am bound to express it.

The question to be determined is whether or not the seller of goods under a c.i.f. contract has performed his obligation with reference to the contract of affreightment. Now that obligation is that he is on shipment to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. That expression of the vendor's obligation is taken, though not absolutely word for word, from the statement of Scrutton, J. in *Landauer* v. *Craven* (12 Asp. Mar. Law Cas. 182; 106 L. T. Rep. 298; (1912) 2 K. B. p. 94) and I will add to that that the contract of affreightment which he so procures must be one which is transferable to the buyer, so that the buyer may be in a position to obtain delivery of the goods, and also to resort to the carrier direct in case the carrier should commit any breach of his contract of carriage. In the present case the only document tendered to the buyer as purporting to be in fulfilment of the seller's obligation was this rather curious document which is called a through bill of lading. The shipment of the goods took place during the third week in April and the contract time for shipment expired within the month of April. This document is dated the 5th May. Unless, therefore, the seller had procured some other contract of shipment within the time limited by the contract, he has not fulfilled his obligation. Whether this peculiar document is really a through bill of lading, I feel considerable doubt. It was issued under a contract made by letters between the shipowners and the seller of the goods, which letters provided that a bill of lading should only be issued upon the goods being actually delivered to the shipowners. Therefore, so far as that contract was concerned, this shipowner never was under any liability at all with regard to the carriage of the goods during the first part of their journey, for his obligation only arose when *ex hypothesi* that journey had been completed. I really, therefore, feel considerable doubt whether this bill of lading was a contract of affreightment in one sense from the original point of departure to the point of delivery. But passing that by and assuming that it was so, still I am clearly of opinion that it was not a contract made during the period in which under a c.i.f. bargain the seller was bound to procure that contract. For that reason, in my opinion, the judgment of Bailhache, J. was erroneous, and this appeal ought to be allowed.

ATKIN, L.J.—The first question that arises in this case appears to me to be this: Has the seller procured a contract of affreightment covering the whole of the transit and tendered to the buyer the document which will give to the buyer the rights under such contract of affreightment for the whole of the transit, that is to say, the right to sue the ship if necessary? I think that is a question of considerable difficulty. The supposed contract, the bill of lading, was issued in pursuance of a contract which the seller had made with the owner of the ocean ship, and it was a contract under which the owner of the ocean ship, agreed for the freight therein mentioned to transport the goods from Hamburg to Japan, and he undertook to issue a bill of lading in respect of the ocean ship as soon as the goods had arrived and were in his possession at Hamburg. To my mind it is quite plain that the owners of the ocean going ship undertook no obligation at all to the seller in respect of the transit between Norway and Hamburg. It seems to me idle to suppose that for the freight from Hamburg to Japan he was going to incur liabilities from Norway to Hamburg, and I think the construction of the document makes it quite plain that there was no such obligation. Indeed, the learned judge has so found, because he has found that there would be a breach of contract if in fact the goods had been lost between Norway and Hamburg. Therefore, if in fact the seller had no rights against the shipowners under the original contract, I think it would be very difficult for him to say at any rate that he had got any rights against the shipowner under the through bill of lading which from

that point of view would be, as far as he was concerned, it appears to me, either a mere receipt for the goods, or at any rate only to express terms of contract as between Hamburg and Japan, and if he had no rights he could transfer no rights to the endorsees. But in fact this bill of lading is taken out by the seller of the goods. He is not named in the bill of lading ; he does not purport to make the contract. The shipper named in the bill of lading is the consignee, and I myself have very considerable doubts as to whether the shipowner who clearly, to my mind, had never contracted to give rights to the seller of the goods as between Norway and Hamburg ever intended to give rights to the buyer of the goods in respect of the transit between Norway and Hamburg. If any such question had arisen in respect of sea damage or goods injured, or otherwise, at that stage of the transit, it appears to me that the buyer in accepting this document would acquire a somewhat difficult right of suing rather than have plain rights against the ship. I think it would be a very difficult position, and I doubt myself whether under the circumstances this document would be a satisfactory tender at all.

But I do not propose to decide this case upon that footing, because upon the assumption that this document would give rights to sue to the buyer, the question arises whether the document is in order as having been made at the time stipulated for impliedly under the contract on c.i.f. terms. Now in respect of that matter there is the authority of Scrutton, L.J. in *Landauer* v. *Craven* (12 Asp. Mar. Law Cas. 182; 106 L. T. Rep. at p. 301 ; (1912) 2 K. B. at p. 105). He read a passage from Hamilton, J.'s judgment in *Biddell Brothers* v. *E. Clemens Horst Co.* (Asp. Mar. Law Cas. 1 ; 103 L. T. Rep. at p. 662 ; (1911) 2 K. B. at p. 220) : " A seller under a contract of sale containing such terms, has firstly to ship at the port of shipment goods of the description contained in the contract ; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract." Then Scrutton, J. adds this on his own account : " I should myself add to the first requisite the words ' within the time named in the contract.' " About that, of course, there can be no question—and then he adds : " And to the second, that such a contract must be procured on shipment. I should make the last addition for the reason that the seller must as soon as possible after he has sent forward the cargo, send forward the documents to the vendee or consignee." That is what Scrutton, J. says, and Bailhache, J., in commenting on that says : " Now if I may respectfully say so, I entirely agree with what Scrutton, J. said in that case, and the question here is whether there has been a compliance with those requirements in this case." It is upon that footing of the proposition stated by my brother and acquiesced in by my brother Bailhache in this case that we have to determine this case, and I am not conscious that any other proposition was put before us at all in the matter, and therefore I assume that that is correct. Was this contract of affreightment made on shipment ? I think the answer is quite clearly that it was not. The contract of affreightment is a contract of affreightment of rights in or to be under the contract transferred to the buyer, and for this purpose the only contract of affreightment that is so tendered is this through bill of lading. That is dated the 5th May, some fortnight or so after shipment. It is a contract which is only made with the buyer who is the named shipper and the consignee after the goods had in fact arrived at Hamburg, therefore not made on shipment, but only made after part of the transit had been completed. I have stated the circumstances under which it was made, and it appears to me that there never was a contract with the buyer at all until the 5th May, nor has there been any attempt to transfer to the buyer the benefit of any contract made upon shipment. It is true that it is said that this contract with the buyer which purports to be a through contract was made in pursuance of a contract that had been made with the seller in April, but that is not an assignment of the rights, and it is not in fact giving the buyer the benefit of the original contract. In truth the difficulty that the seller is in in this case seems to be shown on the face of the judgment of the learned judge, because he deals with the different objections in this way ; objection one, there is no such contract. The answer of the learned judge is : " Oh, yes, there is in substance ; there is the bill of lading which is a through contract." Then it is said : " Very well, that contract is not made at the time of shipment." " Oh, yes," says the learned judge, " it is because the contract is the contract in the letter of Lind." Then there is a further objection made : " But that contract is not delivered forthwith in time to send to the seller." " Oh, yes," says the learned judge, " it is, because the contract you have to send to the seller is the bill of lading." So that the position is shifted in answering each objection, sometimes reliance being placed on the through bill of lading, sometimes reliance being placed on the contract expressed in the letter to Lind. I think myself that the true answer is that the only contract which is relevant for this particular purpose is the document which is tendered to the buyer so that he may have the rights under it against the shipowner for the whole of the transit, the only document which could be suggested to comply with that test is that of the 5th May, and that document was not made, as it seems to me, within the time stipulated by the contract.

There is another objection. Nothing that we have said, speaking for myself, and speaking for the whole court, I am sure, is intended to throw any doubt upon the commercial practice which prevails when goods are shipped from one destination to another where there is no direct means of transport, and it is therefore impossible to load in one ship at the port of lading and discharge from the same ship at the port of destination. C.i.f. contracts can be properly carried out in accordance with commercial practice by means of transhipment and are carried out, and the courts are not in the least likely to interfere with that commercial practice. The objection here is that the practice adopted does not conform to that which is necessary and that which can be adopted for the purpose of strictly carrying out the terms of the cost, insurance, and freight contract. Now the matter does not rest there in this particular case, because the actual practice proved by the witnesses does not appear to me to have been adopted in this particular case. It is undoubtedly of the essence of such a contract as this that the buyer should be put, as soon as reasonably possible, in possession of the documents that represent the goods for the obvious reason that he desires to dispose of them in the ordinary course of commerce as soon as he can. The practice appears to me, as proved, to be this, that the owner of the ocean-going ship who has to perform the greater part of the

transit will, on a proper contract having been made with him, at or before the time of shipment, either allow the master of the local vessel to sign a through bill of lading, or will authorise his accredited agent at the port of loading to sign a through bill of lading, or if he not able to do that, will as soon as he receives the bill of lading for the goods in the local ship, then issue his through bill of lading. Now that is a process that requires normally a short period of time. It does extend the time for getting the document by the time that it takes to dispatch by the ordinary commercial business a bill of lading to the place where the ocean shipowner carries on his business and to get back the ocean bill of lading, because the shipowner then has control of the goods and is able to issue his through bill of lading, though the goods have not been placed on board the ship. The evidence that was adduced before the learned judge, both by parol evidence and in the depositions, appears to me to be quite plain that that is the practice. In this case nothing of the kind was done, because instead of a through bill of lading being issued in exchange for the ocean bill of lading as soon as it was available, the owner of the ocean-going vessel refused to issue his through bill of lading till the goods had actually arrived at Hamburg, and that, it appears to me, must cause a definite period of time and cause delay which is not contemplated under the contract. I think a bill of lading issued under those circumstances and at that time, and dated as of the date when the goods are put on board the ocean-going vessel, would not be a compliance with the practice as proved. For that further reason it appears to me that the buyers were entitled in this case to reject these documents when they were handed to them. I think the result is that this appeal should be allowed and judgment should be entered for the defendants with costs here and below.

Appeal allowed.

The seller appealed on the following grounds, namely, that (1) the established practice and course of business in the case of shipments from Norway to Japan was that such shipments are shipped from Norway to a port of transhipment for Japan, Hamburg being the usual port of transhipment; (2) the appellant shipped in due time at a Norwegian port to be transhipped at Hamburg to the Japanese Port, goods in accordance with the contracts; (3) at the time of shipment the appellant had a contract or contracts of affreightment for the carriage of the goods so shipped from the Norwegian to the Japanese port; (4) the through bills of lading tendered to the respondents were proper and sufficient documents procured in due time in accordance with the established practice and course of business; (5) the through bills of lading contained the contract of affreightment for the whole voyage from Norway to Japan in a form transferable to the respondents and which would have been transferred to the respondents if they had accepted the tender.

Leck, K.C., and *N. L. Macaskie*, for the appellant.

R. A. Wright, K.C., and *O'Hagan*, for the respondents.

Their Lordships took time to consider their judgments.

LORD SUMNER delivered the judgment of the House.—The only question argued on this appeal was whether the respondents were right in refusing to take up and pay for certain shipping documents tendered to them, on the appellant's behalf, by his bankers in London. The bill of lading was the actual document in dispute. Why the respondents really refused the document does not matter, nor does the case turn on the particular objection put forward by them at the time.

It was common ground that the whole transaction is governed by English law. The cargo—cod guano in bags—was sold c.f. and i., Kobe or Yokohama, to be shipped from Norway, 300 tons, March/April, and the balance, May/June. There was no stipulation as to the months within which the bill of lading itself must be dated, or as to the date of the bill of lading being conclusive evidence of the date of the shipment. The bags in question were shipped at Braatvag in Norway. A direct steamer to Japan was not available from Braatvag, nor do I imagine that the buyers supposed that it would be, and the seller shipped the consignment at Braatvag on board the *Kiev*, a steamer belonging to a Norwegian company, to be carried to Hamburg, where it was to be transhipped into the Osaka Shosen Kaisha's s.s. *Atlas Maru* for Yokahama. The appellant had made a contract, partly expressed in a "freight contract" and partly in correspondence, with a Mr. Lind, of Hamburg, the representative of the Osaka Shosen Kaisha, for the conveyance of the cod guano from Hamburg to Japan on the terms, among others, that bills of lading to Japan would be signed in Hamburg on presentation of the local bill of lading—that is, the bill of lading for carriage by the *Kiev*—as soon as the goods were in Mr. Lind's possession, being there either taken over in lighters on the appellant's behalf or direct into the steamer for Japan. If they arrived in Hamburg too late for the steamer scheduled, the appellant reserved to himself the right to ship them by the next steamer of the line.

The first, or local, bill of lading was signed on behalf of the master of the *Kiev* on the 22nd April, 1920, and acknowledged receipt of the cod guano from the appellant, to be delivered to "order Yokohama," the *Kiev* being bound for Hamburg, with the right to tranship and send on the goods by another steamer, freight being prepaid to Hamburg, the *Kiev's* destination.

At Hamburg there was issued to the appellant an ocean bill of lading, signed by Mr. Lind on behalf of the captain of the *Atlas Maru* and dated the 5th May 1920. The respondents were named in it as the shippers in accordance with a stipulation they had made, and the cod guano was made deliverable to order at Yokohama. The case is another instance, like *The Parana* (124 L. T. Rep. 609; (1921) 1 A. C. 486), of tranactions in which, in spite of the insertion of the consignee's name in the bill of lading, the intention to reserve the *jus disponendi* to the seller till the documents are taken up is manifested by the way in which the transaction is carried through with regard to the presentation of the documents. The respondents being named as the shippers, no question arises of any estoppel as against the carriers in favour of persons taking the bill of lading by endorsement and on the faith of the statements recited in it. The document was headed: "Through Bill of Lading," and it contained in the margin these statements: "From Braatvag to Yokohama" and "shipped from Braatvag according to bill of lading on the 22nd April 1920," and it began thus: "Shipped in

apparent good order and condition by Messrs. Hamel & Horley, Limited, on board the steamship *Kiev*, lying in or off the port of Braatvag and bound to Hamburg for transhipment into the Osaka Shosen Kaisha's steamship *Atlas Maru* . . . 1500 bags cod guano . . . to be delivered . . . at the port of Yokohama . . . unto order."

This bill of lading accordingly was itself dated after the contract time of shipment, viz., March/April, but it is stated in the margin, and truly so, that, according to a bill of lading (that is the local one), shipment at Braatvag was within the contract time. It stated further that the goods, when shipped on the *Kiev*, were in apparent good order and condition, but it was silent as to their condition at Hamburg. There was no express statement that any goods had been shipped on the *Atlas Maru* at all, or, if so, in what order and condition they were when shipped, and it was reasonably plain that the *Kiev* did not belong to the Japanese owners of the *Atlas Maru*. The undertaking to deliver in Japan would, in the absence of special authority to those signing the bill of lading, apply only to such cargo as might, in fact, have been shipped at Hamburg on board the *Atlas Maru*, and no one would assume without actual evidence of it that a person like Mr. Lind, signing on behalf of the captain of the *Atlas Maru* had any authority to bind her owners for the carriage by the *Kiev* or the owners of the *Kiev* for anything at all. The question is whether this ocean bill of lading was a good tender under the contract of sale and whether the respondents were bound to take it up and pay for the consignment.

A c.f. and i. seller, as has often been pointed out, has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination and I think that this ocean bill of lading afforded the buyer no protection in regard to the interval of thirteen days which elapsed between the dates of the two bills of lading and presumably between the departure from Braatvag and the arrival at Hamburg. The initial words, on which the matter depends, may be put as a mere recital of a fact, or as words of contract, and in the latter case the contract may be that the owners of the *Atlas Maru* will (i) be answerable for the safe carriage of the goods from Braatvag to Hamburg, though they have not actually carried them, subject always to the perils excepted in their own bili of lading, though these do not correspond with the exceptions in the *Kiev* bill of lading, or (ii) will make good any loss or damage to the goods during the transit from Braatvag to Hamburg, if the owners of the *Kiev* fail to do so, or (iii) will indemnify the respondents against loss or damage affecting the goods during that voyage. Unless the words are words of contract to the effect first above-mentioned, they are useless to the appellant, and even so the question arises on the face of the document what authority, if any, the captain of the *Atlas Maru* or his agent, Mr. Lind, who signs for him, has to bind his owners by words of promise in respect of a voyage, which is already over before he has anything to do with the goods on behalf of the Osaka Company. *Primâ facie* he has none, and there is nothing shown to rebut the presumption. No doubt a question may arise on any bill of lading whether the captain has, in fact, signed for more goods than were put on board, and, if so, whether he has any special authority to do so, but the doubt raised here, if not dissimilar in kind, is different in its actual form and much greater in degree. Of course, no contract by way of indemnity or by way of guarantee or of anwering for the default of another will satisfy those requirements of a c.f. and i. sale which involve a contract of affreightment, since different defences are available on them and different incidents attach to them to those applicable to a bill of lading. Still less can a mere recital of facts avail.

With all deference to the very weighty opinion of Bailhache, J. to the contrary, in my judgment these words are mere words of recital, but, even if they were what the appellant contends that they are, I think it is clear that they do not make the ocean bill of lading a good tender in this case. The bill of lading by the *Kiev* was originally a contract with the appellant himself, and never was, nor in any normal course of business ever would be, tendered to the respondents. As there were not, I suppose, to be two contracts for carriage as far as Hamburg, this is strong to show that the appellant never intended the ocean bill of lading to be a contract of carriage from Braatvag to Hamburg. When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout. He is not buying a litigation, as Lord Trevethin (then A. T. Lawrence, J.) says in the *General Trading Company's* case (1911, 16 Com. Cas., at p. 101). These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce. I am quite sure that, under the circumstances of this case, this ocean bill of lading does not satisfy these conditions. It bears notice of its insufficiency and ambiguity on its face: for, though called a through bill of lading, it is not really so. It is the contract of the subsequent carrier only, without any complementary promises to bind the prior carriers in the through transit. The appellants' contract with Mr. Lind was not transferable by endorsement and delivery, nor was it tendered; the *Kiev* bill of lading he kept to himself, and endorsed to Mr. Lind under his own contract with him. I do not suggest that tender of either document would have carried matters any further, but, as things stood, the buyer was plainly left with a considerable lacuna in the documentary cover to which the contract entitled him.

The point is also put in a slightly different way, which equally relates especially to bills of lading. Scrutton, J. points out in *Landauer* v. *Craven* (13 Asp. Mar. Law Cas. 182; 106 L. T. Rep. 298; (1912) 2 K. B. 94), that in a sale of goods c.f. and i., the contract of affreightment must be procured "on shipment." Of course this is practicable and common even when a through bill of lading is necessary, containing provision for transhipment at an intermediate port from a local to an ocean steamer not in the same ownership. I do not understand this proposition as meaning that the bill of lading would be bad, unless it was signed contemporaneously with the actual placing of the goods on board. "On shipment" is an expression of some latitude. Bills of lading are constantly signed after the loading is complete and, in some cases, after the ship has sailed. I do not think that they thereby necessarily cease to be

procured " on shipment," nor do I suppose that the learned judge so intended his words. It may also be that the expression would be satisfied, even though some local carriage on inland waters or by canal or in an estuary by barge or otherwise, preceded the shipment on the ocean steamer, provided that the steamer's bill of lading covered that prior carriage by effectual words of contract. " On shipment " is referable both to time and place. In principle, however, and subject to what I have said, I accept this opinion of so great an authority, and I am quite sure that a bill of lading only issued thirteen days after the original shipment, at another port in another country many hundreds of miles away, is not duly procured " on shipment." Indeed the ocean bill of lading was not procured as part of this c.f. and i. shipment at all, and " on shipment " does not at any rate mean on re-shipment or on transhipment. It is not enough that at the time of the initial shipment the c.f. and i. seller procured a contract by correspondence with Mr. Lind for the forwarding of the goods by an ocean steamer, for that was not procuring a bill of lading. If the *Kiev* had been lost with the cod guano on the coast of Norway, no contract of affreightment to Japan would have been procured or forthcoming at all. The matter was well tested thus in the Court of Appeal. In the absence of express stipulation, shipping documents under a contract of sale on c.f. and i. terms must be tendered by the buyer as soon as possible after shipment (*Biddell* v. *Horst*, 12 Asp. Mar. Law Cas. 1; 104 L. T. Rep. 577; (1911) 1 K. B. 958). If, then, the port of transhipment was late on in the through voyage, a buyer might be entitled to tender the documents long before any through bill of lading to Japan had been signed or procured at all, and when there was no bill of lading in existence except that to the intermediate port. This ocean bill of lading was, therefore, on this ground also, in my opinion, a bad tender.

Though the document is called a through bill of lading it is not really so, for no one contracted by it for the carriage through from Braatvag to Yokohama. Accordingly, I express no opinion adverse to the sufficiency of through bills of lading, properly so called, as a tender under a contract like this. I would add that the evidence, given to prove a course of business between the contracting parties or a custom of merchants generally affecting the normal requirements of a c.f. and i. contract, failed to establish any distinction in this case, and I have no observation to make on the effect of such evidence had it been sufficient. The gist of it, however, was that, although in some cases the Japanese line either appointed an agent at the Norwegian port, or gave authority to the captain of the local steamer to sign a bill of lading on their behalf at and from that port, which would, of course, be a real through bill of lading, in cases where they had no control over the cargo till it reached Hamburg, of which this was an instance, they would sign only at and from Hamburg, and would not issue a through bill of lading, since they were not booking the cargo for the whole journey at a through rate.

An experienced witness called by the appellant further stated that he did not recall any other instance of a through bill of lading dated (that is, signed and dated) at the port of transhipment, and it was admitted by counsel that no such instance could be found in any reported case. Nor was any instance forthcoming of a ship's signing for the carriage of goods, already carried and delivered by another ship, as a prior part of the entire transit. It was admitted by another of the appellant's witnesses that a through bill of lading ought to be issued at the original port of shipment. Plainly, what the seller ought to have done was either to get Mr. Lind to sign a bill of lading from Braatvag to Yokohama with the right to tranship at Hamburg, if he had authority so to sign, or to have sold c.f. and i. Hamburg for Yokohama, and have forwarded the goods to Hamburg on his own account. I have only to add that, judging by the report in (1912) 2 K. B. 107, the decision in *Cox, McEwen and Co.* v. *Malcolm* does not touch the present case. Being a decision on a case stated and on questions put by an arbitrator, the issue was limited by his findings and by the terms of his questions. What those terms were is only to be gathered from the judgment, but they plainly did not include the the question now in issue, viz., whether a bill of lading signed at and operating from an intermediate port of transhipment is a sufficient document for tender to the buyer under a c.f. and i. sale. The contract was for goods to be shipped from Manila to London by steamers " direct or indirect," and the buyers rejected bills of lading from Hong Kong, partly on the ground that they did not comply with a stipulation as to the date of shipment, and partly because they did not conform to the words " shipment direct or indirect." The arbitrator found as facts that transhipment at Hong Kong was usual, and that through bills of lading from Manila, though usual, were not essential. Evidently he was proceeding on some recognised custom of the trade affecting the meaning of the contract. Accordingly the decision was that the contract did not require a through bill of lading; that the goods were, in fact, shipped to London " indirect," and were shipped at Manila within the contract time. The production of the Hong Kong bill of lading alone did not show that the conditions of the contract were not fulfilled, and the form of the arbitrator's question prevented the buyers from raising the contention that they were entitled to reject the tender because a Hong Kong bill of lading was not one which they were bound to take up. On the facts found it was assumed that the Manila bill of lading was not one of the shipping documents which had to be tendered and taken up, since, on a contract to which a through bill of lading was not essential and which was in terms satisfied by indirect shipment, the tender of the Hong Kong bill of lading sufficed. The arguments of counsel on both sides in the case of *Landauer* v. *Craven* (12 Asp. Mar. Law Cas. 182; 106 L. T. Rep. 298; (1912) 2 K. B. 101) show that *Cox, McEwen and Co.'s* case (*sup.*) was understood not to turn on any question of the shipping documents which are required by c.f. and i. terms in general, and I do not think this case can affect the present appeal. I would suggest to your Lordships that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors, *Reynolds* and *Son*; *Donald Macmillan* and *Mott*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 24, 25, 26, *and Feb.* 22, 1922.

(Before P. O. LAWRENCE, J.)

Re LONDON COUNTY COMMERCIAL RE-INSURANCE OFFICE LIMITED. (*a*)

Marine insurance—Policy—Gaming or wagering—Loss in event of peace not being declared by date named—P.p.i. clauses—Insurable interest—P.p.i. clauses detached and not detached at time of claim—Short slips—No mention of p.p.i.—Instructions for insertion of in long slips—Rectification—Life Assurance Act 1774 (14 *Geo.* 3, *c.* 48)—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 4.

The risk insured against by certain policies of insurance or re-insurance issued on marine insurance forms and containing the p.p.i. and f.i.a. clauses, meaning "policy proof of interest" and "full interest admitted," was a total loss in the event of peace not being declared on or before a certain date. The company also issued policies of marine insurance or re-insurance to which were attached at the date on which they were signed the detachable p.p.i. clause which at the time at which the claims were made on the policies were in some cases detached and in other cases not detached. The short slips for these marine policies contained no mention of p.p.i., but the long slips or concluding instructions did contain instructions for the insertion of the p.p.i. clause. On the question being raised by the voluntary liquidator of the company as to the validity of these policies

Held, that though the provisions of the Marine Insurance Act 1906 *were not applicable to the peace policies they were insurances within the meaning of the Life Assurance Act* 1774 *and insurances on an event in which the assured had no interest or insurances by way of gaming or wagering within the meaning of sect.* 1 *of the Act of* 1774 *and therefore illegal and no premiums paid on them were recoverable. The fact that the policies were re-insurance policies and that the re-assured had paid under the policies which they had issued did not enable the claims to be substantiated.*

Held also, that the marine insurances were void under sect. 4 *of the Marine Insurance Act* 1906, *being policies which at the time of issue had the detachable p.p.i. clause attached, and whether such clause was detached or not detached at the time the claim was put forward made no difference; the court would not rectify such policies as the long slips contained instructions for the insertion of the p.p.i. clause, and therefore the policies contained the real terms agreed upon.*

ADJOURNED SUMMONS in companies winding-up with witnesses.

Lionel Maltby, as the voluntary liquidator of the London County Commercial Re-insurance Office Limited (hereinafter called the company) in conjunction with his special adviser appointed under the scheme of arrangement sanctioned by order of the court dated the 21st Feb. 1919, made an investigation of a number of claims on policies which had been issued by the company subject to a condition known as "policy proof of interest" (p.p.i.) The total amount of the claims on these disputed policies was 97,535*l.* 11*s.* 4*d.* The liquidator made an affidavit stating the following questions upon which he desired to obtain the opinion of the court:

(*a*) A policy of insurance or re-insurance issued by the company in the name of G. Chatelain and (or) as agent for the sum of 300*l.*, the risk insured against being a total loss in the event of peace not being declared between Great Britain (England) and Germany on or before the 31st March 1918 pursuant to the corresponding long slip. To this policy was attached a perforated slip which could be detached or not, apparently at the option of the assured, and as appeared from the wording on such perforated slip it was alleged that it formed no part of the policy and was not attached thereto, but was to be considered as binding in honour on the underwriters, the assured, however, having permission to remove it from the policy should he so desire, but it purported to allege that in the event of claim the policy should be deemed to be sufficient proof of interest, and that full interest was admitted. The question arose whether this policy issued pursuant to the long slip and policies in similar form were illegal and void as being gambling policies or otherwise falling within sect. 4 of the Marine Insurance Act 1906 and whether, being a policy of indemnity, it was competent for the parties thereto to make it subject to the conditions of "p.p.i." and "f.i.a.," which indicated "full interest admitted."

The form of the above policy was as follows:

Whereas G. Chatelain, Esq., and (or) as agent represented to the London County Commercial Re-insurance Office Limited that he is interested in or duly authorised as Owner Agent or otherwise to make the insurance hereinafter mentioned and described with the London County Commercial Reinsurance Office Limited. Now this policy of insurance witnesseth that in consideration of the premises and of the sum of twenty-eight pounds seven shillings paid by the said insured to the said company by way of premium at and after the rate of nine guineas per centum for such insurance the said London County Commercial Reinsurance Office Limited do covenant with the said insured that the said company shall be subject and liable to 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 three hundred pounds hereby insured which insurance is hereby declared to be upon [then followed a blank space; the above except the name of the insured and the amounts of the premium and the sum assured was printed, then followed typed in red ink:] To pay a total loss in the event of peace not being declared between Great Britain (England) and Germany on or before the 31st March 1918.

P.P.I.
F.I.A.

[After the above was printed the following:]

in the ship or vessel called the whereof is at present master or whoever shall go for master of the said ship or vessel lost or not lost at and from

[Below this were small print clauses relating to ship insurance. This policy was dated the 10th Oct. 1916, and had attached the perforated slip referred to The corresponding long slip or concluding instructions

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

for issue of the policy was as far as material in the following form :]

London County Commercial Reinsurance Office Limited, Marine Department.

Policy in the name of G. Chatelain and (or) as agent. To the debit of Chatelain and Co.

On. Ship's name. Voyage. Including all risk of craft. [Typed in red ink below :] 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. Warranted free of loss or damage caused by Strikers, Locked-out Workmen, or persons taking part in labour disdisturbances, or riots or civil Commotions.

[Then typed in black the following :]

To pay a total loss in the event of Peace not being declared between Great Britain (England) and Germany on or before the 31st March 1918.

p.p.i., f.i.a.

[The sum insured and premium per centum were also set out.]

(*b*) Further policies of insurance and reinsurance had been issued by the company in pursuance of the corresponding long slip subject also to the detachable slip, and were issued to cover the risk of loss on certain steamships therein referred to. A number of these policies had been issued, and the question arose whether even if they had been issued to cover a legitimate risk the attaching of the detachable slip on the policies or the terms of the long slip rendered them invalid.

(*c*) The company had also issued a number of policies on ships subject to a long slip against war risks, but prior to the claims thereon having been made the detachable slip which had been attached thereto had been detached. Assuming that the risks under these policies were ordinary marine risks, the question was whether in view of the fact that at the time the claim was put forward the slip which had been attached thereto was detached, the policies were valid, or whether they were invalid by reason of the attachment of the said detachable slip or of the terms of the long slip.

(*d*) The company had also issued a number of policies to which was attached the long slip and which were issued subject to the conditions of p.p.i. and f.i.a. (full interest admitted), and the question was whether these policies were in the nature of "wager" policies and within the scope of sect. 4 of the Marine Insurance Act 1906. The condition "p.p.i." and "f.i.a." on which these policies were issued appeared both on the long slips and on the policies, in addition to which there were also the detachable slip above referred to. The insurance in this case was upon increased value of grain.

(*e*) The company also issued a number of policies on steamships subject to the condition of "free of all average and war risk as per original ex delay," which had attached thereto the detachable slip above referred to, and the question arose whether these policies were also invalid under sect. 4 of the Marine Insurance Act 1906, and whether claims should be admitted thereon as valid. Other policies were issued "warranted f.a.a.," meaning free of all average without benefit of salvage, but to pay loss on such portion of the interest as might not reach its destination in the said ship or ships as above. Here latter policies were also issued subject to the condition "f.p.a.," meaning free of particular average, and claims have been made upon these latter policies, and the question arises whether such claims can be admitted.

The liquidator in these circumstances issued this summons in the winding-up of the company against G. Chatelain and Co., Auton Alrik Sunden-Cullberg and Erik Olof Nordgren, trading as Alrik Sunden-Cullberg of Stockholm, Sweden, Hamilton Smith and Co., Eagle Star and British Dominions Insurance Company Limited, and B. N. L. Whiteaway for the decision of the following questions: (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), and (*g*), and for the purpose of the decision of such questions that G. Chatelain and Co. might be appointed to defend on behalf of and represent all the holders of the policies mentioned in question (*a*); And the said Auton Alrik Sunden-Cullberg and Erik Olof Nordgren might be ordered to defend on behalf of and represent all the holders of the policies mentioned in question (*b*); that the said Hamilton Smith and Co. Limited might be ordered to defend on behalf of and represent all the holders of the policies mentioned in question (*c*); that the Eagle Star and British Dominions Insurance Company Limited might be ordered to defend on behalf of and represent all the holders of the policies mentioned in question (*d*); that the said B. N. L. Whiteaway might be ordered to defend on behalf of and represent all the holders of the policies mentioned in question (*e*); and that the said Hamilton Smith and Co. might be ordered to defend on behalf of and represent all the holders of the policies mentioned in question (*f*).

(*a*) Whether Lionel Maltby as such liquidators ought to admit as valid the policies of insurance or re-insurance issued by the company in the form known as p.p.i. policies more particularly described in the affidavit of Lionel Maltby to be filed in support of this summons.

(*b*) Whether as such liquidator he ought to admit as valid the policies of insurance or re-insurance issued by the company in the form known as p.p.i. policies, more particularly described in the said affidavit to each of which policies a slip capable of being detached in the words stated in the said affidavit had been attached, but which slip had not been detached at the date when such claim was put forward.

(*c*) Whether he ought as such liquidator to admit as valid the policies of insurance or re-insurance issued by the company in the form known as p.p.i. policies, more particularly described in the said affidavit to each of which policies a slip capable of being detached in the words stated in the affidavit had been attached, but which slip had been detached at the time the claim was put forward.

(*d*) For the decision of the questions raised under (*a*), (*b*), (*c*), treated as relating to a policy in the form f.i.a., more particularly described in the said affidavit.

(*e*) For the decision of similar questions referred to in the policy in the form f.a.a. without benefit of salvage, more particularly described in the affidavit.

(*f*) For the decision of similar questions referred to in the policy in the form v.o.p., and meaning "valued as in original policy."

(*g*) Whether in the event of it being held that all or any of the said policies were void and that no claims could be maintained under them, the liquidator ought to admit a claim for the premiums paid in respect of the policies.

An affidavit was sworn to by L. H. Hobbs, a director of Hamilton Smith and Co. Limited, insurance brokers, of thirteen years' experience as a marine insurance broker, as to the customary course of marine insurance or re-insurance business, the material parts of which were as follows:

The practice where the underwriters are a limited company or an insurance company in marine insurance or re-insurance has always been as follows: The broker, who is the agent of the assured, writes on a short slip the necessary particulars of the insurance proposed, such particulars as a rule, and more especially in cases of re-insurance, are in themselves sufficient to enable a policy to be drawn up. The broker then submits the short slip to the company's underwriter who, if he is prepared to accept the risk offered, enters on the slip the amount he is willing to insure and signs the slip with his initials and generally dates the signature. In this way by one or by several underwriters the full amount is insured. It is this short slip thus initialled (and not the so-called long slip) which, according to the practice of marine insurance and in the understanding of those engaged in marine insurance is deemed to be a complete and final contract, fixing the terms of the insurance, including the premium, and neither party can without the assent of the other deviate from the terms so agreed upon without a breach of faith. When, under the contract thus concluded, the broker requires a policy in the case of an insurance with Lloyd's underwriters, he prepares it himself and submits it to the underwriters concerned for signature, but in the case of an insurance with a company (such as is here in question) he hands to the company what are known as closing instructions on a document which is sometimes called the long slip, and on these instructions the company prepare and sign the policy. The broker acting for the assured makes out the long slip without which the company could not prepare the policy, as the broker takes away and keeps the short slip after it has been initialled. The underwriter signs the short slip only, and it is by the terms of the short slip alone that he is bound. If there is any variation between the short slip and the long slip the former not the latter is the authoritative expression and evidence of the contract. This is so in the case of an insurance with Lloyd's underwriters, and also in the case of an insurance with a company and sect. 21 of the Marine Insurance Act 1906 applies (as I submit) to both cases.

In the ordinary understanding of brokers and underwriters engaged in marine insurance the terms "p.p.i.," or other similar terms (such as are mentioned in par. (1) (*a*) and (*e*) of the affidavit of Lionel Maltby), in a policy do not necessarily indicate that the assured has no insurable interest or does not expect to acquire an insurable interest thereunder. In many cases where there is an insurable interest the p.p.i. clause is inserted because the insurable interest is such that a loss in respect of it, though real, would be difficult to prove or assess. By the addition of such terms to the contract the underwriters agree to release the assured in the event of a claim from the difficulty and expense of proving his interest. It has become usual to add a p.p.i. clause (when required) in the form and with the reservation appearing on the policies referred to in the said affidavit of Lionel Maltby, viz.: "This slip is no part of the policy and is not to be attached thereto but is to be considered as binding in honour on the underwriters, the assured, however, having permission to remove it from the policy should they so desire." I submit that where a p.p.i. or other similar clause is attached to a policy in the form and with the reservation as aforesaid such a clause is not part of the contract at all but is only an obligation binding in honour on the underwriters, and the assured is entitled to (whether the said clause has been removed from the policy or not) to prove interest and to recover in respect of any claims that have arisen under the policy.

The claims on the policies which are not disputed by the liquidator amounted to over 500,000*l.*, and as the assets were insufficient to pay all these claims it was important to policy holders under the policies, the claims on which were admitted, that the liquidator should not have to pay the claims amounting to 97,500*l.* on the policies in dispute in this case.

On the 17th March 1917 the Danske Genforsikring Aktieselskab presented a petition to wind up the company. The Danske Company was formed during the war under some arrangement with the company to guarantee all the risks of the undertaking, providing a certain amount in the £. That arrangement was disputed by the Danske Company, and in the winding-up of the company a scheme was drawn up under the terms of which the creditors other than the Danske Company were to receive a composition at the rate of 6*s.* in the £ in full satisfaction of their claims against the company and the Danske Company. The court sanctioned this scheme on the 21st Feb. 1919, and on the 28th Feb. 1919 a resolution was passed for a voluntary winding-up in accordance with the scheme, and Lionel Maltby was appointed liquidator.

R. A. Wright, K.C. and *F. Whinney* for the liquidator.—The liquidator submits the questions in the summons for the decision of the court, but contends that the p.p.i. policies, even should there be an insurable interest, are nevertheless void under sect. 4 of the Marine Insurance Act 1906 (see *Cheshire and Co.* v. *Vaughan Brothers and Co.*, *ante* p. 69, 123 L. T. Rep. 487; (1920) 3 K. B. 240, 254), and that the policies issued to insure the risk of peace not being declared before the date named are gaming or wagering policies within the meaning of the Life Assurance Act 1774.

Stuart Bevan, K.C. and *Le Quesne* for G. Chatelain and Co. Chatelain and Co. are brokers, and acted as principal. The first question is as to the effect of the detachable p.p.i. slip, but it is proposed to leave the argument as to that to the respondents, Hamilton Smith and Co. and Sunden-Cullberg. My view will be submitted on the assumption that the detachable slip is held to be part of the contract, and therefore the question remains on question (*a*) of the summons, whether the policies included in that question are void as being within sect. 4 of the Marine Insurance Act 1906. At common law prior to the statute (19 Geo. 2, c. 37, the Marine Insurance Act 1745), p.p.i. contracts were not void (Arnould on Marine Insurance, 10th edit., sect. 311, p. 428), but after that Act they were made illegal right down to the year 1906. Sect. 4 of the Act of 1906 for the first time included foreign ships, declaring that wagering contracts with regard to British and foreign ships were void. Persons whose profits in a business were dependent on whether war continued or not naturally desired to insure and where their liveli-

hood was affected by the continuance of the war they had an insurable interest. These policies under question (*a*) concerned no marine losses or marine adventure, and are clearly not marine policies within sect. 1 of the Act of 1906, and that Act is not applicable to them. But it is contended these policies are void as being within the Marine Insurance Act 1745. There exists no authority as to this, though Arnould on Marine Insurance, 10th edit., p. 434, sect. 315, seems to think such policies are void. These policies are being attacked, and it is for those who do so to prove they are gambling policies. They are perfectly consistent on the face of them with the assured having an insurable interest. These re-insurances were effected by G. Chatelain and Co. in respect of insurances effected by them against similar risks, and they have paid in every case, and that constitutes his proof of interest and is sufficient proof of interest. Even if G. Chatelain were liable in honour but not in fact there would still be an insurable interest. There has been here a new consideration and a new contract not tainted with illegality which can be sued upon :

Hyams v. *Stuart King*, 99 L. T. Rep. 424 ; (1908) 2 K. B. 696, 704, and 707.

[Halsbury's Laws of England, vol. 17, p. 514, was also referred to.] It is the duty of the court always to lean in favour of an insurable interest if possible :

Stock v. *Inglis*, 5 Asp. Mar. Law Cas. 294 ; 51 L. T. Rep. 449, 12 Q. B. Div. 564.

F. D. Mackinnon, K.C. and *H. C. Scott* for the firm of Alrik Sunden-Cullberg, and *F. D. Mackinnon*, K.C. and *Le Quesne* for Hamilton Smith and Co.—Hamilton Smith and Co. are respondents as being the brokers in London, though the Alliance Insurance Company are the real parties interested in nearly all Hamilton Smith and Co.'s policies. The firm of Sunden-Cullberg support the policies coming under question (*b*) and Hamilton Smith and Co., all those falling within questions (*c*), (*d*), and (*f*). In every case these policies were genuine business and nobody ever knew or thought that any of these policies contained the p.p.i. clause. As these policies are not in fact gaming or wagering policies, and as actual loss can in each case be proved to have been sustained, not only by the re-assured but also by the original assured, the liquidator ought as an honourable man to admit the claims made under them, and being in the position of an officer of the court, he is bound to be as honest as other people. See :

Ex parte James ; Re Condon, 30 L. T. Rep. 773 ; 9 Ch. 609, at p. 614 ;

Ex parte Simmonds ; Re Carnac, 54 L. T. Rep. 439 ; 16 Q. B. Div. 308, at p. 312 ;

Re Contract Corporation ; Gooch's case, 26 L. T. Rep. 177 ; L. Rep. 7, Ch. 207.

And the fact the applicant is a voluntary liquidator does not alter the case, and companies of the highest class constantly issue p.p.i. policies. [P. O. LAWRENCE, J.—You might address the legislature as to that.] If a claimant had no real insurable interest but was merely using his insurance to effect a bet, the above argument that the liquidator ought to admit these claims would not hold, but where he has an insurable interest the liquidator would be relying upon a mere technicality in trying to deny his claim. As to question (*b*) the firm of Sunden-Cullberg are in quite a different position as their agents exceeded or did not act on their instructions. That firm asked the company to re-issue a perfectly proper risk, and did not ask that the p.p.i. clause should be attached, and never even saw the policy. There was no variation, therefore, of the original contract if the p.p.i. clause was attached by mistake. The firm of brokers, instructed by Sunden-Collberg, were directors of the company, and were, in fact, that company, so that there was no opportunity for the assured to read the policies. In the case of Hamilton Smith and Co., if the policies as they stand are void, then as the short slips did not show that the policies were intended to be p.p.i. policies, but the p.p.i. clause was in fact attached, there was a mistake, and that is a ground for having these policies rectified by the court. The liquidator though bound to raise these questions, as he represents the interests of other misleaded creditors, is not wishful that these policies should be held void. A case where the defendants themselves were wishful that the policy should not be held void on account of its having been made in terms prohibited by the statute, was heard as if the policy did not contain the p.p.i. clause. See :

Buchanan and Co. v. *Faber*, 4 Com. Cas, 223, 227 *n* ;

Gedge v. *Royal Exchange Assurance Corporation*, 9 Asp. Mar. Law Cas. 57 ; 82 L. T. Rep. 463 ; (1900) 2 Q. B. 214.

If there was a perfectly proper policy in perfectly good terms, but contemporaneously with the policy the company were to write to the assured that they saw a difficulty for him to prove his interest so that if a loss occurred they would not insist on proof of interest, that would be practically p.p.i., but it would be no defence for the underwriters to plead that such a policy was void because of the contemporaneous agreement. The decision in *Cheshire and Co.* v. *Vaughan Bros. and Co.* (*ubi sup.*) is distinguishable, as there the broker was told to insert the p.p.i. clause, but in this case a clerk or office boy put in the clause in the long slip with no authority to do so.

W. Werninck for B. and L. Whiteaway.—We produce no evidence. The three policies which go to make up this group amount to 1200*l*. They have the detachable slip on, and there seems to be no distinction from question (*b*) as these policies have only f.a.a. on them in addition.

Whinney in reply.—The peace policies included in question (*a*) are clearly insurance policies and not mere wagers, but fall within the Life Assurance Act 1774, and are illegal, or they are null and void under the Gaming and Wagering Act 1845. They took the form of re-insurances moreover, and are for that reason insurance policies : Arnould on Marine Insurance, 10th edit., p. 514, sect. 1012.

As to the distinction between a policy of insurance and a mere wager, see :

Wilson v. *Jones*, 15 L. T. Rep. 669 ; L. Rep. 2 Ex. 139, 150.

What is stated in Arnould on Marine Insurance, 10th edit., p. 375, sect. 744, I adopt as part of my argument. This case is nothing like *Hyams* v. *Stuart King* (99 L. T. Rep. 424 ; (1908) 2 K. B. 696), which is in no way applicable for the purpose it was cited. There is no case in which it has been decided that a person such as a voluntary liquidator is an

officer of the court. This liquidator is merely carrying out the trusts of a scheme of arrangement; but assuming he were to be treated as an officer of the court, then I rely upon *Re Wigzell; Ex parte Hart* (125 L. T. Rep. 361; (1921) 2 K. B. 835, 854). The trustee is acting under a statutory provision. The respondents, except Sunden-Cullberg, are not entitled to rectification, as no one has ventured to suggest the p.p.i. clause was attached by mistake. The liquidator cannot claim not to be liable to pay on the policies of the firm of Alrik Sunden-Cullberg, which are on an entirely different footing. They never gave the brokers (their agents) any authority to enter into p.p.i. policies, and as principals were unaware such policies had been entered into.

Cur. adv. vult.

Feb. 22.—P. O. LAWRENCE, J.—The first question which arises on this summons is as to the validity of the peace policies. In my judgment these policies are not contracts of marine insurance. It is true that they are made out on the printed form which the company generally uses for its marine policies, but that fact alone does not, in my opinion, make them marine policies. None of the printed clauses contained in these policies have any application to the subject matter of the insurance, and when the substance of these policies is looked at it is obvious that the losses insured against are not losses incident to any marine adventure. These policies, therefore, do not come within the definition of contracts of marine insurance contained in sect. 1 of the Marine Insurance Act 1906, and the provisions of that Act do not apply to them.

The next question to be determined is whether these policies are insurances forbidden by the Life Assurance Act 1774 (14 Geo. 3, c. 48). Although it would appear from the title of this Act as if the Act were confined to life insurances, yet its operative part extends to insurances on any events whatsoever except insurances on ships, goods, and merchandise. This Act, however, does not extend to all contracts by way of gaming and wagering, but is confined to contracts of insurance. The first matter to be considered, therefore, is whether these policies are insurances whithin the true meaning and intent of sect. 1 of the Act. In the case of *Wilson* v. *Jones* (15 L. T. Rep. 669; L. Rep. 2, Ex. 139, at p. 150) Blackburn, J., in pointing out the distinction between a policy of insurance and a mere wager defines a policy as a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to. Applying that definition to the facts of this case, it will be seen that in form these policies undoubtedly are contracts of insurance as they purport to indemnify the assured against loss in the event of peace being declared before a certain date. Moreover, the policies were all effected by way of re-insurance having been issued to Mr. Chatelain as broker on behalf of the Lloyd's de France Insurance Company as the English and Foreign Iusurance Company for the purpose of re-insuring the risks undertaken by those companies under certain policies issued (also by way of re-insurance) to certain underwriters at Lloyds, who had underwritten the original policies. In these circumstances I am clearly of opinion (and indeed Mr. Stuart Bevan in the course of his argument felt himself constrained to admit) that the peace policies are contracts of insurance in the ordinary sense of the words, and not mere wagers.

That being so, the next question arises whether these policies are insurances on some event wherein the assured has no interest, or insurances by way of gaming or wagering within the meaning of the Act of 1774, and consequently illegal and void. In my opinion the fact that the policies contain the p.p.i. clause does not of itself prove that the assured has no insurable interest in the subject matter of the insurance, or that the policies are gaming or wagering policies, as that clause may have been inserted on account of some difficulty in proving interest. Mr. Stuart Bevan has called my attention to the judgment of Sir William Brett, M.R., in the case of *Stock* v. *Inglis* (5 Asp. Mar. Law Cas. 294; 51 L. T. Rep. 449; 12 Q. B. Div., 564, at p. 571) where that learned judge states that in his opinion it is the duty of the court always to lean in favour of an insurable interest if possible, and I have assumed that this opinion correctly expresses the attitude in which the court ought to approach the present case. In my judgment, however, the facts disclosed by the evidence here are such that it is impossible to hold that the assured had any insurable interest. In my opinion the description of the subject matter of the insurance, the existence of the p.p.i. and f.i.a. clauses on all the policies, and the absence of any attempt on behalf of the claimants to prove that the original assured had any insurable interest, lead to the irresistible inference that these policies were insurances by way of gaming or wagering, and I should require the clearest possible evidence to convince me to the contrary. If I were to accede to the argument addressed to me by Mr. Mackinnon that I ought to uphold these policies because the original assured might possibly have had some insurable interest, I would be shutting my eyes to the true nature of these policies, and stretching the rule referred to, expressed by the Master of the Rolls in *Stock* v. *Inglis* (*ubi sup.*), beyond its proper limits. The fact that the policies are re-insurance policies, and that the re-assured have paid under the policies which they have issued does not, in my judgment, operate to enable them to substantiate their claims against the company. It is well settled that (subject to anything to the contrary in the re-insurance policy) the re-assured in order to recover from their underwriters must prove the loss in the same manner as the original assured must have proved it against them, and the re-insurers can raise all defences which were open to the re-assured against the original assured. This is equally true whether the re-assured had or had not paid their assured, inasmuch as it would be inequitable for them to renounce any of their defences so as to prejudice the re-insurers. (See the article written by the late Mr. Arthur Cohen in Halsbury's Laws of England, vol. 17, sect. 744, p. 375.) Nor does the fact that the re-assured in this case were only themselves re-insurers assist the claimants as it only operates to throw the position one step further back. If it once be established that the original insurances were illegal, it follows, in my judgment, that all the re-insurances are tainted with that illegality, and are themselves illegal and void.

In the result I hold that the peace policies are gaming or wagering policies within the meaning of sect. 1 of the Act of 1774, and are consequently illegal and void. It follows from the fact that these policies are illegal that the claimants cannot recover either the amounts thereby insured or the premiums paid for effecting them.

A further point, however, was taken on behalf of the claimants, namely, that the company had agreed not to dispute the claims under these policies in consideration of the claimants' supporting the scheme of arrangement which was then about to be submitted to the creditors for their approval. There are at least three answers to this contention; each of which, in my opinion, is conclusive. In the first place the letter of the 30th Dec. 1918, which was relied upon as constituting the bargain, was not in fact written on behalf of the company, and therefore does not bind the liquidator. In the second place a bargain not to dispute a claim arising under an illegal contract is one which the court would not give effect to under any circumstances, much less where it purports to affect persons who were no parties to it. In the third place this bargain, which, if valid, would have materially affected the rights of the general body of creditors, was not disclosed to the court when it was asked to sanction the scheme, and therefore the court ought not to pay any attention to it when adjudicating upon the rights of the creditors in the liquidation.

In the result I propose to make a declaration that the liquidator ought not to admit any claims under the peace policies, either for the moneys purporting to be assured thereby or for the return of the premiums paid in respect thereof.

The next policies as to which questions arise are those issued by the company to Hamilton Smith and Co. These are undoubtedly marine policies. They were taken out to re-insure genuine marine risks which the re-assured has underwritten, and were in no sense gaming or wagering policies. The first question which arises on these policies is whether the fact that a detachable p.p.i. clause was gummed on to the policies when they were signed and issued does not render them void under sect. 4 of the Marine Insurance Act 1906. In my judgment there is no difference between those policies which still have the p.p.i. clause attached to them and those from which the p.p.i. clause has been detached. It is not necessary to consider what course the court would have adopted if before the policies had been brought to its attention the p.p.i. clause had been detached, and neither of the litigating parties had raised the point that such a clause had ever formed part of the policies, because in the present case evidence has been adduced on behalf of the liquidator which proves clearly that the p.p.i. clause was attached to all the policies when they were signed and handed to the assured. In my judgment the proper time to judge whether these policies are valid or void as *at* the time when they are issued. The subsequent tearing off of the p.p.i. clause by the assured (even though it was done with the permission of the insurers) cannot in my opinion have the effect of rendering the policies valid if they were null and void when they were issued. It was contended, however, that the court ought not to regard any of the policies as p.p.i. policies because of the introductory words preceding the p.p.i. clause on the detachable slip, which stipulated that the p.p.i. clause was no part of the policy but was to be binding in honour on the underwriters, and might be removed by the assured. In my opinion that contention cannot prevail. The stipulation relied upon is a palpable and, in my opinion, wholly futile attempt to evade the provisions of sect. 4 of the Act of 1906. A stipulation that an important clause affecting the whole tenour of the policy should form no part of the policy, and might be removed by the assured, stands self-condemned, and cannot, in my opinion, have the effect of making the policy what it is not, namely, a policy not containing such a clause. Moreover, the statement that the p.p.i. clause should be binding on the insurer in honour only does not affect the position at all, as even without that statement the clause would not have bound the insurers in any other way. The policies as issued were in substance and in fact p.p.i. policies, and the effect of attaching the p.p.i. clause was in my judgment to render the policies void by virtue of the provisions of sect. 4 of the Act of 1906.

In my judgment, therefore, unless the assured can succeed in their claim for rectification all the policies to which the p.p.i. clause was attached at the time of issue are void. The question then arises whether the claimants are entitled to have these policies rectified by striking out the p.p.i. clause. It is argued that the court ought to rectify the policies because the short slips, which it is said contain the true terms of the bargain arrived at between the parties, did not stipulate for a p.p.i. clause. In my opinion the claim for rectification cannot possibly succeed, as there is no evidence whatever of a common or even of a unilateral mistake. The reason why the company attached the p.p.i. clause to these policies is because the closing instructions expressly stipulated that the policy should be a p.p.i. policy. It is true that none of the short slips mentioned the p.p.i. clause as one of the terms of insurance, but (according to the custom prevailing where the insurer is a company) these short slips were in each case followed by the long slips or closing instructions drawn up by or on behalf of the assured, and presented to the company in order that the company might prepare the policy in the terms of these long slips. In every case the long slips contained instructions for the insertion of a p.p.i. clause, and I have no doubt whatever that the assured desired to have p.p.i. policies. It was suggested that the long slips did not contain the real terms agreed upon, but were prepared by office boys or clerks who had no authority to insert the instructions for a p.p.i. policy. Even if this suggestion were true, it does not prove that the company made any mistake, but as a matter of fact there is no evidence whatever to support the suggestion. The true inference to be drawn from the evidence is that the long slips were prepared in the office of the brokers and presented to the company in the ordinary course of business. In these circumstances the court cannot possibly assume that the persons who made out the long slips acted without authority, more especially as Mr. Hobbs, a director of Hamilton Smith and Co. Limited, has made a long affidavit, and has not ventured to say that the insertion of the p.p.i. clauses in the closing instructions was not authorised by him. No doubt the company could, without any breach of faith, have refused to issue p.p.i. policies because when it underwrote the risk on the short slips the p.p.i. clause was not mentioned, but as a matter of fact the company in every case accepted the closing instructions without demur, and issued policies in accordance with those instructions. The policies were accepted by the re-assured with full knowledge that they contained the p.p.i. clause in accordance with the closing

instructions; and in the circumstances it is plain that the terms contained in the short slips were by agreement between the parties superseded by the terms which were eventually embodied in the final contracts of insurance. The policies, therefore, contain the real terms agreed upon between the parties and, in my judgment,, the claim that they should now be rectified at the instance of the assured by omitting the p.p.i. clause is a hopeless claim, and one which the court cannot possibly entertain.

But then it is contended that the court ought to order the liquidator to admit the claims under these policies, in spite of the fact that they are void, on the ground that the liquidator is in the position of an officer of the court, and that the principle that the court ought to be as honest as other people (per James, L.J., in *Ex parte James; Re Condon*, 30 L. T. Rep, 773; L. Rep. 9, Ch. 609, at p. 614) and will direct the officers to do that which any high-minded man would do (per Lord Esher, J.R., in *Ex parte Simmonds; Re Carnac* (54 L. T. Rep. 439; 16 Q. B. Div. 308, at p. 312) applied to the facts of this case. It is said that as these policies were not in fact gaming or wagering policies, and as actual loss could in each case be proved to have been sustained not only by the re-assured but also by the original assured, the liquidator would only be acting as an honourable man would act if he were to admit the claims, and therefore the court ought to compel him to admit them notwithstanding that the statute makes the policies void. In my judgment the court cannot possibly accede to this contention. Even if the voluntary liquidator were in the position of an officer of the court for this purpose (which I think is open to doubt) I am of opinion that the doctrine has no application to a case such as this where a claim is made under a contract which the legislature has for sufficient reasons thought fit to declare void. Under sect. 4 (2) (*b*) of the Act of 1906 every policy containing the p.p.i. clause is to be deemed to be a gaming or wagering policy. (See *Cheshire and Co.* v. *Vaughan Bros. and Co.* (*ante* p. 69; 123 L. T. Rep. 487; (1920) 3 K. B. 240.) Moreover, it is by no means clear that the court, on having its attention drawn to the p.p.i. clause, ought not to treat the policies as void even though the parties themselves may not desire to have them so treated, *Cheshire* v. *Vaughan* (*ante* p. 69; 123 L. T. Rep. 487; (1920) 3 K. B., at p. 252). In these circumstances it is in my opinion hopeless to contend that the court ought to hold that it is contrary to honourable or high-minded conduct for an insurer (or as in this case a liquidator of an insolvent insurer) to rely on the provisions of this section. To order the liquidator to admit these claims would, in effect, be repealing this section so far as this liquidation is concerned (see *Re Wigzell; Ex parte Trustee* (125 L. T. Rep. 361; (1921) 2 K. B. 835, at p. 863). There remains to be considered the question whether the claimants under these policies are entitled to the return of the premiums which they have paid. Having regard to the fact that the Marine Insurance Act 1745 (19 Geo. 2, c. 37) which rendered marine policies affected by way of gaming or wagering illegal, was repealed by sect. 92 of the Act of 1906, and that the latter Act merely renders such policies void, I am of opinion that the claimants are entitled to prove for the amount of the premiums paid by them in respect of these policies. It is admitted that the original assured, and therefore the re-assured, had an insurable interest in the subject matter of the policies, and that there was no fraud or illegality on the part of the assured or re-assured or their agents. In these circumstances I am of opinion that as the consideration for the payment of the premiums has totally failed, sect. 84 (2) of the Act of 1906 applies, and the premiums are returnable by the company. In my judgment, therefore, the liquidator ought to admit the claimants under these policies as creditors in respect of the premiums paid by them. I propose, therefore, to make a declaration that the liquidator ought not to admit the claimants under the policies issued to Hamilton Smith and Co. Limited, or under any other marine policies to which the p.p.i. clause was at the date of issue attached (except the Sunden-Cullberg policies which have yet to be dealt with) as creditors in respect of the moneys thereby insured, but ought to admit them as creditors for the amount of the premiums paid by them to the company.

I now come to the Sunden-Cullberg policies, which relate to the steamers *C. Sundt*, *Robert*, and *Theodor Williams*. These policies stand on an entirely different footing from the Hamilton Smith and Co.'s policies, and the liquidator has by his counsel stated that he is not in a position to contest the claims made by the assured under them. In these circumstances I will content myself by stating quite shortly why I think the court is justified in holding that these policies ought to be treated as rectified by deleting the p.p.i. clause. Mr. Davies, the managing director of the company, acted as broker for the Stockholm firm who had instructed him to re-insure certain risks which they had underwritten. I am satisfied on the evidence that the instructions given to Mr. Davies by the Stockholm firm were instructions to effect ordinary re-insurance policies, and that the Stockholm firm never contemplated having p.p.i. policies, and never knew until after the liquidation that p.p.i. policies had in fact been issued. As Mr. Davies was managing director of the company, both short and long slips seem to have been dispensed with, and Mr. Davies himself signed and issued the policies. In these circumstances he either made a mistake which must be treated as a common mistake, or else he knowingly exceeded his instructions in which case the company cannot take advantage of the wrongful act of its own managing director. The assured have produced satisfactory proof of interest and loss, and I, therefore, propose to make a declaration that the liquidator ought to admit the claimants under the Sunden-Cullberg policies as creditors in respect of the amounts covered by their policies. In conclusion, I will only add that the policies referred to under the headings (*d*), (*e*), and (*f*) in the summons are covered by my decision in the case of Hamilton Smith and Co., as it appears from the exhibits to the liquidator's affidavit that p.p.i. clauses are attached to all these policies. That being so, I am relieved from dealing with the further objection to the policy mentioned under head (*e*) of the summons on the ground that it is made subject to the term "Warranted f.a.a. without benefit of salvage," as to the effect of which I prefer not to express an opinion. The costs of all parties to this application will be taxed as between solicitor and client, and retained and paid by the liquidator out of the assets.

Solicitors: *Wansey, Stammers,* and *Co.*; *Hicks, Arnold,* and *Co*; *Simmons* and *Simmons*; *Walton* and *Co.*; *Richards* and *Butler.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 20 *and* 23, 1922.

(Before Sir HENRY DUKE, P.)

THE COASTER. (*a*)

Limitation of liability — Claims settled abroad — Limitation fund—Right of the plaintiff to claim for the amount paid in settlement of claims abroad— "Claims"—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

Where the plaintiff in a limitation suit has settled claims abroad arising out of the collision in respect of which the decree of limitation has been obtained, he is entitled to bring payment of such claims into consideration before the registrar when the administration of the limitation fund is decided upon. Proof of such payment may be brought before the registrar notwithstanding that such payment was made under a foreign system of limitation, or for an amount not limited according to the English rule of limitation. It is not material that the claimants to whom such payments were made were not subject to the jurisdiction of the court.

The steamer D. *and her cargo were sunk in collision with the steamer* C. *After the collision the* C. *put into a French port, where her owners were forced to give bail in order to secure her immunity from arrest at the suit of the owners of the* D. *Bail was given in an amount equal to the value of the* C. *at that time, which was the full amount of the liability of her owners under the law of France. In subsequent proceedings in France the* C. *was held alone to blame, and her owners were condemned in the amount of their bail and costs. The owners of the* C. *discharged the judgment debt and then commenced proceedings to limit their liability in England. A decree of limitation was pronounced and at the subsequent reference a claim was filed by the owners of the cargo laden on the* D., *and the owners of the* C. *themselves also filed a claim for the amount they had paid under the judgment in France, together with their costs in the French proceedings. The registrar allowed their claim for the amount paid to the owners of the* D., i.e., *the amount of the statutory liability of the owners of the* C. *in France.*

Held, on appeal from the registrar, that the claim was properly allowed.

Leycester *v.* Logan (26 *L. J. Ch.* 306) *and* The Crathie (8 *Asp. Mar. Law Cas.* 256; 76 *L. T. Rep.* 534; (1897) *P.* 178), *followed.*

The Kronprinz Olav (15 *Asp. Mar. Law Cas.* 312; 125 *L. T. Rep.* 684; (1921) *P.* 52) *distinguished.*

MOTION in objection to a report of the registrar.

The plaintiffs in this limitation suit were the "T" Coasters Limited, the owners of the steamship *Coaster,* and the defendants were the owners of the cargo lately laden on board the steamer *Dokka* and other persons claiming to have suffered damage in a collision between the *Coaster* and the *Dokka* on the 21st Oct. 1917.

The collision took place in the English Channel. The *Dokka* was sunk, and the *Coaster* subsequently put into Fécamp, where proceedings were instituted against her by the owner of the *Dokka.* In order to secure her immunity from arrest the owners of the *Coaster* gave bail at Fécamp in the sum of 200,000 francs, which sum represented the full value of the *Coaster* at that time. In subsequent proceedings at Fécamp the total loss suffered by the owners of the *Dokka* was assessed at 3,550,500 francs. Judgment was pronounced on the 21st Feb. 1921 by the Tribunal of Commerce awarding the owners of the *Dokka* 200,000 francs, together with interest, costs, and surveyors fees amounting to 24,422.80 francs. On the 21st May 1921 the owners of the *Coaster* paid to the owners of the *Dokka* in settlement of this judgment 224,422.80 francs.

The owners of the *Coaster* then commenced the present action to limit their liability in England, and on the 18th July 1921 a decree of limitation of liability was pronounced. Under the decree the owners of the *Coaster* paid into court the sum of 2047*l.* 8*s.* 7*d.*, being the amount of their statutory liability. The reference was held on the 11th Nov. 1921, when the owners of the cargo laden on the *Dokka* put forward a claim which was agreed at 2645*l.* The owners of the *Coaster* also put forward a claim for 4943*l.* 10*s.* 11*d.*, being the amount paid to the owners of the *Dokka* together with their own costs at Fécamp converted to sterling at the appropriate rate of exchange. The claim of the owners of the *Coaster* was made up as follows:

Principal sum awarded to the owners of the *Dokka* for claims	200,000 francs
Legal expenses, expenses providing security, payments to surveyors, registration of judgment	24,422.80 francs
Legal expenses of the owners of the *Coaster* in France	4,068.85 francs

On the 21st Nov. 1921 Hill, J. decided in chambers in proceedings at the instance of the owners of the *Coaster,* that the owners of the *Dokka* could not make any claim against the fund.

On the 22nd Nov. 1921 the registrar reported that there was due to the owners of the cargo on the *Dokka* the sum of 2645*l.* and to the owners of the *Coaster* the sum of 4319*l.* 13*s.* 1*d.*, being 200,000 francs converted to sterling at the appropriate rate of exchange. The registrar gave the following reasons for his report:

REPORT.

This reference came before me on the 11th Nov. 1921, in the course of a limitation action, in which the owners of the *Coaster* had obtained a decree limiting their liability. The sum paid into court amounted with interest to 2047*l.* 18*s.* 7*d.* One set of claimants were the owners of cargo on the *Dokka,* which vessel had been in collision with the *Coaster,* for which collision the *Coaster* had been held to blame by the court. After the collision the *Coaster* put into Fécamp, and proceedings were taken against her in the Tribunal of Commerce at that port by the owners of the *Dokka.* In these proceedings, the *Coaster* was held alone to blame. The course of proceedings is fully narrated in the affidavit of Thomas Edward Brown, one of the firm who were managers of the *Coaster.* The result

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

of the proceedings in France was the payment of a sum of 200,000 francs, the value of the *Coaster* to the owners of the *Dokka*. In the limitation action the owners of the *Coaster* claimed against the fund in court in respect of this sum and in respect of expenses of the litigation in France. The owners of cargo objected to this claim. *The Crathie* (8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178), and *The Kronprinz Olav* (15 Asp. Mar. Law Cas. 312; 125 L. T. Rep. 684; (1921) P. 52) were referred to by counsel.

I am of opinion that the owners of the *Coaster* are entitled to claim on the fund in court a sum equal to the amount recovered in France by the owners of the *Dokka*. Strictly, the owners of the *Coaster* cannot be claimants, but rather are the plaintiffs in the limitation action, entitled to safeguard their rights, just as when plaintiffs who have paid a sum into court in order to limit their liability, consider that by appearing at the reference they may be able to reduce the claim below the limit of liability, so that there would be in court a balance due to the parties limiting: (see *The Kronprinz Olav* (*sup.*).

In *The Crathie* (*sup.*) one set of claimants, who had recovered damages in Holland, did not make a claim against the fund in court in England, nor do the owners of the *Dokka* in this reference. But it was held in *The Crathie* (*sup.*) that "the plaintiffs (*i.e.* the owners of the limiting vessel) will also take out of the fund a sum equal to the amount received by the Atlantic Insurance Company" (*i.e.* the non-claiming cargo owners).

Applying *The Crathie* (*sup.*) to the present case, this decision is an authority that the limiting parties are entitled to receive the sum and only that sum which the owners of the *Dokka* have received in France out of the fund in court. It is therefore unnecessary to discuss the various points raised before me at this reference or to consider upon what grounds the decision in *The Crathie* (*sup.*) is based.

The claims as allowed are stated on the schedule hereto. (Sgd.) E. S. ROSCOE, Registrar.

In the schedule the claims were set out as stated above.

The owners of the cargo on the *Dokka* appealed.

Dunlop, K.C. and *Dumas* for the defendants, the owners of the cargo on the *Dokka*.—The registrar was wrong in allowing the claim of the owners of the *Coaster*. If the owners of the *Coaster* are allowed to make claims they will in effect be claiming against themselves, since the fund in court is provided by themselves to satisfy claims arising from their own negligence. They cannot sue themselves. If the claim is made on the ground that the rights of the owners of the *Dokka* are now subrogated to those of the owners of the *Coaster* the claim ought not to be allowed, since Hill, J. has decided that the owners of the *Dokka* have no rights against the fund, and, therefore, the owners of the *Coaster* can have none. A person whose rights arise by subrogation to the rights of another can have no greater rights than that other had. A plaintiff in limitation proceedings cannot claim for damage which he himself has suffered:

Simpson v. *Thompson*, 38 L. T. Rep. 1; 3 App. Cas. 279; 3 Asp. Mar. Law Cas. 567.

The only claims which can be made against a limitation fund are claims made by persons within the jurisdiction. Limitation only affects liability in so far as claims made within the jurisdiction are concerned. Claims not made under the provisions to the Merchant Shipping Acts cannot be preferred against a limitation fund:

The Kronprinz Olav, 125 L. T. Rep. 684; (1921) P. 52; 15 Asp. Mar. Law Cas. 312.

This proposition is established by the judgment of Atkin, L.J. The claim which the owners of the *Coaster* have been allowed to make was not a claim within the meaning of sect. 503 of the Merchant Shipping Act 1894. It was not a claim in respect of a payment made to settle a claim extra-judicially, nor to avoid proceedings in England. It was a payment made in satisfaction of a judgment debt abroad. This is not a claim within the meaning of sect. 503: *The Crathie* (76 L. T. Rep. 543; (1897) P. 178; 8 Asp. Mar. Law Cas. 256) is distinguishable, since in that case the owners of the *Crathie* had been under no liability abroad, *i.e.*, as judgment debtors, to the parties to whom they had already made payments, with the exception of the Atlantic Insurance Company. With regard to that claim, the amount was so small that this point was never taken in argument: (see full reports of the arguments of counsel in 8 Asp. Mar. Law Cas.). *Rankin* v. *Rashen* (4 Ct. of Sess. Cas. 4th ser. 725) is distinguishable because there the claims were claims within the jurisdiction. It is on these grounds that *The Crathie* (*sup.*) and *Rankin* v. *Rashen* (*sup.*) were distinguished by the Court of Appeal in *The Kronprinz Olav* (*sup.*): (see judgment of Bankes, L.J.).

Raeburn, K.C. and *Noad* for the plaintiffs, the owners of the *Coaster*.—The report of the registrar is right and ought to be confirmed. The policy of the Merchant Shipping Act 1894 is to limit the liability of shipowners, not to limit claims; the court must give effect to this intention of the Legislature so far as it can do so. The owners of the *Coaster* are not claiming against themselves; nor are they asserting rights derived by derogation from the rights of the owners of the *Dokka*. They are bringing to the notice of the court the fact that they have paid certain claims. The law is correctly stated in *The Crathie* (*sup.*) and *Rankin* v. *Rashen* (*sup.*) and is in no way affected, or intended to be affected, by anything decided in *The Kronprinz Olav* (*sup.*). In *The Kronprinz Olav* the Court of Appeal upheld the decision of Hill, J. not to exercise his discretion to extend the time within which claimants to the limitation fund might bring in their claims: (see judgment of Hill, J. at p. 685 of 125 L. T. Rep.; p. 54 of (1921) P.; p. 313 of 15 Asp. Mar. Law Cas.). It was within the discretion of Hill, J. to extend such time in suitable circumstances: (see *The Disperser*, 123 L. T. Rep. 683; (1920) P. 228; 15 Asp. Mar. Law Cas. 112). In *The Kronprinz Olav* (*sup.*), Hill, J. decided that the circumstances did not warrant the exercise of this discretion. The judgment of Atkin, L.J. is *obiter dicta* in so far as it decides anything beyond this. In any event it does not decide, or purport to decide, the propositions contended for. The law is as stated in *The Crathie* (*sup.*).

Dunlop, K.C. replied. *Cur. adv. vult.*

March 23.—Sir HENRY DUKE, P. said: This case was before me in the form of an objection to the report of the registrar on a reference in an action for limitation of liability. The proceedings arose out of a collision which took place in the English

Channel on the 31st Oct. 1917, between the vessel of the plaintiffs in the limitation suit *Coaster*, and a French vessel called the *Dokka*. As the result of the collision the *Dokka* was sunk, and her cargo, which was of considerable value, went down with her. The particulars as to amount of damage it is not necessary to consider, but obviously the casualty was one which exposed the owners of the *Coaster*, in case it had arisen by error of navigation or by fault or default of their servants, to very serious claims in respect both of the *Dokka* and her cargo. The plaintiffs in the limitation suit found themselves with their vessel under arrest in France, at Fécamp, and were called upon at Fécamp to meet the claims of the owners of the *Dokka*. That is a material matter in this case, and I shall have to refer to it more in detail. They, in fact, made a payment in satisfaction of that claim. The decree in the limitation suit was obtained after the payment in satisfaction had been made, and is dated the 18th July of last year. After the payment in satisfaction had been made there was an attempt in the proceedings in the limitation action to obtain for the plaintiffs in limitation, by proceedings in the name of the owners of the *Dokka*, the advantages of limitation in respect of the claim of the owners of the *Dokka*. That claim came before Hill, J., and was disposed of. For various reasons, which are apparent on the face of it, it is clear that there should have been no claim by the owners of the *Dokka*—they were at the time of their application out of time under the Limitation Act; they were out of time under the Maritime Conventions Act, and they had been satisfied, so that they were not good claimants and their claim was dismissed, quite properly as it seems to me. There was no appeal against Hill, J.'s decision dismissing that claim.

In that state of the case, a reference to the registrar and merchants was held, and before the registrar there were brought in two claims. There was brought in the claim to the owners of the cargo on board the *Dokka* (that was a claim which was agreed at a sum of 2645*l.*) and there was also before the registrar the claim of the plaintiffs in the limitation suit to have the benefit of the payment which they had made under compulsion of the proceedings before the French tribunal, and which claim amounted to 4319*l.* 13*s.* 1*d.* The fund in court in the limitation suit, which was necessarily assessed in accordance with the provisions of the Merchant Shipping Act 1894, s. 503, was a fund of only 2047*l.* 18*s.* 7*d.* The cargo owners claimed to be entitled to receive the whole of it, and then they would have received something like five-sixths or five-sevenths of the amount of their loss, not taking into account the expenses to which they might have been put. The question upon the objection in the registrar arises with regard to the claim of the plaintiffs relative to their payment to the owners of the *Dokka*. The registrar considered the matter and came to the conclusion that by operation of Lord Gorell's well-known decision in *The Crathie* (76 L. T. Rep. 534; 8 Asp. Mar. Law Cas. 256; (1897) P. 178) made as long ago as 1897, the plaintiffs were entitled to have credit in the proceedings as against claimants to the fund for a sum of 4319*l.*, being the sum they had paid to one of the claimants against the fund. The question is whether, in view of the recent consideration of the combined operation of sects. 503 and 504 of the Merchant Shipping Act 1894, that decision of the registrar ought to be affirmed. There is no dispute that the payment in respect of which the plaintiffs in the limitation action brought their claim was in fact made. There was no application before the registrar to ascertain what was in truth the claim under French law or any other law of the owners of the *Dokka* in respect of their damage by the collision. The proceedings to the registry upon those two matters were not challenged, and they are not in question here. There were two technical grounds of objection which were raised, and there were certain substantial grounds of objection—I mean substantial in point of law. They are of a refined character—I am not sure whether Mr. Raeburn said they were of a sophisticated character—but of a refined character undoubtedly.

They have, however, to be seriously considered. The technical objections which were taken were two. There was an objection that the proceedings before Hill, J., in which it had been sought to raise a claim by the owners of the *Dokka*, was a bar to the claim of the plaintiffs.

I do not propose to discuss that matter. My own view of it is that it was simply an error in procedure, and had no other effect than such as might be involved in any liability for costs arising from it. There was the further ground that in the decree in the limitation suit there was no reservation of the question of the appropriation of the funds which would of itself found this claim for the plaintiffs. As to that matter, I think it is a purely technical one. It seems to me that the procedure which has been followed—which has grown up in the exercise of the jurisdiction with regard to limitation of liability and the distribution of funds in court—is such as to deprive that objection of any substantial value. Whether it would have been a ground for some objection before the registrar, I do not know; but, at any rate, I have found no substance in it.

I come to consider the questions of principle, the questions of law, which were raised. The first was that the claim of the plaintiffs in limitation to receive out of the fund the amount of payment which they had made outside the jurisdiction was in truth a claim by the plaintiffs to participate in the fund. Upon grounds of principle which seem to me clear—grounds of principle which were discussed and illustrated in the well-known case of *Simpson* v. *Thompson* (38 L. T. Rep. 1; 3 Asp. 567; 3 App. Cas. 279), which ultimately found its way to the House of Lords—there is no question that a plaintiff in limitation cannot come in as a claimant in respect of damage which he has done. Where there has been negligence, and there is the concession by the Legislature of a limited liability for the results of the negligence, it would seem to be impossible in principle that the author of the negligence—the person answerable for the negligence—should be entitled to displace those who had been injured by such negligence, and to put into his pocket either a larger or smaller part of the fund provided to limit his liability in respect of the negligence. The real question here is whether the plaintiffs are claimants in that respect—whether they come within the principle which was discussed in *Simpson* v. *Thompson* (*sup.*)—or whether in fact they are merely setting up their right, in the administration of the limitation fund, to retain part of the fund by reason of claims which they have already satisfied. That seems to me to be a different matter—which has been long recognised as a different matter—so far as claimants

within the jurisdiction are concerned. So far as claimants within the scope of the Act are concerned, there is no question but that a claimant in limitation, who has paid to claimants a sum in satisfaction of a liability arising from the collision, might bring in that payment to found an application on his part to be credited in the administration of the fund in respect of the liability which he had satisfied.

I think that—apart from the question of law which really underlies the appeal, to which I will presently refer—an examination of the objection that the plaintiffs were making their claim contrary to *Simpson* v. *Thompson* (*sup.*) only discloses that there is no substance in that objection, that it is an objection in point of form, but not an objection which really touches the merits of the case as far as the plaintiffs are concerned.

The next objection which was made was that the plaintiffs' payment had been a payment not in respect of a claim arising out of the collision, but a payment under a portion of the judgment—a payment in satisfaction of the judgment debt—and that, therefore, the claim of the person satisfied was not a claim within the meaning of the term in the Merchant Shipping Act 1894. In my opinion that objection has no more substance than the objection to which I have previously referred. The question is not, as it seems to me, whether a foreign plaintiff had a claim here in respect of a judgment debt. It may be that, having a judgment debt, he would not have a claim here in respect of damage by the collision.

I express no opinion about that—certainly no opinion in the affirmative. But the question is not whether the foreign plaintiff had a claim, but the question is whether the plaintiff in limitation is entitled to have account taken of the sum which he has paid, and to be credited in the administration of the fund with the sum he has so paid. The objection which was mainly argued was this—that the plaintiffs could have no claim in respect of a payment made to the owners of the *Dokka* by reason that the owners of the *Dokka* were not entitled to the payment they received under the Merchant Shipping Act 1894. It was contended that a foreign claimant—that is, a claimant outside his Majesty's Dominions—is not within the purview of the provisions of the limitation sections in the Act of 1894. Mr. Dunlop pointed out that a foreign claimant founds himself either upon an absolute liability for damage done, or on a system of limitation which is different from the system of limitation under our Merchant Shipping Act. He contended that the possible claimants were those who consent to come in for the purposes of the distribution of a limitation fund to share in it rateably. He contended that the plaintiffs in the French action, the owners of the *Dokka*, were not within that definition. He argued that upon principle—and by reason in particular of a recent decision in the Court of Appeal—that sect. 503 of the Merchant Shipping Act must be read as though the limitation of liability were a limitation to this effect, that the owners of the ship in fault shall not be liable in damages beyond the amount of the limitation in respect of claims from persons subject to the operation of the statute. That is the main question which has to be considered. There can be no doubt, I think, that the contention is directly contrary to the practice which has been pursued in the administration of the limitation sections, at any rate since the decision in *The Crathie* (*sup.*), and, as I believe, for a period long before the decision in that case. It has, however, to be considered. It was said on the part of the plaintiffs in the limitation suit that the decision in the case in the Court of Session of *Rankin* v. *Raschen* (4 Ct. of Sess. Cas. 4th Ser. 725) did not raise the question which is raised here, and it was said that in *The Crathie* (*sup.*), although there was a claim which raised the question, as to the right to claim for damage out of the jurisdiction, nevertheless that the amount there involved was so small that the matter was dealt with by counsel and by the court, upon the footing that the claimants might stand upon the common basis of being, all of them, persons who could make claims within the provisions of the Merchant Shipping Act. It was further said that all the judgments in *The Kronprinz Olav* (125 L. T. Rep. 684; (1921) P. 52, 15 Asp., Mar. Law Cas. 312) not merely reserved the question which is raised here, but expressed views with regard to it which ought to guide me to the conclusion first of all that the matter is open in point of authority; and, second, that it ought to be dealt with in the manner contended for by the owners of the *Dokka*. The practical result would be of the nature I have stated, that the plaintiffs here, although their limitation of liability is a limitation of a sum of just over 2000*l.*, would find themselves involved in the payment of a sum just under 7000*l.* So that the limitation of 8*l.* per ton of the ship which was in collision would become nugatory. It is said that such a case cannot arise because there is no international statute, no international scheme for dealing with these claims for limitation, and that limitation takes place within national areas, and upon a different footing within those several areas, and that where there is a statutory fund it should be distributed between the persons who are bound by the statutory limitation. It was admitted on the part of the owners of the *Dokka* that a foreign claimant may come in and claim upon the administration of the fund for limitation in our courts. This was said to go further than that, and, in so far as it went, further raised the question of principle to which I have referred. I have to deal with the matter upon principle, and with reference to the authorities, and having recognised in the course of the argument that I have strong predilection of my own part to the view which seemed to me a rational common-sense view—which has long been acted upon in the registry—I took time to read with care the judgments upon which the practice has been settled, and the judgments in *The Kronprinz Olav* (*sup.*). It has been recognised, from the time at any rate of the Merchant Shipping Act of 1854, and I think authorities will be found under the earlier Acts (under the statute of 53 Geo. 3), that a limitation fund is to be equitably administered. Under the Merchant Shipping Act of 1854, where there was a section providing for limitation, with a section empowering Courts of Equity to proceed to administer a limitation fund, there is a decision of Lord Hatherley, when he was Page Wood, V.-C. which arose under circumstances which I think throw some light on this case. There had been a suit in the High Court of Admiralty with arrest of the vessel, and the suit had proceeded to judgment in favour of the plaintiff. The question was whether, under the provisions of the Act of 1854, the plaintiffs in the limitation were entitled

to bring in that judgment as one of the claims in respect of which their liability was to be ascertained, and in respect of which the fund was to be administered. The authority is *Leycester* v. *Logan* (26 L. Jour., Ch. 306), and there questions were raised with regard to the meaning of the term "claim," and with regard to other questions, some of which are involved in this case. Lord Hatherley had no doubt that the plaintiffs there were entitled in equity to have credit in the administration of the limitation fund for the liability which had been brought home to them by the judgment in the Admiralty claim.

That goes some distance in favour of the contentions made by Mr. Raeburn. There was the well-known case of *Rankin* v. *Raschen* (*sup.*) in the Court of Session, where the decision was broadly given that the plaintiff in limitation is entitled to state a claim in respect of the party whose claim he has settled extra judicially. As was said here, if these plaintiffs had come in and made a claim within the jurisdiction, which had been settled extra judicially upon the footing of the Merchant Shipping Act the case of the plaintiffs in limitation would have been different.

Following those cases, there was before Lord Gorell in *The Crathie* (*sup.*) the question where the distribution of such a fund as this was considered by the authorities. There being claimants who had elected to sue in Holland, Lord Gorell held that in respect of those claims the claimants who had not been satisfied in full were entitled to claim in this jurisdiction, and that the plaintiffs in limitation were also entitled to take out of the fund a sum equal to the amounts already received by those claimants. That case in which a considered judgment was delivered has hitherto been treated as having settled the practice. In the case of *The Kronprinz Olav* (*sup.*) there was a claim in Norway which had proceeded to trial. There was a limitation suit, and in the limitation suit the plaintiffs in limitation sought an extension of time to bring a claim in respect of the claim which had been litigated and was in the course of being litigated in the Norwegian courts.

Hill, J. held, and the Court of Appeal affirmed his decision, that it was not a necessary exercise of the discretion as to the extension of the time, and would not be a proper exercise of the discretion in that case, to extend the time in order that the plaintiffs might learn what would be the ultimate fate of their litigation with the foreign claimant in Norway. That does not decide anything in the limitation in this present suit.

However, in the course of the judgments in the case Bankes, L.J. said this at p. 686 of 125 L. T. Rep.; p. 58 of (1921) P.; p. 314 of 15 Asp. Mar. Law Cas.: "Some question may arise as to whether there is any difference between the case in which the shipowner who has successfully established his right to limit his liability is called upon to meet a claim by a claimant resident in this country and a case in which the claimant is resident abroad and has either established, or is seeking to establish, his right abroad. I do not think it is necessary to decide that question on this particular appeal, but speaking for myself, I think that it is difficult to see why any distinction should be drawn between the two cases if the object of the court is to give to the applicant the relief which, as between himself and the claimants to the fund, the statute seems to me to contemplate that he should have. I do not think it is necessary to decide that point definitely on this particular appeal." Then the Lord Justice at the close of his judgment, says: "Under these circumstances it does not seem to me necessary to discuss either of the two decisions to which we have referred, *The Crathie* (*sup.*) and *Rankin* v. *Raschen* (*sup.*), because the facts in those cases were so different. In both cases a sum of money had in fact been paid to claimants, and they were, I think, bound by the provisions of the statute." Mr. Dunlop said there has been a claim here conceded to claimants, but they have not become bound by the provisions of the statute. In the course of Atkin, L.J.'s judgment he said this at p. 687 of 125 L. T. Rep; 62 of (1921) P.; 315 of 15 Asp. Mar. Law Cas.: "I know of no case where the registrar and merchants, or the court, in dealing with something which is not the subject matter of a claim brought in before the registrar and merchants, have dealt with it except upon the footing that payment has actually been made by the plaintiffs. The suggestion here is that the court has a further power to consider not only a claim in fact made within the jurisdiction and settled, but a contingent claim that is being made or may be made abroad, in respect of a party who is not subject to the restrictions of the particular section of the Merchant Shipping Act. I have been in very considerable doubt whether such a claim can be considered at all, because it seems to me that the benefit that is given under this statute is given to persons who come within the jurisdiction of the statute." Those words were words upon which Mr. Dunlop particularly relied. The judgment goes on: "It is a restriction upon the rights of persons who, on this hypothesis, have got a claim larger than, in fact, they are going to be paid, and that restriction does not apply at all in the case of foreigners who are in a position to make their claim outside the jurisdiction. I see nothing to compel them, at any rate, to come here and make their claims, and if there is nothing to compel them to make their claims here I find it very difficult to conceive that the court can order the fund to be adjusted upon the footing that such a claim was made." No doubt the passages to which I have referred and the parts of them upon which Mr. Dunlop relied do raise a question as to claimants without the jurisdiction as to whether, without accepting the limitation of the Act and coming in upon an even footing with other claimants on the fund, they are entitled to participate in the distribution of the fund. In this case the facts are not entirely without colour with regard to that particular contention. It has happened that the plaintiffs in limitation did not pay their money to the owners of the *Dokka* upon their own limited claim, or upon the award which was made by the French court of a sum based upon the French rule as to limitation with regard to that claim. They made accord and satisfaction with the French claimants, and they paid the French claimants an amount which was not the amount of the judgment, but which was in satisfaction of particular demands. The receipt was produced, it was not in any way challenged, and it has the effect I have mentioned.

Those are the circumstances in this case which distinguish it from a mere case of payment to a person outside the jurisdiction of the amount payable according to the limitations existing outside the jurisdiction. My own view is that it

is not necessary in this case to rely upon that distinction.

I have come to the conclusion that, with regard to any payment made in satisfaction of a claim in respect of damage caused by collision, the general words of sect. 503 are to be so construed as to entitle the plaintiff in limitation to bring before the registrar proof of the payment he has in fact made in respect of a claim arising out of the collision. I think he may do so where there is a foreign system of limitation and where the claim of the foreign claimant is in respect of an amount, not limited according to the English rule of English limitation. That, however, it is not necessary that I should decide in this case. I merely express the view which, upon reflection on the matter, I have arrived at. But in the circumstances of this case I am satisfied that the fund is to be administered according to the equitable principles which were laid down by Lord Hatherley which were followed in the Court of Session and which were illustrated in the case of *The Crathie* (*sup.*), and that a payment which has been imposed upon the plaintiff in limitation in respect of damage arising out of a collision, is a payment which he is entitled to bring into consideration before the registrar when the administration of the limitation fund comes to be decided upon in this court. For the reasons I have stated, I disallow the objection and confirm the report.

Solicitors: *Thomas Cooper* and *Co*; *Stokes* and *Stokes*, agents for *Bramwell, Clayton*, and *Clayton*, Newcastle.

Monday, March 27, 1922.

(Before Sir HENRY DUKE, P.)

THE LOREDANO. (*a*)

Collision — Action by the Crown — Writ issued after the expiration of period provided by statute of limitation—Crown not expressly included in the statute—Statute of limitation, whether binding on the Crown—Maritime Conventions Act 1911 (1 *& 2 Geo.* 5, *c.* 57), *s.* 8.

Sect. 8 *of the Maritime Conventions Act* 1911 *provides: "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight . . . caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered. . . . Provided always that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs . . . extend any such period. . . ."*

Held, that this section is not binding on the Crown in an action in which the Crown is plaintiff.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

SUMMONS adjourned into court.

The facts and arguments of counsel appear from the judgment of the learned President.

Sir *Ernest Pollock* (A.-G.) and *Balloch* for the Crown.

Alfred Bucknill for the owners of the *Loredano*.

March 27.—Sir HENRY DUKE, P. said: I think it well to proceed to deliver judgment in this case, which is a matter of public importance, and I deliver it in court. The summons will be taken to be adjourned into court.

This is an action in the name of the commissioners for Executing the Office of the Lord High Admiral of the United Kingdom against the owners of the steamship or vessel *Loredano*. It is brought to recover damages in respect of a collision between His Majesty's ship *Salome* and the *Loredano*, which occurred in July 1917. An application has been made by the defendants that the plaintiffs should show cause why they should not either apply for leave to maintain their action, or, alternatively, submit to have their action dismissed on the ground that the pleadings in the action were not commenced within two years from the date of the collision. The Attorney-General has appeared to establish on behalf of the Crown the contention that the limitation contained in sect. 8 of the Maritime Conventions Act of 1911 is a limitation which does not bind the Crown. That contention is founded upon two grounds. It is founded, first of all, upon the general proposition that the statute is a statute of limitation, and that it is well settled law that no statute of limitation binds the Crown, unless the Crown be found to be expressly included within its terms. The Attorney-General cited a case in the Privy Council—the case of the *Attorney-General for New South Wales* v. *The Curator of Intestate Estates* (97 L. T. Rep. 614; (1907) A. C. 519)—which was not statute of limitation but raised the question whether the Crown was bound by provisions of an Act of the Parliament of New South Wales whereby certain assets of deceased persons were protected from payment of certain debts of those persons, and in that case Sir Arthur Wilson, who delivered the judgment of the Privy Council, made this statement of the law at p. 615 of 97 L. T. Rep. 523 of (1907) App. Cas.: "The question therefore arises whether the present Act binds the Crown. The Crown is not named in it, nor can their Lordships see any clear indication to bind the Crown. *Primâ facie*, therefore, the Crown is not affected by it." That is a statement in a carefully limited form of the prerogative of the Crown with regard to the exemption from the operation of statutes, in particular of statutes of limitation. The rule with regard to statutes of limitation has been more emphatically stated in other decisions, and it is summed up in a very express statement in the passage which the Attorney-General cited from Mr. Robertson's book in the 1903 edition. Taking the statute as it stands, it is not suggested that the Crown is expressly included in its provisions, and, after listening to the argument in which Mr. Bucknill has carefully protected the interests of the defendants, I am not able to find that by implication the statute extends to the Crown. Mr. Bucknill made reference to the comprehensive character of the Maritime Conventions Act, and to the proviso to sect. 8, and said that the term "vessel" must

be taken to mean "any other vessel." That is no more comprehensive than is the legislation in an infinite variety of Acts of Parliament where such legislation in any way affects the prerogative of the Crown. He said that in order to give effect to the contention raised on behalf of the Crown, the words "a vessel" in sect. 8 must be read as "A vessel other than a vessel of His Majesty the King." By well established principles of law it seems to me that every statute must be construed, where the King is not named, as though it contained a limitation of some such words as those which Mr. Bucknill applies to this case. The prerogative of the Crown is saved by operation of law, and the statute is construed with reference to the principle. Mr. Bucknill pointed out too that personal claims are not limited—personal claims form no part of the prerogative of the Crown. An action against an individual is no infringement of either an immunity of the Crown or a right of the Crown. Reference was made to the decision in the case of His Majesty's ship *Archer*, where, with regard to a personal action, this statute was treated as having application. That decision does not seem to me to affect the question which is here under consideration. It seems that the question which is here raised was not raised there, and did not arise. Mr. Bucknill said further that it would be inequitable to limit the operation in the manner for which the Attorney-General contends—that, for instance, the defendants in the action would not be at liberty to plead any immunity by reason of the Act, and they would not be able to raise any claim by way of counter-claim as they might have done if these proceedings had been taken within the two years limited by the Act. That is true, but the same argument, of want of equity, might be raised in a hundred cases where the interests of the State are held to be superior to the interests of individual claimants. So far as the general principle is concerned, I am bound to say I feel no doubt that the general principle entitled the Crown to the dismissal of this summons.

The argument was put upon the further ground that by the express terms of the Maritime Conventions Act it must be taken that the Crown is not within these provisions. Sect. 10 of the Act provides that the Maritime Conventions Act shall be construed as one with the Merchant Shipping Acts 1894 to 1907. Sect. 741 of the Merchant Shipping Act 1894 provides this: "This Act shall not, except where specially provided, apply to ships belonging to His Majesty." Incorporating that section in the Act of 1911, there would be the very words for which Mr. Bucknill urged the necessity. It seems to me that on both grounds the application of the defendant fails and must be dismissed. I should say this, that some contentions were raised in this action that it would be perfectly proper to raise in the pleadings in the case. If there be a specific ground of equity which ought to be brought to the notice of the Crown, it can be alleged in the pleadings, and if there be any other specific ground on which the pleadings on behalf of the Crown ought to fail, that equally ought to be alleged.

On this preliminary ground I take the view that the summons is misconceived, and must be dismissed.

Solicitors: The *Treasury Solicitor; Ince, Colt, Ince*, and *Roscoe*.

House of Lords.

March 7, 9, 10, *and April* 4, 1922.

(Before Lords BUCKMASTER, DUNEDIN, ATKINSON, SUMNER, and CARSON.)

ATLANTIC SHIPPING AND TRADING COMPANY LIMITED *v.* LOUIS DREYFUS AND CO. (First Appeal). (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Reference of disputes to arbitration — Unseaworthiness at commencement of voyage—Claim for damage to cargo—Time limit for appointing arbitrator—Effect of arbitration clause.

By a charter-party it was provided that "all disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators . . . one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. . . . Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."

Held, that that provision did not exclude the cargo owner from such recourse to the courts as was always open, by virtue of the provisions of the Arbitration Act, to a party who had agreed to arbitrate, but that it was unavailable to the shipowner as an answer to a claim for damage caused by unseaworthiness.

Tattersall *v.* National Steamship Company Limited (5 *Asp. Mar. Law Cas.* 206; 50 *L. T. Rep.* 299; 12 *Q. B. Div.* 297) *approved and followed.*

Decision of the Court of Appeal affirmed on other grounds.

APPEAL from an order of the Court of Appeal reversing a decision of Rowlatt, J.

The appellants were the owners and the respondents the charterers of the steamship *Quantock*.

By a charter-party dated the 2nd May 1919 it was provided that the vessel should proceed to Rosario, and there load a full and complete cargo of linseed for carriage to Hull. Clause 39 was as follows: "All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London, who shall be members of the Baltic and engaged in the shipping and (or) grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's

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

arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred." The *Quantock* duly proceeded with a cargo of linseed to Hull, where she arrived early in Sept. 1919. Shortly after her arrival the respondents gave notice to the appellants of their intention to put in a claim for damage alleged to have been caused to the linseed during the voyage, and in May 1920 they brought an action against them claiming 2233*l.* damages. The appellants by their defence referred to clause 39 of the charter-party and said that the charterers, having failed to appoint their arbitrator within three months of the final discharge of the ship, must be deemed to have waived their claim, and that no action could now be brought in respect thereof. The respondents, by their reply, pleaded that the ship was unseaworthy and unfit to receive the said goods on board at the date when the said goods were loaded, and at the date of the commencement of her voyage with the said goods on board and remained in the said condition throughout the said voyage, and that the effect in law of the unseaworthiness was to prevent the operation in favour of the appellants of any of the special clauses of the charter-party. An order having been made after the delivery of the reply that the question of law, whether the claim in the action was barred by clause 39 in the charter-party, should be tried as a preliminary question of law. Rowlatt, J. held (1) that the mode of procedure set out in the arbitration clause was a condition precedent to the bringing of any action at all; and (2) that clause 39 applied, and was binding upon the parties, even although the ship was unseaworthy at the commencement of the voyage, and that the seaworthiness of the vessel had nothing to do with the application of the arbitration clause. The Court of Appeal reversed that decision on the ground that the arbitration clause was contrary to public policy and void on the ground that its object and effect were to oust the jurisdiction of the court.

The shipowners appealed to the House of Lords.

Dunlop, K.C. and *Jowitt* for the appellants.—The intention of the parties as expressed in clause 39 of the charter-party was that in the event of a claim by either party against the other arising out of the charter-party, such claim was to be deemed to be waived and absolutely barred unless the claimant made his claim in writing and appointed an arbitrator within three months of final discharge of the cargo. Compliance with the provisions of the clause was a condition precedent to the claimant's having a cause of action, and it being admitted that the respondents have not complied with the provisions of the clause, they must be deemed to have waived their claim. It is further submitted that the clause is not against public policy as it does not oust the jurisdiction of the court.

They referred to:

Jurcidini v. *National British and Irish Millers' Insurance Company Limited*, 112 L. T. Rep. 531; (1915) A. C. 499;
Scott v. *Avery*, 5 H. L. Cas. 811;
Caledonian Insurance Company v. *Gilmour*, (1893) A. C. 85;
Spurrier and another v. *La Cloche*, 86 L. T. Rep. 631; (1902) A. C. 446;
Hamlyn and Co. v. *Talisker Distillery Company*, 71 L. T. Rep. 1; (1894) A. C. 202;
Doleman and Sons v. *Ossett Corporation*, 107 L. T. Rep. 581; (1912) 3 K. B. 257;
Ford v. *Beech*, 11 Q. B. 852;
Moore v. *Harris*, 3 Asp. Mar. Law Cas. 173; 34 L. T. Rep. 519; 1 App. Cas. 318;
Pompe v. *Fuchs*, 34 L. T. Rep. 800.

Neilson, K.C. and *Clement Davies* for the respondents.—If the arbitration clause has the effect contended for by the appellants, it is designed to oust the jurisdiction of the court, and is thereby contrary to the general policy of law and unenforceable. Further, the vessel was unseaworthy at the commencement of the voyage with the result that the appellants are are not entitled to claim the benefit of either the exceptions clause or the arbitration clause of the charter-party. The goods in respect of which this claim has been made were damaged by reason of the unseaworthiness of the vessel, so that the question as to arbitration does not arise at all.

They referred to:

Horton v. *Sayer*, 4 H. &. N. 643;
Bank of Australasia v. *Clan Line Steamers Limited*, 13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39;
Tattersall v. *National Steamship Company Limited*, 5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297;
Kish and another v. *Taylor, Sons, and Co.* 12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604.

Jowitt, in reply, referred to:

Joseph Thorley Limited v. *Orchis Steamship Company*, 10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 660.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Lord DUNEDIN.—Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad as an ousting of the jurisdiction of the courts, but that position was finally abandoned in *Scott* v. *Avery* (5 H. L. Cas. 811). As I read that case it can no longer be said that the jurisdiction of the court is ousted by such an agreement; on the contrary, the jurisdiction of the court is invoked in order to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is not obnoxious in so far as it provides for arbitration. It

goes on, however, to say that if the claim is not made and the arbitration started within a certain time the claim is to be held to be departed from. Now, if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation—it is done, *e.g.*, every day in insurance policies—then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law? All it comes to is this: I stipulate that you shall settle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and start your arbitration within a certain time or you shall be held to have waived your claim. For these reasons, I do not think the judgment of the Court of Appeal can be supported.

We have, however, had another argument which does not really arise on the preliminary question as put, but which, as it has been dealt with in the courts below, your Lordships think should be disposed of here. The respondents aver that the vessel when starting on the voyage was unseaworthy, and that the damage for which they sue was caused by such unseaworthiness, and they say that if they prove these two facts then the clause in question affords no protection. On this point we have no indication as to what the opinion of the learned judges of the Court of Appeal would have been. Rowlatt, J. rejected the contention upon the ground that the implied condition of seaworthiness had nothing to do with and was not in any way affected by a condition which was one of procedure only. There was, however, quoted to us a judgment of Bailhache, J. in the case of the *Bank of Australasia* v. *Clan Line of Steamers* (13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39), to the opposite effect. In that case there was a clause that no claim could be available which was not made at the port of delivery within seven days of the steamer's arrival there, and Bailhache, J. held that that clause was no bar to an action raised upon the averment that the ship was unseaworthy and that the damage which was sued for was caused by such unseaworthiness. His judgment was reversed by the Court of Appeal, but on the ground, which had not been noticed by Bailhache, J., that there was in the charter-party an express exception of damage caused by unseaworthiness and that that being so the express clause must be read along with all other express clauses, of which the limitation of liability was one. It is pointed out by the respondents that in this case there is no express clause as to unseaworthiness, which is therefore left to be dealt with on the implied condition.

In these commercial cases it is, I think, of the highest importance that authority should not be disturbed, and if your Lordships find that a certain doctrine has been laid down in former cases and presumably acted on in the framing of other contracts you will not be disposed to alter that doctrine unless you think it is clearly wrong.

Before the decision of Bailhache, J., there was the earlier case of *Tattersall* v. *National Steamship Company Limited* (5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297), a judgment of Day and A. L. Smith, JJ., where it was held that there being no express contract as to unseaworthiness a clause limiting liability to 5*l.* per animal (the goods shipped were cattle) did not apply to damage done by unseaworthiness. I think it clear that the learned judges of the Court of Appeal in the *Bank of Australasia* case (*sup.*) approved of that case in terms, and therefore inferentially, though they do not actually say so, approved of Bailhache, J.'s judgment if there had not been an express clause dealing with unseaworthiness.

Now, does the present case fall into line with *Tattersall's* case (*sup.*)? On the best consideration I can give to the matter, I think it does. It is quite true that the fact of unseaworthiness does not destroy the contact of affreightment *in toto*. Such a doctrine would lead to absurd consequences; the goods might be safely delivered and yet no freight be due under the contract, but only a *quantum meruit* for services rendered. The test seems to me to be whether the particular clause interferes with the liability which unseaworthiness creates. It is just here that I think Rowlatt, J. did not sufficiently distinguish between the two parts of the clause. So far as it dealt with the procedure, I agree with him, and if this clause had been a mere reference to arbitration and had stopped there, I do not think it would have been hit. But it goes on and, under certain conditions, destroys liability. If *Tattersall's* case (*sup.*) is right that you cannot in such cases appeal to a limitation of liability, surely it is *a fortiori* to say you cannot appeal to its destruction.

I think there is nothing in the waiver point. For these reasons I agree with the motion to be made by Lord Buckmaster.

Lord SUMNER.—This case turns upon clause 39 of the charter. The first question is, whether it means that, if the charterer does not make a claim or name an arbitrator within three months of the final discharge, he agrees that he is not in any way or in any circumstances to have any access to His Majesty's courts for the purpose of raising his claim. The Court of Appeal thought that it does. With great respect, I am unable to agree. The clause does not mean that under no circumstances shall a claimant be allowed to enter His Majesty's courts at all, but that the cause of action shall not be complete, and therefore cannot be made the subject of proceedings, unless the specified conditions have first been satisfied. The point, however, hardly admits of discussion; a view is formed of it, one way or the other, simply on the perusal of the words, for the question is purely one of interpretation. I think the words do not exclude the cargo-owner from such recourse to the courts as is always open, by

virtue of the provisions of the Arbitration Act, to a party who has agreed to arbitrate. If so, as of course the Court of Appeal would have been the first to recognise, the jurisdiction of the courts is not ousted so as to make this arbitration clause bad altogether. Its terms can be enforced.

The second point is whether a term, that a claim is to be absolutely time-barred after three months, if certain conditions have not previously been satisfied, is available for a shipowner, where the claim is for damage to cargo arising because the ship was not reasonably fit to carry the goods, there being in the charter no express exception of unseaworthiness. Of course the clause means that the ship is liable for proved unseaworthiness under certain circumstances—namely, if the claim and the nomination are made in time—but not otherwise. Can it be said that this recognition of liability *sub modo* prevents the clause from operating as an exception at all, and reduces it to a mere "procedural" provision, fixing the conditions under which liability will be established? With great respect to the opinion of Rowlatt, J., I do not think that it can. The point of course is not dealt with in the judgments of the Lords Justices.

The question arose in this way. To save the great expense of going to trial upon an issue of fact, whether the cargo was damaged in consequence of the ship's unseaworthiness or or not, which might prove after all to be capable of a short answer under the charter, by reason of the charterers' non-compliance with the conditions of clause 39, it was agreed between counsel, that the construction of the charter should be decided as a preliminary question as if upon demurrer, it being assumed against the shipowner that the damage to the cargo arose in consequence of the ship's unseaworthiness; and against the charterers, that they were out of time in making their claim. It is a pity that the agreement was not embodied in an order specifying the preliminary question and directing it to be tried. This ought to have been done, and, but for the fact that there is no reasonable doubt about either the agreement or the terms of it, your Lordships would, I apprehend, have declined, as well you might, to entertain the question.

By the charter the shipowner undertakes to load and carry the cargo and to deliver it at the destination for a freight payable (except as to advances) on right and true delivery. The undertaking is, of course, subject to numerous exceptions of a usual character. Unseaworthiness itself is nowhere mentioned, nor is liability for the consequences of it excepted under any other term. The fact that the words in clause 39, which are relied on—namely, "any claim must be made in writing and claimants' arbitrator appointed within three months," are in quite general terms, does not avail, for such mere generality has long been held, in connection with specific excepted perils, not to be inconsistent with liability for the particular cause of loss, namely, unseaworthiness.

The shipowners' general liability in respect of damage due to the ship's unseaworthiness, accordingly, remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exception from liability, namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case.

This principle of construction has not been confined to excepted causes of loss; it has been extended to provisions which limit the amount to be paid in satisfaction of the loss, for these equally, though in another way, limit *pro tanto* the shipowners' liability. There is no difference in principle between the words which save them from having to pay at all and words which save them from paying as much as they would otherwise have had to pay. In *Tattersall* v. *National Steamship Company Limited* (*ubi sup.*) the words "under no circumstances shall they be held liable for more than 5*l.* for each of the animals" were held inapplicable to protect the shipowners from liability for the full value of animals lost by the ship's unseaworthiness; in spite of the apparently unrestricted generality of the words "under no circumstances," and in spite of the fact that they recognised liability up to 5*l.* a head, and did not purport to exclude it altogether. That such words do not avail where loss is due to unseaworthiness, was virtually recognised 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), and held in *Wiener and Co.* v. *Wilson's and Furness Leyland Line Limited* (11 Asp. Mar. Law Cas. 413; 102 L. T. Rep. 716; 15 Com. Cas. 294). Bailhache, J. expressly so held in *Bank of Australasia* v. *Clan Line of Steamers* (*ubi sup.*), and the Court of Appeal in reversing his decision recognised that it would have been correct, but for a circumstance which he had overlooked—namely, that unseaworthiness was the subject of an express provision and therefore the underlying or implied provision with regard to it was ousted.

In principle I think that clause 39 in so far as the parties, as it was said, provided their own statute of limitations, is unavailable to the shipowners as an answer to a claim for damage caused by unscaworthiness. It does not make any difference that the time allowed is considerable or the formality to be complied with not unreasonable, or that the clause, being a mutual clause, might apply to protect the charterer in certain events, for example, against a claim for demurrage. The effect is not that the clause is deleted from the charter altogether. The shipowners gain no advantage against the charterer from their neglect to make the ship seaworthy; they merely cannot pray the clause in aid in that case. Nor are the

words in question inapplicable because they occur in mutual arbitration clause and are partly procedural. Even if they are read as meaning "I will be liable for three months and no longer, and then only in an arbitration" —they still remain words, which except out of the shipowners' general liability certain losses, namely, losses the assertion of which is belated.

There is the further contention that a clause relieving a shipowner from damage to cargo caused by breach of the conditions as to seaworthiness, to be effectual must be clear. Now to say that a claim is to be waived is incorrect. If a right has accrued, it must be released or discharged by deed or upon consideration. Waiver applies to an election as to something *in futuro*; it is not a term by which to describe the answer to a right, which is complete *in præsenti*. It seems to me, however, that the words "shall be 'deemed to be absolutely barred'" are not obscure. Their meaning is plain; the only doubt is whether they are effective. Accordingly I should not for myself regard these words as falling within the rule in *Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93).

For these reasons I think the appeal fails. There is nothing in the point about the solicitors' letter.

Lords BUCKMASTER, ATKINSON, and CARSON concurred.

Solicitors for the appellants, *Holman, Fenwick*, and *Willan*.

Solicitors for the respondents, *Pritchard* and *Sons*, agents for *Andrew M. Jackson* and *Co.*, Hull.

March 9, 10, *and April* 4, 1922.

(Before Lords BUCKMASTER, DUNEDIN, ATKINSON, SUMNER, and CARSON.)

ATLANTIC SHIPPING AND TRADING COMPANY LIMITED *v.* LOUIS DREYFUS AND CO. (Second Appeal).

STATHATOS AND CO. *v.* LOUIS DREYFUS AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Construction—Rate of Exchange—Despatch money and commission—Payments at foreign port of loading—Law of Argentina.

A charter-party made between owners and charterers in England provided, inter alia, *that despatch money and commission payable on loading a ship at Buenos Ayres or La Plata should be payable "at the rate of" so much sterling per diem.*

Held, that such payments on behalf of the shipowners must be made at the commercial rate of exchange equivalent of the sterling at the date when the payment was made, and not at the rate fixed by the Argentine Monetary Law (art. 1 of the Decree of the Argentine Republic of the 2nd Dec. 1881.)

Decision of the Court of Appeal reversed.

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

APPEALS from the judgment of the Court of Appeal who had reversed two decisions of Rowlatt, J. upholding the awards of an arbitrator.

The two cases which raised the same point were heard together.

The appellants were the owners respectively of the steamships *Eggesford* and *Istros*, and the respondents, a London firm were the charterers. The contract in each case was an English contract to be construed according to English law and all payments under it made by the charterer, except such payments as were made to the ship's captain at the port of loading, were to be made in London. The cargo was loaded at Buenos Ayres, and payments in respect of despatch money and commission were to be made there, and the question raised was whether these payments were to be made at the rate of exchange current between Great Britain and the Argentine Republic at the time of payment, or at the rate at which the value of the pound sterling had been fixed by the Decree of the Republic of the 2nd Dec. 1881.

The arbitrators made an award in favour of the shipowners and that award was upheld by Rowlatt, J. The Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) having reversed his decision, the owners appealed to the House of Lords.

The facts are fully set forth in the judgments of their Lordships.

R. A. Wright, K.C. and Sir *Robert Aske* for the Atlantic Shipping and Trading Company Limited.

Raeburn, K.C. and *G. Langton* for Stathatos and Co.

Sir *John Simon*, K.C., *Leck*, K.C., and *C. T. le Quesne* for the respondents.

Their Lordships took time to consider their judgments.

Lord BUCKMASTER.—These two appeals have been tried together. The respondents are the same in each case. The appellants are different. The point involved is identical. In each case the appellants are owners of steamships, and in each case one of such vessels was let to the respondents.

In the first appeal the name of the vessel was *Eggesford*, and in the second, the *Istros*. The charters were the same in form in each case and differed only as to the amount of freight, and one or two other minor matters.

The charter-party in the first appeal needs to be considered first. It was dated the 24th April 1919, and provided that the ship should load at the charterers' option in the Port of Buenos Ayres or La Plata; the freight should be at the rate of 220*s.* per ton for wheat, or maize, or rye, and that it should be loaded at a certain rate of tonnage per day which it is not necessary to consider.

Clause 16 provided for the payment of despatch money in these terms: "Despatch money (which is to be paid to charterers before steamer sails) shall be payable for all time saved in loading (including Sundays and holidays saved) at the rate of 10*l.* sterling per day for steamers up to 4000 tons bill of lading weight, and 15*l.* sterling per day for steamers of over 4000 tons bill of lading weight." Clause 20 provided for payment of the freight in these terms: "20. The freight shall be paid as follows, viz.: Sufficient cash for steamer's use, if required by the master (not exceeding one-third of the freight) to be advanced by charterers on signing bills of lading, in Buenos Ayres or La Plata (at the master's option) on account of freight at current rate of exchange for approved commercial bills on London, subject to 3 per cent. (three per cent.) to cover interest, insurance and other charges, and the balance of freight on the right and true delivery of the cargo, in cash, by Messrs. Louis Dreyfus and Co. freight to be paid in London as follows: One half on steamer's arrival before commencement of discharge and the remaining half when vessel is discharged less 1000*l.* to be subject to final adjustment on weight being ascertained."

Clause 35 provided that 4 per cent. commission is due by the steamer upon the gross amount of freight, dead freight, and demurrage on shipment of the cargo of coal; and 38 was a clause not found in the other case by which the steamer was to pay to a trade union a contribution of 3*l.* at the last port of loading. Disputes were to be referred to arbitration in London.

There can, I think, be no doubt that the contract was an English contract, to be construed according to English law, and that all payments under it made by the charterer, excepting such payments as were made to the ship's captain at the port of loading, were to be paid in London.

The cargo was loaded at Buenos Ayres. Despatch money was earned to the extent of 803*l.*, and Messrs. Dreyfus being the ship's agents at Buenos Ayres, a sum of Argentine dollars was remitted to them by the owners for the purpose of making payments required in the Argentine. These payments they made, and included in them the sum for despatch money, the freight commission of 4 per cent. and the 3*l.* for the trading society. These moneys they converted into dollars at the rate of 5.04 to the pound sterling, and added to the other payments, they exhausted the money received by all but 3433 dollars in paper, which they reconverted into gold at the rate of 3.66 dollars to the pound sterling and so paid the balance. This method of dealing was disputed by the appellants, and in the arbitration proceedings that ensued the arbitrator awarded in their favour, his award being supported by Rowlatt, J., but set aside by the Court of Appeal.

The explanation, and according to the respondents the justification, of what was done was this: By a decree of the Republic of Argentine dated the 2nd Dec. 1881, for the purpose of establishing the relative value of the old currencies as compared with their lawful units, it was decreed that the value of the currency and the units in circulation, being legal tender in the country as compared with the lawful unit as established by the Currency Law Act, should thenceforth be reckoned as follows:—

Among other currency there are found in the schedule English sovereigns weighing 7981 grains and of 916.2/3 standard and this is paid at 5.04 florins; the subsequent computation at 3.66 being due to the fact that this was the commercial rate of exchange.

The respondents contend that they were justified in so treating the money because the terms of the charter-party entitled them, being paid in Buenos Ayres, to be paid in English gold, and that English gold being converted into Argentine currency must be at the rate provided by the decree, but that when so converted for the purpose of making in Buenos Ayres the dollar equivalent of English sterling the amount should be reconverted at the commercial rate of exchange which by consent was $3.66 to the pound.

The subsequent case of the *Istros* well illustrates the extent to which the respondents maintained that this doctrine applies. In that case there was no money provided by the shipowners, and the respondents made certain payments themselves. These were included in an account which was treated as an advance against freight, and in this account there were two items, the one for despatch money and the other for the 4 per cent. commission which they originally fixed and liquidated in English sterling. This they converted into florins at 5.04 and then reconverted back in the account to English sterling at 3.66 thus increasing the account by the sum of 900*l.* odd, and this, they say, is the right which the charter-party conferred upon them.

I am unable to see that it creates such a position. There are three items referred to by the respondents in support of their contention which need separate consideration.

The item as to despatch is said to be a definite obligation to provide this money in English gold in Buenos Ayres. I do not so regard it, and although it is due before the vessels sail, its payment is not a condition precedent to sailing, and it could have been discharged by sterling in London. If not so paid the amount is fixed "at the rate of" so much sterling per diem, but the obligation of the shipowner under that clause would, in my opinion, be well discharged by providing that the shipowner's payments were made at Buenos Ayres with the commercial exchange equivalent of the sterling at the date when the payment was made. It is upon this point that I am unable to agree with the judgment of the Court of Appeal, where all the learned judges regarded the obligation as one to provide English sovereigns in Buenos Ayres.

With regard to commission the matter is still stronger. I find myself unable to see how there is any obligation to pay the commission in Buenos Ayres at all. It is an amount due by the steamer which ought to be brought into account in the final settlement of the freight and is not even to be paid before the sailing of the steamer. It seems to have been regarded as on the same footing as the despatch money, but even though the Court of Appeal judgment with regard to the despatch money were sound, I cannot see how it embraces the money allowed for commission. The matter of the 3*l.* needs no separate consideration. It is not, in fact, dealt with in the special case except as part of the despatch money, and it was not regarded as a separate item. The contract is, in my opinion, one to provide for payment at the last port of loading (wherever it may be) of the commercial equivalent in the currency of that spot, of the 3*l.* sterling which the contract mentions. I cannot regard the contract as anything but one to pay the commercial equivalent of all the sums measured in sterling, and this is not affected by a law which is solely directed to providing equivalent for English sovereigns did occasion arise for conversion of these coins. In the present cases no such necessity arose and the rate thus fixed did not apply. I think both these appeals should succeed and the awards affirmed.

Lord ATKINSON concurred.

Lord SUMNER.—Of these two cases, that of the *Istros* is slightly the simpler, and may be taken first. As is often arranged, the charterers acted as the ship's agents at the loading port and, before the ship sailed, they made out their account in that capacity. They set out their disbursements, for which they had found the money, sometimes in the paper and sometimes in the gold currency of the Argentine Republic. They included in the account two sums, claimed to be due to themselves as charterers under clauses 16 and 35, and not in respect of advances made by them as agents to the use of their principals. The first is for despatch money at a rate expressed in pounds sterling, the second is for commission at 4 per cent. on the gross freight, dead freight, and demurrage. The first was to be paid before the steamer sailed; the second was expressed to be due on shipment, but the freight, which was a tonnage rate in shillings, being payable on right and true delivery of the cargo (except for any cash advance to the master on signing bills of lading), it follows that the amount ultimately payable and the obligation to pay it depended on the result and the duration of the discharge. The sums claimed under these two heads in the gold currency of the Republic represented respectively 229*l.* 13*s.* 9*d.* and 210*l.* converted at $5.04 to the pound, a rate in excess of the rate of exchange of the day for sterling on Buenos Ayres and fixed by a local currency law of 1881. The dispute arises as to the right of the respondents to effect this conversion at the higher rate.

In both cases the charterers are a London firm, though they have a house in Buenos Ayres, and I think that the charter, truly construed in reference to the circumstances of the parties, makes both the despatch money and the commission on freight payable in England. This is quite consistent with the established business practice to settle up accounts in the way adopted in this case, which has gone without challenge, apart from the question of the rate of exchange, and no custom of trade affecting the construction of the charter has been found. I am satisfied that the Argentine law referred to is merely a legal tender law, fixing the parity, at which certain gold coins then passing current in the republic should be made legal tender, concurrently with the national currency then recently established. For the soveriegn this was fixed at $5.04.

The charterers' claims involve three positions: (1) that despatch money and commission were due to them in sterling; (2) that these sums were payable or to be treated as payable to them in the circumstances in the Argentine Republic and in sterling; and (3) that, if not paid there in sovereigns, they were to be treated as if they had been so paid, so that the charterers might receive the English sums in Argentine currency at $5.04 to the pound. In effect, this is a claim paid in the particular form of legal tender available, which at the time in question suited them best, but their argument logically compels them to accept payment in the same form on other occasions, even though, owing to financial and commercial fluctuations, it may be of advantage to them no longer; nor is this disputed.

I have not been able to adopt the charterers' arguments, though they prevailed in the Court of Appeal. The *Eggesford* is a British ship, and though the *Istros* sails under the Greek flag, no suggestion has been made that any consequence affecting the place at which payments are to be made in accordance with the charter, arises out of that circumstance. The charter is made in London, between parties in London; it is expressed in English and governed by English law. In my opinion the place of payment for both despatch money and commission on freight is English, the payment is to be made in sterling, and the rate of exchange, at which the amount of despatch money and commission should be inserted in a ship's account, made out in Buenos Ayres, is the commercial rate of exchange of the day for converting English money into Argentine money. The charterers do not enlarge their rights by debiting these sums in an Argentine account or in Argentine currency and they can claim no more than the actual amount of English money due or the Argentine currency, into which it could be turned at the rate of the day. It is true that the debtor must seek out his creditors, but in this case he would have found them in London. Even if the creditors be taken to be for this purpose in Buenos Ayres, I do not see how the debtor, when he finds them, can be bound to produce to them English gold

coins. It so happens that in Argentina an English sovereign is legal tender under the law of 1881, but there is no contract between the parties to pay in sovereigns, and, if the creditors do not wish to take English paper currency in payment and sell it, they cannot, in my opinion, claim more Argentine currency than will put them in a position as good as if they had been willing to take it.

The facts, which make a difference in the case of the *Eggesford* from that of the *Istros*, are that the owners of the *Eggesford* put their captain in funds to an amount more than sufficient to cover disbursements, despatch money and commission, and he handed to the charterers the amount in Argentine paper currency to be applied on behalf of the ship and accounted for to her owner. The charterers debited the disbursements and set off the amounts due to themselves for despatch money and commission, and they did so at $5.04 to the pound instead of $3.66, the rate of exchange of the day for British sterling. Their total claim, thus swollen, nearly exhausted the sum paid to them by the captain, and all they returned to him was $3,433.50 paper. As agents, they were clearly not entitled to adopt, against their principals, the parity most favourable to themselves, unless they had, as charterers, a right to be paid in Buenos Ayres in sovereigns. The only way that I can see, in which they can put their case in the *Eggesford* higher than in the case of the other ship is by saying that the shipowners cannot, by electing to pay in Buenos Ayres, relieve themselves from paying the full equivalent of sterling, to which I agree; and that paying sterling in Buenos Ayres means paying in sovereigns, since payment in Treasury notes is not legal tender outside the United Kingdom. To this, I think, it is a good answer to say that neither would payment in sovereigns be a good tender, but for the accident of the Argentine law of 1881, and that law regulates the parity of sovereigns with Argentine currency but does not affect international transactions or obligations under contracts to pay in England. Except by consent, and by a transaction in the nature of the delivery of a commodity of a value equivalent to the amount of the debt, sovereigns would not be receivable at all and that equivalence in the case of commodities is to be ascertained not by a permanent legal tender law relating to currency but by the current quotation for the exchange rate for sterling.

The reason for his opinion in the charterers' favour in the case of the *Eggesford* is thus stated by Bankes, L.J.: "The charterers' case is this: 'it is quite true that you have sent the money over to the Argentine for the purpose of discharging your obligation; it is true that you have handed the money to me; it is true you have discharged all your obligations, including those to myself; but when I consider the position, as between you and me, your obligation was to pay me in British currency. What you have done is to hand me dollars to enable me to do it;' " and he then adds, that, on the findings in the case, the charterers were entitled to do as they did. I cannot agree that, the obligation being to pay in British currency, dollars were handed to enable the charterers "to do it." I think the dollars handed to the charterers, were dollars with which the shipowners "did it" themselves. Scrutton, L.J. and Atkin, L.J., both thought that under the charter payment was to be in England or in Argentina at the shipowner's option. With great respect, I cannot agree, if this means that the shipowner was entitled to pay the charterers in Argentina *in invitos*. It was regularly done as a matter of convenience and by mutual consent, but not so as to constitute a new agreement to affect the obligations of the charter-party otherwise. Reliance was also placed in both judgments on clause 20 of the charter: "The freight shall be paid as follows, viz.: Sufficient cash for steamer's use, if required by the master (not exceeding one-third of the freight) to be advanced by charterers on signing bills of lading, in Buenos Ayres . . . on account of freight at current rate of exchange, for approved commercial bills on London, subject to 3 per cent. to cover interest, insurance, and other charges and the balance of freight on the right and true delivery of the cargo in cash. . . ." As the insertion of the items for this despatch money and commission in the account, was not an advance of "cash for steamer's use," I do not think this clause carries matters any further. Moreover, the charterers induced the master of the *Istros* to sign a draft on his owners for the total amount in sterling of their account (including these items) at the current rate of exchange plus 3 per cent. in accordance with clause 20, and deducted the amount of the draft from the freight payable in cash on delivery of the cargo. What authority the captain had for doing this, in fact, is not found by the umpire, but he could not, without a particular finding on the subject, have authority to sign a draft calculated contrary to the obligations of the charter.

Mr. Scrutton, the umpire in the case of the *Istros*, finds as follows: "the effect of the charterers' first converting the despatch money and the commission into Argentine currency at the rate of $5.04 per pound sterling (which is equivalent to 47.62 pence per dollar), and reconverting those dollars into sterling at the rate of 65½*d.* per dollar was to add to the amount payable by the owners in sterling in respect of these items the sum of 902*l.* 10*s.* 11*d.*," and he adds that "there was no occasion or justification for converting these amounts into Argentine currency at all. With this I agree. The attempt was ingenious; but the defence of it always comes back to the assumption that sterling, paid in Buenos Ayres (if it was so paid), had by law to be paid at $5.04 to the pound, the contract making no such provision. This is expressly the view of Atkin, L.J., but for the reasons I have given I cannot accept it. The Argentine law fixes a parity for those who must take a coin, if tendered; it does not deal with the performance of a foreign contract,

where parties choose to take in Buenos Ayres discharge of a foreign debt, which they could, if so minded, require to be paid to them elsewhere.

It has been suggested that, unless the charterers, as ships' agents, treated these sums as paid before sailing, the steamer could not get her clearance. This is not proved; but I can only say that the charter contains nothing which increases their rights in the matter of the equivalent of sterling, whether or not they had this or any other power of detaining the ship, by local law or otherwise, which I am not to be understood to imply that they had.

I wish to make two additional observations. Bankes, L.J. treats the special case as finding as a fact that "if either of these obligations, which were obligations to pay in British currency, were discharged by a payment in Buenos Ayres, the person discharging the obligation must provide for every pound sterling 5.04 gold dollars." This is a mistake. The findings are: (4) "that both these amounts were payable in Buenos Ayres in sterling." which is a matter of law and is wrong; and "(5) that if the same had been paid to Messrs. Dreyfus and Co. in pounds sterling at Buenos Ayres, they would have received for the same in gold 5.04 dollars for each pound sterling." The case did not exhibit the text of the law of 1881, but, by consent, it has been produced in the Court of Appeal and at your Lordships' bar, and it shows the finding to mean that, if it had been paid in sovereigns, the charterers would have received $5.04 for each sovereign when they paid it away again, which is very different from saying, that the person discharging the obligation under the contract in Buenos Ayres "must provide for every pound sterling 5.04 dollars."

The other matter is the payment of 3*l.* to the Free Labour Union. Something was made of this in argument, but it came to nothing. The union had no right of action on the charter for this sum, even in the charterers' names, nor do we know how it was paid to them, except that it is charged as 3*l.* It is not on the same footing as a commission reserved to the brokers on a charter. It is only another stipulation by the shipowner with the charterers to pay them sterling, though for a particular purpose. The case stated does not make anything of the point, and I think it is of no real relevance.

In both cases I think the appeals should be allowed.

Lord DUNEDIN and Lord CARSON concurred.

Appeals allowed.

Solicitors: For the first appellants, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff; for the second appellants, *Holman*, *Fenwick*, and *Willan*; for the respondents, *Downing*, *Middleton*, and *Lewis*.

March 27, 28, and May 12, 1922.

(Before Lords BUCKMASTER, DUNEDIN, ATKINSON, SUMNER, and PARMOOR.)

ATTORNEY-GENERAL *v.* ROYAL MAIL STEAM PACKET COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Requisition — Charter-party — Loss by enemy action—Compensation—Petition of right—Indemnity Act 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *ss.* 1 *and* 2.

In March 1915 *a ship was requisitioned by the Admiralty and taken under a charter-party which fixed the rate of hire, gave to the Admiralty the right of purchase at a certain price, and rendered them liable for all risks and expenses of the ship. In Feb.* 1916 *the ship while so requisitioned was sunk by enemy action. Accordingly the owners, by petition of right, claimed damages against the Admiralty. Before the petition was heard the Indemnity Act received the Royal Assent on the* 16*th Aug.* 1920. *The Crown having claimed that by virtue of the Act the petition was discharged, the point of law was set down for hearing.*

The Indemnity Act 1920 *provides by sect.* 1 (1) *that no action or legal proceeding (including a petition of right) shall be taken in respect of any act done during the war before the passing of the Act, if done in good faith or in the public interest by or under the authority of an official in the service of the Crown, and that if any such proceeding has been instituted before the passing of the Act, it shall be discharged and made void; "Provided that, except in cases where the claim for payment or compensation can be brought under sect.* 2 *of this Act, this section shall not prevent* (b) *the institution of proceedings in respect of any rights under, or alleged breaches of, contract," if the proceedings are brought within the specified time. Sect.* 2 (1) *provides that "Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person* (a) *being the owner of a ship or vessel which has been requisitioned shall be entitled to payment or compensation for the use of the same and for services rendered during the employment of the same in Government service, and compensation for loss or damage thereby occasioned.*

Held (*Lord Parmoor dissenting*), *that the case fell within sect.* 2, *sub-sect.* 1 (a) *of the Act, the general words of which included claims for breach of contract, and that as there was no agreement as to the amount to be paid for total loss, compensation must be assessed in the manner provided by that section. The petition of right was therefore discharged under the Act.*

Decision of the Court of Appeal reversed.

THIS was an appeal from an order of the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.), reversing the decision of Bailhache, J.

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

upon a petition of right presented by the respondents.

The respondents who were a company incorporated by Royal Charter, carrying on business in the city of London, owned the steamship *Alcantara*, which was a triple-screw steamship of 15,831 tons.

On the 15th March 1915 this steamship was requisitioned by the Director of Transports for and on behalf of the commissioners for executing the office of the Lord High Admiral of the United Kingdom of Great Britain and Ireland, and was taken under a charter-party of that date which was in a form officially known as form B.

By the said charter-party it was amongst other things provided as follows:

1. The owners have let and the Admiralty have hired and taken to freight the good ship undermentioned, viz., *Alcantara*, for service and employment on monthly hire from the 9th March 1915 for the space of three calendar months certain, and thenceforward until the Admiralty shall cause notice to be given to the owners that she is discharged from His Majesty's service, such notice to be given when the ship is in port in. . . .

2. The Admiralty may at any time while the ship is so on hire as aforesaid, upon giving notice to the owners of their intention so to do, purchase her at the price of five hundred and fifty thousand pounds (550,000*l.*), or, in the case of her being required for service as an armed cruiser, they may, upon giving the like notice, purchase her together with such quantities of plated ware, cutlery, earthenware, blankets, counterpanes, and linens, as may be necessary for the number of officers and warrant officers who shall form part of the ship's complement as an armed cruiser at the price of five hundred and fifty-eight thousand pounds (558,000*l.*).

4. The said ship shall, while she is so on hire as aforesaid, be at the absolute disposal of the Admiralty and under their complete control in every respect.

5. The Admiralty shall pay in manner following for the hire of the said ship at the rate of twelve shillings (12*s.*) per ton per calendar month for the number of tons above mentioned during such term as the said ship shall be continued in His Majesty's employ, reducing to eleven shillings (11*s.*) after two months, the rate of eleven shillings (11*s.*) being applicable to the whole period if vessel retained for six months.

On the 29th Feb. 1916 the *Alcantara*, whilst in the employment of the Admiralty under the said charter-party, was sunk in an engagement with the *Greif*, a heavily-armed German merchantman disguised as a Norwegian tramp.

On the 4th April 1916 the Admiralty gave notice by letter of that date, to the respondents of the loss of the steamship *Alcantara*, and by such letter declared that the hiring under the said charter-party was at an end as from the 29th Feb. 1916.

On the 6th April 1916 the respondents made a claim for compensation for the loss of the said steamship, and the amount of such claim was the sum of 805,500*l.*

The Admiralty made payments amounting in the aggregate to 550,000*l.*, but declined to make any further payments.

Accordingly on the 19th May 1920 the respondents presented a petition of right claiming that they were entitled to be paid the full value of the said steamship after deducting the said advances amounting to 550,000*l.*

The Attorney-General, on behalf of the Crown, by his answer and plea delivered the 16th July 1920 admitted liability to the extent of 558,000*l.*, but denied any further liability and brought into court the sum of 8000*l.* which he said was, together with the 550,000*l.* already paid by the Admiralty, sufficient to satisfy the respondents' claim.

Subsequently, namely, on the 16th Aug. 1920, the Indemnity Act 1920 came into force.

Accordingly on the 18th Oct. 1920, by a further answer and plea the Attorney-General pleaded that after delivery of his former answer and plea the said Act had come into force, and that he relied on it, and would submit that by its operation the petition was discharged and made void.

On the 18th Dec. 1920 upon the application of the respondents, it was ordered that the point of law raised by the further answer and plea should be set down for hearing, and disposed of forthwith and before the trial of the issues of fact arising upon the petition.

The Indemnity Act 1920 (10 & 11 Geo. 5, c. 48), so far as material provides:

Sect. 1 (1). No action or other legal proceeding whatsoever shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty or for the defence of the realm, or otherwise in the public interest, by a person holding office under or employed in the service of the Crown in any capacity, or by any other person acting under the authority of a person so holding office or so employed; and, if any such proceeding has been instituted whether before or after the passing of this Act, it shall be discharged and made void, Provided that, except in cases where a claim for payment or compensation can be brought under sect. 2 of this Act, this section shall not prevent . . . (*b*) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within one year from the termination of the war or the date when the cause of action arose, whichever may be the later. . . . (2) For the purposes of this section, a petition of right shall be deemed to be a legal proceeding, and the proceeding shall be deemed to be instituted at the date on which the petition is presented.

Sect. 2. Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty—(*a*) being the owner of a ship or vessel which or any cargo space or passenger accommodation in which has been requisitioned at any time during the war in exercise or purported exercise of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation for the

use of the same and for services rendered during the employment of the same in Government service, and compensation for loss or damage thereby occasioned; . . . and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final. (2) The payment or compensation shall be assessed in accordance with the following principles . . . (ii.) Where the payment or compensation is claimed under par. (*a*) of sub-sect. (1) of this section, it shall be assessed in accordance with the principles upon which the Board of Arbitration has hitherto acted.

Part I. of the schedule provides: The payment or compensation to be awarded for the use of a ship, or vessel, or cargo space, or passenger accommodation therein, and for services rendered shall be based on the rates and conditions contained in the Blue Book reports.

Bailhache, J. decided the point of law in favour of the Crown, but his decision was reversed by the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) upon the ground that the respondents' claim was in effect founded upon the charter-party referred to in the petition of right; that the case was not within the operation of sect. 2, sub-sect. 1 (*a*) of the Indemnity Act 1920, and that the terms of part I. of the schedule to the Act showed that sect. 2, sub-sect. 1 (*a*) was not applicable to cases where there was a contract.

The Crown appealed.

Sir *Ernest Pollock* (A.-G.) and *G. W. Ricketts* for the Crown.

MacKinnon, K.C. and *E. F. Spence* for the respondents.

The House took time for consideration.

Lord BUCKMASTER.—This appeal arises out of proceedings in the nature of a demurrer to a petition of right. The facts, therefore, must be accepted as they are stated in the petition. From this it appears that on the 15th March 1915 a steamship belonging to the respondent company, and known as the *Alcantara*, was requisitioned by the Director of Transports and was taken under a charter-party which fixed the rate of hire, gave to the Admiralty the right of purchase at a certain price, and rendered them liable for all risks and expenses of the ship.

On the 29th Feb. 1916 the ship, whilst in the employment of the Admiralty, was sunk by a heavily-armed German vessel, and the respondents thereupon claimed against the Admiralty damage for her loss.

The first plea that was put in on behalf of the Crown admitted liability up to a certain extent, and this plea was dated the 16th July 1920.

Before the petition came on for trial, however—namely, on the 16th Aug. 1920—the Indemnity Act 1920 received the Royal Assent, and the Crown accordingly amended their plea and said that by virtue of the statute the petition of right was discharged, and this point was put down for argument preliminary to the trial.

That is the only issue that is now before this House. It was found in favour of the Crown by Bailhache, J., whose judgment was reversed by the Court of Appeal.

It follows from what I have said that the point involved is purely a question of construction of the statute. That Act, by sect. 1, sub-sect. 1, provided that no action or legal proceeding should be taken in respect of any act done during the war before the passage of the Act if done in good faith and in the public interest by or under the authority of an official in the service of the Crown, and that if any such proceeding had been instituted before the passing of the Act it should be discharged and made void. A petition of right was expressly included as a legal proceeding within the meaning of this section.

It is first argued on behalf of the respondents that the circumstances of this case do not bring it within the general provisions of sect. 1, but I am unable to accept that contention.

Although the act done in this matter that caused the loss was committed by the Germans, yet the loss was due to the use by the Admiralty of the vessel, and it was because of that use, exposing it to the risk which led to its destruction, that the respondents' claim arose. The general words therefore, in my opinion, cover this case. To these general words, however, there is an exception, which runs as follows:

Provided that, except in cases where a claim for payment or compensation can be brought under sect. 2 of this Act, this section shall not prevent (*b*) the institution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within one year from the termination of the war or the date when the cause of action arose, whichever may be the later.

The time condition has been satisfied in this case. The first comment to be made upon this provision is that it shows clearly that the general words in the section include claims for breach of contract unless, indeed, the words are surplusage, and this I cannot accept. The respondents therefore would be outside the operation of the statute unless they could have brought a claim for compensation under sect. 2, in which case the exception removes them from the benefit of the proviso.

Sect. 2 is in these terms:

2. (1) Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty—(*a*) being the owner of a ship or vessel which or any cargo space or passenger accommodation in which has been requisitioned at any time during the war in exercise or purported exercise of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation for the use of the same and for services rendered during the employment of the same in Government

service, and compensation for loss or damage thereby occasioned.

Now this ship was requisitioned and the circumstance that the user was regulated by the terms of a charter-party does not alter this fact. The respondents, therefore, were entitled to payment for the use of the same under sect. 2, sub-sect. 1, but it is said that this can only apply to cases where the requisitioning has not been associated with or regulated by a contract. The interlocking of sects. 1 and 2 defeat this argument, for the proviso at the end of sect. 1 contemplates that there may be cases under sect. 2 which, but for the exception, might come in among other things under sub-clause (*b*), and it therefore shows that the rights given under sect. 2 are general and are not affected by contract in a particular case.

Finally it is urged that the subsequent provisions of sect. 2, and notably sub-sect. 2 (1) and (2), which provide for the assessment of compensation, are inapplicable to cases where a contract has been made, and this shows that sect. 2 (1) must be in some way modified so that it can only apply to such classes of cases as those where, even if a contract had been made for the use of the vessel, the terms both as to freight and repayment for damage or loss had not been fixed. This is the argument that found favour with the Court of Appeal. There is no doubt that the terms of the schedule do not themselves suggest that they refer to cases where contractual rights exist between the parties. But it does not follow because the freights have been regulated by contract that these provisions should be incapable of application. They are not fixed amounts, but merely a basis upon which a calculation may be fixed, and the actual terms of the contract might well be regarded in relation to such a matter. In the present case there is no agreement as to the amount to be paid for total loss unless it be found in the provision giving the Government the right of pre-emption at a fixed price, and the provision of the schedule can therefore be made readily applicable to the existing circumstances.

The provisions of this Act of Parliament are very difficult to construe, and the difference of judicial opinion that has already emerged is not surprising.

I think that the view of Bailhache, J. was correct and that this appeal should be allowed.

Lord DUNEDIN.—I concur with your Lordships in thinking that the judgment of Bailhache, J. is right, but as the Court of Appeal has reversed his decision, I think it right to state my opinion.

The first question is, Does what was done fall within sect. 1 of the Act at all ? Here I am able to go along with the Court of Appeal ; they thought it did. It seems to me that it depends upon a question of fact : Was what was done something done by someone either himself acting on behalf of the Crown, or by anyone acting under such a person's orders, in the execution of duty and for the public safety ? The requisitioning of a ship falls, I think, within that description, nor does it matter that the requisitioning eventuates in a contract being made. The fact of the contract did not wipe out or change the nature of the original act. Further, obviously the terms of sub-clause (*b*) of the proviso show that there are cases of contract which fall within sect. 1 (1).

The next step is easy. There being a contract on which the suppliants could sue, they are protected under the said sub-clause (*b*) unless that sub-clause is made unavailing to them in respect of the exception therein expressed. Now the exception expressed is that the sub-clause is not to apply where a claim for payment or compensation can be made under sect. 2. I turn to sect. 2, and there I find that where a person is the owner of the ship which has been requisitioned he is to be entitled to payment or compensation, as the case may be, and that that payment or compensation must be awarded by a special tribunal. If these were all the words I think that the Court of Appeal would have agreed with Bailhache, J., but then there are added the words that payment or compensation are to be assessed on the principles hereinafter mentioned. The principles are set forth in sect. 2 (2), and the principles applicable to cases falling under 2 (1) *a* are to be those set forth in sched. 1. Sched. 1 says that payment for hire is to be in accordance with certain blue book rules, and that when there is damage to or loss of a ship, compensation shall be made for such damage or loss. Now the learned judges in the Court of Appeal say the mention of blue book rules gives a standard which clearly will not fit with the provisions of an actual contract and therefore they cannot think that the section applies at all.

I cannot agree with this argument. If the words are plain, and I think they are plain, they must be given effect to and the blue book rules must supersede the contract. No one ever escaped the bed of Procrustes because it did not fit. But in the present case I do not think that either the difficulty or the seeming hardship arises, for in this case the contract is silent as to a bargain as to what is to be paid if the ship is lost. The provision as to what was to be paid upon purchase may of course be evidence of value, but it has no further function ; and as such evidence it is equally cognisable by an ordinary court or by the special tribunal, which will find nothing in the blue book rules to trammel their judgment as to whether that evidence is or is not conclusive.

For these reasons I concur in the motion made by my noble friend on the Woolsack.

Lord ATKINSON.—I concur.

This appeal raises a preliminary point of law, namely whether the Indemnity Act of 1920 prevents the suppliant company, hereinafter referred to as the company, from having their petition of right heard in the court of King's Bench.

The facts stated in the petition must, it is admitted, be for the purpose of this case taken as true. The second paragraph of the

petition opens with the statement that on the 15th March 1915 the steamship *Alcantara*, the property of the company, was requisitioned by the Director of Transports on behalf of the Admiralty, and was taken under a charter-party of that date which was officially known as form B. The charter-party took the form of a demise of the company's vessel to the Admiralty on behalf of His Majesty for service and employment on monthly hire from the 9th March 1915, for the space of three calendar months certain, and thenceforward until the Admiralty should cause notice to be given to the owners that the ship was discharged from His Majesty's service. The hire to be paid for the ship is fixed at 12*s.* per ton per month to be reduced to 11*s.* after two months, applicable to the whole period if the vessel was retained in the service for six months. As the registered tonnage of the ship was 15,831 tons this must have amounted to a very considerable sum. The charter-party contained a clause enabling the Admiralty to purchase the ship at any time while she was on hire for a sum of 550,000*l.*, or in case of her being required as an armed cruiser, as in fact she was, for a sum of 558,000*l.* No clause was contained in the charter-party providing expressly that the Admiralty should be liable to pay compensation to the owners if their vessel should, while in the service of the Admiralty, be lost, much less fixing the amount of such compensation if she were lost. This is, in my view, having regard to the provision of sect. 1, sub-sect. 1 of the Indemnity Act, a rather important matter.

There is a clause, however, in the charter-party which runs as follows :

> 3. The Admiralty may at any time alter or remove all or any of the fittings or arrangements on board the said ship, and may erect any new fittings which may be required to render the ship available for service as a mercantile fleet auxiliary, provided that the said ship, her outfit and machinery shall, at the cost of the Admiralty, be restored to and given up to the owners in the same condition in which they were when taken by the Admiralty, ordinary wear and tear alone excepted.

The ship was, on the 29th Feb. 1916, while in the service of the Admiralty under the charter-party, lost, not by the act or default of any officer or person in the employment of His Majesty or of any person under the authority of such officer, or by the act or default of any of the officers or members of her crew, but by the direct act of the German enemy. She was sunk in an engagement with a heavily armed German enemy merchantman, named the *Greif*, disguised as a Norwegian tramp.

The company claim by their petition of right to recover, in respect of the loss of their ship, the sum of 805,500*l.* less a sum of 550,000*l.* received by them.

The petition does not contain any statement as to the ground, breach of contract or other, upon which their demand is based. On the 18th Oct. 1920, the Attorney-General, on behalf of His Majesty, filed a second or further plea and answer to the company petition, giving the court to understand and be informed that after the delivery of his first answer and plea, on the 16th Aug. 1920, the Indemnity Act of 1920 came into force, that he relies upon it, and submits that by its operation the petition of the company is discharged and made void. By an order made upon summons by the master of the court, it was ordered that the point thus raised should be set down for hearing and disposed of before the trial of the issues of fact arising on the petition. Before dealing with the Indemnity Act 1920 it is necessary to refer to the provisions of the Proclamation dated the 3rd Aug. 1914. This proclamation empowered the Admiralty, by warrant under the hand of one of the officers of the Crown therein mentioned, to requisition and take up for the service of the Crown 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 might be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the ships had 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 the Crown for that purpose. Well, the Lords of the Admiralty did in the present case, by mutual agreement with the company (*i.e.*, the charter-party), arrange the sums they should pay for the use and services of the *Alcantara*. They did not arrange by mutual agreement or at all what compensation the owners should receive in respect of the loss of their ship while performing the services she was taken up to perform. That being so, under this proclamation the board of arbitration, subsequently instituted by notification dated the 31st Aug. 1914, became the tribunal on whom the task of settling the amount of this compensation devolved.

It could not, in my view, be reasonably contended that, by the entering into such an agreement as is in this proclamation mentioned, the requisition of the ship was revoked, nullified, or put an end to. And I think it is equally clear that in the present case the requisition was not by entering into the charter-party revoked, nullified, or put an end to, so as to leave the respective rights, liabilities and remedies of the Crown and the company to be determined and enforced as if the charter-party was an agreement entered into between these parties irrespective of all requisitioning. I think on the contrary that this vessel was, when sunk by the act of the German enemy, a requisitioned ship in the service of the Admiralty. Sect. 1, sub-sect. 1 of the Indemnity Act 1920 has two limbs. The first limb prohibits the future institution of any action

or other legal proceeding, civil or criminal (including a petition of right), in respect of the matters thereinafter mentioned. The second limb deals with similar proceedings which have been instituted either before or after the passing of the statute, and declares that these latter shall be discharged and be void; but the basis upon which each class of action or proceeding must rest is the same—namely, any act, matter or thing done during the war, before the passing of the Act in good faith, or done or purported to be done in execution of his duty or done for the defence of the realm or for the public safety, or for the enforcement of discipline or otherwise for the public interest by any person holding office under or employed in the service of the Crown in any capacity, or by any other person acting under the authority of a person so holding office or so employed; that is to say, it is the action of the officers and employees of the Crown and of those other persons acting under their authority which is the foundation upon which all the legal proceedings mentioned in this sub-section must be based. I am at a loss, therefore, to see how an action or proceedings based upon the act of an alien enemy in sinking a ship comes within sect. 1, sub-sect. 1 of this statute. One can well imagine a case in which an act of an officer of the Crown might involve a breach by the Crown of a contract entered into on its behalf with a subject, and be the ground of a petition of right. For instance, if ammunition or other goods sold during the war by a contractor to the Crown were loaded on a vessel in the service of the Crown and commanded by one of the officers of the Crown to be safely carried to a named destination, and this commander though acting in all good faith and doing what he considered to be best, steamed too fast through a fog, came into collision with another ship and lost or damaged his cargo, a suit instituted in respect of this loss or damage might reasonably fall within proviso (*b*) of sect. 1, sub-sect. 1, of the Indemnity Act 1920, but the present case is wholly different from such a case as that.

In my opinion, therefore, the appellants cannot obtain relief under sect. 1, sub-sect. 1. The ship, being a requisitioned ship, when she was sunk, the owners would, *primâ facie*, be entitled to obtain compensation under sect. 2, sub-sect. 1, of the Indemnity Act 1920.

It is, however, provided by sub-sect. 2 (ii.) of that section that where compensation is claimed under sect. 2, sub-sect. 1 (*a*), it shall be assessed in accordance with the principles upon which the board of arbitration, constituted under the proclamation of the 3rd Aug. 1914, has hitherto acted, which principles are set forth in part I. of the schedule to the Act.

The Court of Appeal have, as I understand it, held that the effect of this provision is to exclude the claim of the suppliants for compensation from sect. 2, sub-sect. 1 (*a*). With the most genuine respect for the learned Lords Justices, I am entirely unable to take that view.

When one turns to part I. of the schedule, one finds that in the first eight and a half of its lines the sums to be awarded in respect of the use of a ship or vessel, or cargo space, or passenger accommodation therein, or services rendered, are alone dealt with.

These sums are to be based on the rates and conditions contained in the Blue Book reports, or in cases of a class where these rates or conditions have not been applied on some liberal estimate of the profits which the owner could have made of them had there been no war.

The schedule then goes on to provide that in addition to the compensation recoverable by the owner under the provision of these eight lines, they are to recover compensation for loss or damage of the ship or vessel directly due to her use. Here the loss of the vessel was, in my view, directly due to her use as an armed cruiser. The principles of the Blue Book do not apply, in my view, to the estimation of the compensation to be paid for her loss at all.

I see nothing, therefore, in the schedule which debars the owners of this vessel from obtaining just and adequate compensation from the arbitration board under the provisions of sect. 2, sub-sect. 1 (*a*).

I am, therefore, of opinion that the judgment appealed from was erroneous and should be reversed—that the judgment of Bailhache, J. was right and should be restored, and this appeal be allowed with costs here and in the Court of Appeal.

Lord SUMNER.—Except out of respect for the Court of Appeal I should not trouble your Lordships with my reasons for concurring in the motion proposed. The critical question appears to be, whether the first paragraph of the first schedule to the Indemnity Act is so inappropriate to this case as to prevent it from falling within the words "except in cases where a claim for payment or compensation can be brought under sect. 2 of this Act." On this point, two views have been taken: the first, that the schedule is inapplicable to contracts generally and especially to contracts for the use of a ship, because it fixes the amounts to be paid otherwise than by reference to the terms of the contract itself; the second, that at any rate it is inapplicable to the present case, because, where a loss of the ship has occurred, which is directly due to the use of it, there is to be awarded under the schedule simply a sum by way of compensation in respect of such loss without mention of the contract. The first is the view of the Lords Justices.

Bankes, L.J. says "the suppliants' claim, based as it is upon a contractual obligation by the Admiralty, is or may be quite inconsistent with the principle upon which the tribunal is directed to assess their loss." Scrutton, L.J., speaking of the schedule, adds: "It appears to me to be quite inapplicable to claims for payments due under contract or to damages for breach of contract and to have been drawn without any reference to such claims." This view I am unable to accept. That some

contracts may fall within sect, 1, sub-sect (1), is clear from the proviso, par. (*b*). The exception out of the proviso shows that, in some cases of contract, claims may be brought under sect. 2, and I see no sufficient ground for limiting the exception to the other paragraphs of the proviso, to the exclusion of (*b*). If so, no kind of contractual case falls more naturally under sect. 2 than one in which the owner of a ship which has been requisitioned, though, on terms subsequently expressed in a charter, is entitled to payment accordingly. I think further, that if any cases of that kind are to be excluded from the application of the first schedule, they cannot be the whole class of contractual obligations, as such, but must be those specific cases only to which, in the particular circumstances, the schedule is found to be inapplicable. The words in the exception of the proviso are "in cases"—that is individual cases—"where a claim for payment can be brought," and not "in such classes of case as can be brought" under sect. 2. If the particular case now in question is to be held to be one to which the schedule does not apply, it must be on grounds arising out of the particular claim made, and out of the particular stipulations agreed to.

The second and more restricted view appears therefore to be, that there is something in the terms of the actual demise charter entered into, which gives to the suppliants rights in respect of the loss of the *Alcantara* beyond what is covered by the words of the schedule, viz., "a sum by way of compensation in respect of such loss or damage." Of the contention that the price at which the Admiralty receives an option to purchase the ship in some way limits the compensation to be paid in the event of her loss, it would be premature to express any opinion. If it is so, however, the schedule is phrased more favourably to the suppliants than is the contract; but in other respects I do not see how the schedule affects, and certainly not how it limits, the measure of the compensation.

I will only add that I think the decision in *Brooke* v. *The King* (*ante*, p. 205; 125 L. T. Rep. 183; (1921) 2 K. B. 110) entirely distinguishable.

Lord PARMOOR.—I am unable to concur in the opinions which have been expressed by your Lordships, and I think that the judgment of the Court of Appeal should be affirmed.

The petition of right presented by the respondents, states that on or about the 15th March 1915, the steamship *Alcantara* was requisitioned by the Director of Transports for, and on behalf of, the Admiralty, and was taken under a charter-party of that date, which was in the form officially known as form B. I agree in the view taken by the Court of Appeal that this allegation in the petition should be taken to allege that the *Alcantara* was requisitioned on the condition that the respondents should receive payment, or compensation, under the terms of the charter-party. The obligations of the Admiralty were made to depend not on the act of requisition, but on the terms of the charter-party. The charter-party placed on the Admiralty a liability to restore the ship in the same condition in which she was taken, ordinary wear and tear alone excepted, and to bear all risks during the continuance of the ship's service under the charter-party.

On the 4th April 1916, the Admiralty gave notice, by letter, of the loss of the ship, and by such letter declared that the hiring under the charter-party was at an end as from the 29th Feb. 1916. Apart from any disability imposed by the terms of the Indemnity Act 1920, the respondents would have been entitled to claim damages, either for the failure of the Admiralty to restore the ship, or on the covenant that all risk during the continuance of the ship's service under the charter-party should be borne by the Admiralty. After the passing of the Indemnity Act, the Attorney-General entered a further answer and plea to the petition, submitting that by the operation of that Act the petition was discharged and made void.

The question on appeal depends upon the construction of the Indemnity Act. Sect. 1 of the Act includes the case presented by the respondents in their petition. The *Alcantara* was requisitioned, and the terms of the contract were arranged in good faith by a person employed in the service of the Crown and acting in the execution of his duty. Hence apart from the subsequent provisions or limitations of the Act the contention of the Attorney-General would prevail, and the petition should be discharged and made void. It is provided, however, that except in cases where a claim for payment or compensation can be brought under sect. 2 of the Act, sect. 1 shall not prevent the institution or prosecution of proceedings in respect of any rights under or alleged breaches of contract, if the proceedings are instituted within the prescribed time. The respondents in their petition state a claim, made within the prescribed time, and founded on alleged breach of contract. They are therefore entitled to proceed on their petition unless the exception applies, and they can bring a claim for payment or compensation under sect. 2 of the Act.

The real difficulty in the case depends on the construction of sect. 2 of the Indemnity Act. The question to be determined is whether this section applies where legal proceedings are taken to enforce the payment of amounts due under contract, or as damages for alleged breach of contract, where after requisition a contract has been entered into by mutual consent, or is restricted to cases where no contract has been made, and the subsequent liability of the Admiralty arises from the act of requisition. The language used in the section is not inconsistent with either of these alternative contentions. The Court of Appeal has unanimously accepted the more restricted contention. I agree in their decision.

Sect. 2 gives a right to payment or compensation in the cases under (*a*) and (*b*), and in other

cases directs that compensation should be assessed under the provisions of (2) (iii.). Under (*a*) and (*b*) there is no option, and payment, or compensation, can only be assessed on the principles and by the tribunal therein mentioned, whose decision shall be final, subject to a right of appeal, on any point of law, to the Court of Appeal, and by leave given, to this House. Where payment or compensation is claimed under (*a*) the tribunal is the board of arbitration constituted under the proclamation issued on the 3rd Aug. 1914, and the principles to be applied are set forth in part I. of the schedule to the Act. In the present appeal compensation for breach of contract is claimed, but the same considerations would apply if the claim had been one for payment for the use of the steamship *Alcantara*. The result of applying these terms, where a mutual agreement has been made, is that, for the purpose of claims or compensation, all charter-party contracts in form B. consequent on requisition, would be set aside and rendered void. There would be a clean sweep of contractual obligations affecing payment or compensation, and the substitution, therefore, of a statutory tribunal and statutory principles. If this intention is expressed in the language of the Legislature effect must be given to it; but the alternative and more restricted contention appears to me to be equally in accord with the language used. Adopting this construction, claims under (*a*) would have no reference to payments under contract, or for damages for breach of contract, and are not applicable to such claims. Atkin, L.J. says, that to anyone who knows the number of cases in which the terms of requisition were arranged as being on the terms of the form of charter-party set out in the Blue Book reports mentioned in the schedule, it is incredible that the Legislature meant either to avoid and discharge all mutual agreements arranging the terms of requisition. I have no knowledge of the number of cases in which the terms of requisition were agreed in a charter-party in form B, but I agree with the Lord Justice in adopting the alternative construction that sect. 2 (*a*) is limited to cases where terms have not been arranged by mutual agreement.

The argument in favour of this contention appears to me to be strengthened by reference to the other portions of sect. 2. The same difficulties arise in including contractual obligations under (*b*) and 2 (iii.) as arise in the case of (*a*). I think that sect. 2 is not intended in all these cases to set aside contracts entered into by the Government, and to introduce a statutory principle and scale, which may be wholly inconsistent with terms arranged by mutual agreement. The opinion expressed by Scrutton, L.J. that sect. 2 of the Indemnity Act has no reference to claims for payment under contract or for damages for breach of contract appears to me to be correct.

In my opinion the appeal should be dismissed and the judgment of the Court of Appeal should be affirmed.

Solicitors for the appellant, *Treasury Solicitor*.
Solicitors for the respondents, *Bristows, Cooke*, and *Carpmael*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Dec. 20, 1921.

(Before Lord STERNDALE, M.R., ATKIN and YOUNGER, L.JJ.)

THE COUNTESS. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Docks — Negligence — Collision with gates —Dockowner's rights of detention—Statutory powers of the Mersey Docks and Harbour Board—Limitation of liability—Priorities—Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act* 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3—*Mersey Docks and Harbour Act* 1912 (2 *&* 3 *Geo.* 5, *c. xii.*), *s.* 7.

The plaintiffs' steamship C., *lying in a dock belonging to the defendants, the Mersey Dock and Harbour Board, negligently crashed through the dock gates into the river, carrying with her a number of other craft. The* C. *herself had to be beached by tugs, and the defendants' assistant marine surveyor certified that she was "in a sinking condition" in the river, and, in his judgment, "an obstruction, impediment, or danger," or likely so to become, to the safe and convenient navigation of the port. The defendants then patched, docked, and repaired the* C. *at a cost of* 1048*l. The damage negligently done to the defendants' docks and works amounted to* 10,014*l. The plaintiffs instituted proceedings for limitation of liability. The defendants claimed the right to detain the* C. *under the Mersey Dock Acts Consolidation Act* 1858 *and the Mersey Docks and Harbour Act* 1912 *until the plaintiffs had paid the sum of* 5000*l., the statutory amount of the plaintiffs' liability calculated in accordance with the Merchant Shipping Acts, and in addition the sum of* 1048*l. The plaintiffs issued a writ in detinue, alleging that the detention of the* C. *was wrongful. The* C. *was released on payment of* 5000*l. into court by the plaintiffs. By sect.* 94 *of the above-named Act of* 1858 *a vessel negligently doing damage to any works belonging to the Dock Board may be detained until the amount of the damage, or a deposit for the estimated amount has been paid. By sect.* 1 *of the Merchant Shipping Act* 1900 *a shipowner's right of limitation of liability under the*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

Merchant Shipping Act 1894 *is extended to all cases where, without his actual fault or privity, any loss or damage is caused to property of any kind, whether on land or water, by reason of the improper navigation of the ship; and by sect.* 3 *the limitation under the Act applies "whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act." By sect.* 7 *of the Mersey Docks and Harbour Act* 1912 *the Dock Board may remove the wreck of any vessel or any vessel sunk or stranded within the port which, in the judgment (written and duly recorded) of the marine surveyor or his assistant, is an obstruction, impediment, or danger to the safe use of the port, or likely, in his judgment, so to become, and the Board may sell the wreck or vessel and out of the proceeds retain the expenses to which they have been put. Similar rights are given to harbour and conservancy authorities by sect.* 530 *of the Merchant Shipping Act* 1894. *Duke, P. held* (a) *that until a limitation decree was made the detention of the* C. *under sect.* 94 *of the Act of* 1858 *was permissible; but* (b) *that afterwards the section did not give the defendants priority over other claimants to the limitation fund; that the fund must be distributed rateably; and that the liability of the plaintiffs to the defendants upon which the lien of the defendants depended was reduced in proportion as the total claims exceeded the plaintiffs' limited statutory liability; and he directed that the* 5000*l. should be transferred to the credit of the limitation action;* (c) *that the* C. *was a vessel "stranded" and "likely to become an obstruction, impediment, or danger to navigation," and that accordingly the defendants were entitled to recover the sum of* 1048*l. under this head. Both parties appealed.*

Held, by Atkin and Younger, L.JJ. (Lord Sterndale, M.R. dissenting) that, after the limitation of liability decree, the defendants were entitled to hold the deposit only until they were paid their rateable proportion of the amount of the plaintiffs' limited liability; that under the Merchant Shipping Acts the defendants had a lien until they actually received such payment, and that the order of the president transferring this deposit to the credit of the limitation action was wrong.

Held, further, by the whole court, that the C. *was a vessel "stranded" and "likely to become an obstruction, impediment or danger to navigation," that the judgment of the assistant marine surveyor was sufficiently certified so as to comply with sect.* 7 *of the defendants' Act of* 1912*; and that, therefore, the defendants were entitled to recover the said* 1048*l.*

Judgment of Duke, P. (infrà; (1921) *P.* 279) *affirmed subject to a variation.*

APPEAL by the Mersey Docks and Harbour Board from a judgment of Duke, P. in an action of detinue, and an action of limitation of liability; and cross-appeal by the owners of the *Countess* in the detinue action.

The following statement of the facts is taken from the judgment of Atkin, L.J.:

On the 5th June 1920, at about 11.10 a.m., the *Countess*, owing to improper navigation, burst open and damaged the gates of the Alfred Dock, Birkenhead, belonging to the Mersey Docks and Harbour Board (hereinafter referred to as the board). The amount of damage done to the dock gates was estimated by the board at about 10,000*l.* In consequence of the bursting open of the dock gates and the consequent outrush of water, damage was done to a number of barges and other craft, some of which were sunk. The *Countess* was holed and in danger of sinking. She drifted up the river, and about 11.50 was beached on Tranmere beach by a privately owned tug, the *Egerton*. The accident and the condition of the *Countess* had been reported to the senior assistant marine surveyor of the board, and by his orders she was taken higher up on to the beach by two of the board's tugs. The assistant marine surveyor, after giving these directions, made out a certificate or record with regard to the *Countess*, addressed to the general manager and secretary of the board, as follows:

> Sir,—Pursuant to sect. 7 of The Mersey Docks and Harbour Act 1912 I hereby certify that the steamship the *Countess* is in a sinking condition in the river off the Alfred Dock river entrances, within the port of Liverpool, and that such vessel is, in my judgment, an obstruction or impediment, or danger, or is likely, in my judgment, to become an obstruction, impediment or danger, to the safe and convenient navigation or use of that part of the said Port.

It was signed about 3.30 p.m. and lodged at the office of the board about 4.40 p.m. On the 7th June the board wrote to the owners that they were detaining the vessel in respect of the damage under sect. 94 of their Act of 1858. On the 9th June she was removed by the board to the Herculaneum Dock for repairs under an arrangement that this should not prejudice the board's claim under their statutory powers.

At this time the Board were claiming to detain the *Countess*: (1) Under sect. 7 of their Act of 1912 in respect of expenses estimated at about 1048*l.* in and about removing her from being an obstruction to navigation; (2) under sect. 94 of their Act of 1858 for the damage done to their dock gates estimated at about 10,000*l.* On the 5th June actions were commenced against the *Countess* by the various barges, &c., for damage caused by her improper navigation, and on the 9th June the solicitors for the owners, gave the usual undertaking to appear and put in bail. The *Countess*, therefore, was never in fact arrested and remained in constructive detention by the board until released under an order of the Court of Appeal, dated the 26th July 1920. On the 14th June 1920, the owners of the *Countess* commenced an action for limitation of liability in which the defendants were the board and all others claiming to have sustained damage by the collision

with the *Countess*. The board duly appeared and the statement of claim was delivered on the 5th July claiming the usual relief. No defence was delivered, and in due course the president made his decree on the 23rd March 1921. Meantime the owners, being anxious to obtain release of the vessel, by writ dated the 12th July 1920, commenced an action of detinue in respect of the *Countess* against the board. On the 26th July 1920, the Court of Appeal, acting apparently under the powers given by Order L., r. 8, directed that the vessel be released upon the plaintiffs' paying into court the sum of 5500*l.* to be dealt with as provided in the order. The sum of 5500*l.* was made up of 1000*l.* the estimated expenses of removal of obstruction and 4500*l.* representing the total sum for which it was claimed the plaintiffs could limit their liability for damage (the actual sum was 4468*l.*) at 8*l.* a ton. The vessel was in due course released upon the sum mentioned being paid into court. On the 8th Nov. 1920, the plaintiffs delivered their statement of claim in the detinue action and on the 30th Nov. the defendants delivered a defence and counter-claim. On the 23rd March 1921, the president heard the detinue action together with the limitation suit and made the decree from part of which the appeal and cross-appeal were brought.

The Mersey Docks Acts Consolidation Act 1858, provides:

Sect. 94: In every case in which any damage shall be done to any . . . pier, landing stage, jetty, . . . work belonging to the Board, through the misconduct, negligence, or default of the master of any vessel, or any other person on board of any vessel, the amount of such damage may be recovered . . . in a summary way, . . . or, at the option of the Board, such vessel may be detained until such damage shall have been paid or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the Board for the estimated amount of damage so done by such vessel; which deposit the Board are authorised to receive and to retain until the entire amount of such damage shall have been ascertained by the Board and paid to them by the master or owner of such vessel, when the said deposit shall be returned to him: . . .

The Mersey Docks and Harbour Board Act 1912, provides:

Sect. 7, sub-sect. 1: The Board may . . . . remove the wreck of any vessel or any vessel . . . sunk or stranded . . . within the Port of Liverpool . . . and which shall be in the judgment of the marine surveyor . . . or . . . of the assistant marine surveyor for the time being of the Board, such judgment being recorded in writing signed by him and deposited with the secretary of the Board, an obstruction or impediment or danger or is likely in such judgment as aforesaid to become an obstruction, impediment or danger to the safe and convenient navigation or use thereof . . . and may . . . sell in such manner as they may think proper the said vessel or wreck . . . and out of the proceeds of such sale . . . may retain the expenses of . . . removing such vessel or wreck. . . .

The Merchant Shipping Act 1894, provides:

Sect. 503, sub-sect. 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) . . . (*d*) Where any loss or damage is caused to any other vessel, or to any goods, . . . on board any other vessel, by reason of the improper navigation of the ship; be liable in damages beyond the following amounts; . . . (ii.) In respect of loss of, or damage to, vessels, goods, . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

Sect. 504: Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . loss of or damage to vessels or goods, and several claims are made . . . in respect of that liability, then the owner may apply . . . to the High Court, . . . and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants. . . .

Sect. 530: Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or conservancy authority, . . . in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation . . . that authority may—(*a*) take possession of, and raise, remove, or destroy any part of the vessel; and (*b*) light or buoy any such vessel . . . and (*c*) sell . . . any vessel . . . so raised . . . and out of the proceeds of the sale reimburse themselves. . . .

The Merchant Shipping (Liability of Shipowners and Others) Act 1900, provides:

Sect. 1: The limitation of the liability of the owners of any ship set by section five hundred and three of the Merchant Shipping Act 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship.

Sect. 2: (1) The owners of any dock or canal, or a harbour authority . . . shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton. . . . (3) Sect. five hundred and four of the Merchant Shipping Act 1894, shall apply to this section as if the words "owner of a British or foreign ship" included a harbour authority. . . .

Sect. 3: The limitation of liability under this Act shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act.

Sect. 5: This Act shall be construed as one with the Merchant Shipping Act 1894. . . .

Wright, K.C., *Miller*, K.C., and *L. Noad*, for the plaintiffs, Messrs. J. Hay and Sons, the owners of the *Countess*.

Greaves-Lord, K.C., and *E. Stewart Brown*, for the defendants in both actions, the Mersey Docks and Harbour Board.

Balloch, for owners of damaged craft, defendants in the limitation action.

Cur. adv. vult.

March 23, 1921.—Duke, P., read the following judgment: These are two actions brought by the plaintiffs, William Hay and others, owners of the steamship *Countess*, against the Mersey Docks and Harbour Board. The first in date was an action in common form for limitation of liability in respect of a collision of the plaintiffs' steamship with the dock gates of the Alfred Dock at Birkenhead, a dock of the defendants. By reason of the existence of demands of the defendants which did not arise out of the collision, and other circumstances which made it doubtful whether the questions at issue between the parties could be disposed of in an action for limitation of liability, the plaintiffs issued their writ in an action founded upon an alleged wrongful detention, and in this action the defendants set up, by way of defence and counterclaim, the several claims in respect of which they allege themselves to have been entitled at all material times to hold possession of the plaintiffs' steamship. These are claims of the defendants under their statutory powers. The plaintiffs' vessel was, on the morning of the 5th June 1920, in the eastern float of the Alfred Dock, waiting to proceed into the Mersey, when an order was given by her master to go full speed astern, but her engines were put full speed ahead and the ship crashed through the dock gates, with the result that a great body of water escaped from the dock and carried into the river not only the plaintiffs' vessel but a large number of barges and floats, some of which were sunk. The plaintiffs' steamship was holed in the engine room and suffered other damage. The liability thrown upon the plaintiffs by reason of the damage to the dock, and to the large number of vessels damaged and sunk, is the liability sought to be limited by the plaintiffs' original action. [His Lordship stated the facts.]

At the hearing before me there was no question on the defendants' part that the plaintiffs are entitled to the usual declarations in their action for limitation of liability, and it was agreed that the statutory amount of the plaintiffs' liability is 4468*l.* 4*s.* 9*d.* in respect of the collision. The plaintiffs' counsel mentioned that the actual value of the *Countess* was estimated at 34,000*l.*, and it had been agreed in the course of the litigation that the damage done to the defendants' works on the 5th June amounted to 10,014*l.* The defendants justified the detention of the *Countess* under sect. 94 of their Act of 1858, and sect. 7 of their Act of 1912, and alleged a justification alternatively under the Merchant Shipping Act 1894, s. 530. They also claimed payment of such sums as may be found payable under the order of the 26th July 1920. [His Lordship then read the Mersey Docks Consolidation Act 1858, s. 94, and the Mersey Docks and Harbour Board Act 1912, s. 7, and continued:] Counsel on behalf of the plaintiffs argued that the detention of the *Countess* for the two sums named in the counterclaim was wrongful, as being made and maintained for an amount in excess of anything due to the defendants and without statutory warrant. As to the 1858 Act, he submitted that the detention was unwarranted in point of time and mode and amount. As to the 1912 Act, he objected further that the vessel was not in fact a wreck, or sunk or stranded, and that the certificate made by the assistant marine surveyor when the *Countess* was on the beach was avoided by proof of the actual situation of the vessel when the certificate was made, and, since it did not certify the vessel to be stranded, was ineffectual to authorise detention of the *Countess* as a stranded ship. With regard to the above claim under the Merchant Shipping Act 1894, s. 530, counsel for the plaintiffs took the further point that the defendant board was not shown to have been of opinion that the *Countess*, as she lay at Tranmere Beach, was or was likely to become an obstruction or danger to the navigation of the Mersey, and that, until such an opinion is in fact formed by the authority under the statute, the power to take possession, remove, hold as security, or sell, does not arise. Counsel asserted, on behalf of the Docks and Harbour Board, a right, in the events that happened, to detain under this Act of 1858, for the damage caused by the collision, at all events until (if at all) the liability of the plaintiffs should be limited, and a further right under the Act of 1912, acting on the judgment of the surveyor, to remove the *Countess* from her original position at Tranmere Beach to her ultimate position there, and from the beach to the Herculaneum Dock, and to hold and sell the vessel in order to pay the expenses thereby incurred. The certificate of the surveyor, given on the afternoon of the 5th June, he defended as a sufficient evidence of the judgment formed and acted on in the morning. Any expenses, other than those of removal, which were included in the sum of 1048*l.*, he claimed for the defendants as salvors.

The main question involved in the case is that of the effect upon the defendants' powers under the Act of 1858, of the statutory provision for the limitation of liability which are embodied in the Merchant Shipping Act 1894, ss. 503 and 504, and in the Merchant Shipping (Liability of Shipowners and Others) Act 1900, ss. 1, 2, and 3, with regard more particularly to the enactment in the last-mentioned statute, whereby liability for damage, such as is in question here, is brought within the liabilities capable of limitation, and dock and harbour owners and authorities are enabled to limit their liability for damage caused to shipping by negligence of their servants.

The question raised under the defendants' Act of 1912 is of less general importance than that under their Act of 1858, but is no doubt of considerable consequence to the defendants by reason of the necessity of immediate action in a waterway like the Mersey when the

security of convenience of navigation is threatened by a sudden occurrence like that of the 5th June 1920.

The argument with regard to the defendants' Act of 1858 was addressed to three topics, first, whether the defendants' right of detention is taken away by the Merchant Shipping Acts, secondly, whether the lien upon the vessel which is created by sect. 94 survives notwithstanding the right of the plaintiffs to obtain a declaration of limitation of liability; and, thirdly, whether, if it survives, it is a lien for the whole of the amount of the damage to the defendants' works, or only for the sum which may become payable to the defendants rateably with other losers by the collision, when the amount payable by the plaintiffs comes to be distributed. [His Lordship then read the Merchant Shipping Act 1894, ss. 503 and 504, and the Merchant Shipping (Liability of Shipowners) Act 1900, ss. 1, 2, 3, and 5, and continued.]

The extent to which the defendants' powers under sect. 94 of the Act of 1858 are modified by the Merchant Shipping Acts was much debated. Counsel for the plaintiffs did not contend that they were wholly revoked. Counsel for the defendants developed an argument which amounted in substance to a claim that the defendants have, by virtue of this section, a priority over other claimants in respect of damage caused by the collision. He presented the defendants in the light of secured creditors in a class by themselves, entitled to rank before the general body of the persons who suffered loss by the occurrence, and insisted that no express words to deprive them of the advantages of sect. 94 could be found in the general Acts, that the policy of the legislation until 1900 had been illustrated by the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), s. 74, and by many local Acts, and that a construction adverse to their right would be contrary to the presumable intention of the Legislature. I do not find in the Act of 1900 language which supports this view. While the Legislature extended the shipowners' privilege of limited liability by including in it liability for damage to docks, it also extended to the owners of docks a like privilege of limitation for damage to shipping. Further, in sect. 3 of the Act express notice is taken of the enactments, public and general, local and private, which relate to liabilities in respect of damage to dock undertakings.

The true means of ascertaining whether and to what extent the provisions of the defendants' private Act of 1858 are modified by the general Acts is to read the respective enactments together and see how far, upon a reasonable construction of the language employed, the two sets of enactments can stand together. At the outset it is to be observed that, if no action to limit liability is instituted, the provisions of sect. 94 can operate absolutely. So also if the action is unsuccessful. Sect. 94 is therefore not repealed by implication. How far it is modified can perhaps be seen by applying the terms of the later legislation by way of proviso. Down to the time of decree in a limitation action the two sets of powers and rights can well co-exist. After decree the powers and rights conferred by the earlier legislation are diminished. The liability of the plaintiffs to the defendants, upon which the defendants' lien over the plaintiffs' vessel depends, is reduced in proportion as the total claims from all quarters exceed the limited statutory liability.

The first question of real difficulty arises when you come to consider whether by necessary implication the legislation has transferred the defendants' lien from the ship, or the deposit made in lieu of the ship, to the statutory fund which is to be provided by the owners and distributed rateably by the court. I do not find it more remarkable that the Legislature should modify the statutory security of the defendants in respect of damage of their docks than that it should have modified the rights *in rem* of the shipowners who had a maritime lien for damage done to their vessels. To hold the defendants to be entitled to recover their damages independently of the sum to be paid upon limitation of liability would be to disregard the express language of the Merchant Shipping Act 1894, s. 503, that the owners shall not be liable beyond an aggregate amount not exceeding so many pounds per ton. To hold the defendants entitled to a priority in the distribution of the limited amount would be to disobey the statutory direction that that amount shall be distributed rateably. I was referred to the decision in the Scotch case of *Rankine* v. *Raschen* (1877, 4 R. 725) as authority for a proposition that the distribution is not inevitably made upon a rateable basis. The case does not appear to me to conflict with the view I take. On the contrary, where a shipowner had paid one claimant in full, the Court of Session held that prejudice resulted to him only, and that the rights of other claimants for their rateable amounts were not affected. When limitation of liability is applied for, as in this case, before any payment on account of liability has been made, it seems to me impossible that the court should prefer any one of the claimants. I hold that the defendants have not the suggested priority, and that the plaintiffs' right to a limitation of liability covers their liability to the defendants in respect of the defendants' claim for the damages, amounting to 10,014*l.*, done to their dock in the collision.

It is true that the Legislature has not by the Merchant Shipping (Liability of Shipowners and Others) Act 1900 directed, with regard to the detention by the dock authority of a ship which has done damage to their works, what shall happen if and when the liability of the owner in respect of the negligence causing the damage comes to be limited. Sect. 504 of the Act of 1894 deals with the whole matter of procedure in very general terms. While there is nothing express or implied in the statute to take away the

defendants' right to detain pending the decree of limitation of the plaintiffs' liability, the provisions in the defendants' Act of 1858 for detention of the ship until the entire amount of the damage to their works shall have been ascertained and paid are inconsistent with those parts of the limitation sections of the Merchant Shipping Acts which contemplate release of the ship against provision of, or security for, the limited amount, and to the extent to which they are inconsistent they are impliedly repealed. The substance of the matter is that the defendants' power of detention in the period between the decree for limitation of liability and satisfaction of their claim is left by the Legislature, together with many other incidents of limitation of liability, to be dealt with according to law. I see nothing surprising in this. Long before 1900 the rights of the holder of a possessory lien upon a ship had been reconciled by the court with the right of a plaintiff having a cause of action *in rem* and power to obtain arrest of the ship by virtue of that right. And in the present case any difficulty which existed was solved by the order of the Court of Appeal for the release of the *Countess* against a payment into court and upon terms.

The submission which was made on behalf of the plaintiffs, that the defendants did not in this case duly exercise their right of detention under their Act of 1858, requires a brief examination of what was in fact done. The direction as to the *Countess* originally given on the defendants' behalf was that given on the 5th June under the powers of the Act of 1912, with regard to removal of vessels wrecked or stranded, or likely to cause obstruction to navigation. The detention under the Act of 1858 was made in express terms on the 7th June, while the *Countess* was on Tranmere Beach under the control of the defendants' officials. This is said on the part of the plaintiffs to have been a detention otherwise than in the mode and form required by a strict construction of the Act of 1858. Such powers are to be exercised in strict conformity with the law, but I see no reasonable ground for saying that there was not such an exercise in this case. The vessel still lay on the beach where she was placed after the collision, within the defendants' jurisdiction, and without, so far as appears, any intervention of rights of third parties which affected the matter. I hold, therefore, that the detention was duly made in the exercise of the defendants' statutory right.

As to the beaching and removal of the *Countess*, and her temporary repair, the powers of the defendants' Act of 1912 are relied upon by them, and they also claim as salvors. What is challenged is the detention of the vessel for the expenses, amounting to 1048*l.*, which the defendants incurred. Counsel for the plaintiffs did not challenge the details of the outlay, or its propriety, but contended that, in order to make the sum a charge upon the ship, the requirements of sect. 7 of the Act must be strictly complied with. I think they must, and it is said for the defendants that they were. What has to be determined is whether the *Countess* was a wreck or a vessel stranded within the Port of Liverpool which, in the judgment of the assistant marine surveyor, duly recorded in writing signed by him and deposited with the secretary of the board, was, or was likely to become, an obstruction to the safe and convenient use of the port. The chief objection taken on behalf of the plaintiffs was that when the assistant surveyor certified the *Countess* to be in a sinking condition, and to be, or to be likely to become, an obstruction she was neither a wreck nor a stranded ship but was safely moored on Tranmere Beach. It was argued on behalf of the defendants that the *Countess* was, if not a wreck, a vessel stranded, and that the judgment of the assistant surveyor was sufficiently certified. On the question of fact, my finding is that the *Countess* was not a wreck. The judgment of the Court of Appeal in *The Olympic* (12 Asp. Mar. Law Cas. 318, 580; 112 L. T. Rep. 49; (1913) P. 92) under the Merchant Shipping Act 1894 does not appear to me to be in point. The question there related to termination of wages contracts and the meaning of the word "wreck" in sect. 158 of the Merchant Shipping Act 1894. Here the question is one of fact under the defendants' Act of 1912, where "wreck" and "vessel" are distinguished one from another. *De Mattos* v. *Saunders* (1 Asp. Mar. Law Cas. 377; 27 L. T. Rep. 120; L. Rep. 7, C. P. 579) was cited as an authority on the question whether the *Countess* was stranded, and is one of a numerous class of cases decided upon contested claims against underwriters, where the courts were required to decide whether a ship conveying goods the subject of insurance had been stranded within the meaning of a policy. The decisive consideration is such cases is said to be whether the vessel takes the ground in the ordinary and usual course of navigation and management, or whether the ground is taken under extraordinary circumstances of time and place by reason of some unusual or accidental occurrence. Such authorities are no doubt helpful, but I do not think they are decisive in the present case. The question of fact is to be determined with regard to the language and objects of the Act of 1912. The *Countess* was a vessel narrowly saved from sinking and put upon the beach to save her from sinking. She was not under control of her own power, could not be floated with safety to herself or other vessels, and needed to be repaired before she could prudently be put afloat at all. *De Mattos* v. *Saunders* (*sup.*) shows that it is immaterial whether the vessel drifted to the beach or was guided there. I find her as she lay on the beach to have been, within the meaning of the Act of 1912, a vessel stranded. I may add that, in my opinion, the question whether this vessel was a wreck or was stranded was a question for the judge; but, lest any element of fact

should be involved, I consulted the Elder Brethren who have been sitting with me, and they agree in the view that, looking at the facts and without regard to the requirements of any Act of Parliament, this vessel was not in their judgment a wreck, and, on the other hand, was a vessel stranded.

As to the form and effect of the surveyor's certificate, sect. 7 of the Act does not require that the surveyor shall certify the particular condition of the vessel, which is a condition precedent to the power of removal. He is to form and certify his judgment as to obstruction or risk of obstruction. The certificate in question was alleged to be void by reason of error as to subject-matter and time. To what I have said as to the state of the *Countess* I have only to add that the words in the document which are descriptive of her condition are not necessary to the validity of the certificate and that, in my judgment, the fact that they had become erroneous when the certificate was made and delivered is immaterial. With regard to time, it was not denied that the *Countess* was, when the surveyor formed his judgment on the morning of the 5th June, and was likely to be, an obstruction, impediment, and danger to navigation. The objection which was taken was that she no longer remained so when she had been removed to the beach. The assistant surveyor did not take that view, and if it is material, I find upon this question of fact that the *Countess* as she lay at Tranmere Beach, was, and was likely to be, an obstruction, impediment, and danger to navigation, and fit to be removed by the defendants. It is true that the certificate did not in its terms relate to this time. I therefore add that, in my opinion, when on the 5th June 1920 the assistant surveyor had formed his judgment to the effect required by the statute, the defendants, by their officers, were entitled forthwith to act upon it in respect of the matter in question in the exercise of their powers under sect. 7, and that the judgment was sufficiently recorded. It was promptly recorded in the course of the transaction. I cannot see how the board could secure to shipping the advantages intended to be conferred by the section, where action must be prompt to be effective, if between decision and action you interpose delay for formal official procedure : (see on this subject *Jones* v. *Mersey Docks and Harbour Board* (12 Asp. Mar. Law Cas. 335 ; 108 L. T. Rep. 722 ; 18 Com. Cas. 163). From the conclusions I have stated, it follows that I hold the removal of the *Countess* to have been a removal under sect. 7 of the Act of 1912, and the subsequent detention in respect of the defendants' expenses under this head to have been a justifiable detention.

The result of the whole matter is that there will be judgment for the plaintiffs in the action for limitation of liability, and judgment for the defendants on the plaintiffs' claim in detinue and on the counter-claim for payment out of the sum in court of 1048*l.* 6*s.* 11*d.*, and for the declaration prayed that the defendants were entitled to detain the vessel under the Acts of 1858 and 1912. The balance of the money in court will be transferred to the credit of the action for limitation of liability, which will proceed in the usual way.

The Mersey Docks and Harbour Board appealed.

The respondents to the appeal, the owners of the *Countess*, also by a cross-appeal claimed that the board were not entitled to recover the sum of 1048*l.* for repairing and removing the *Countess*.

The appeal was heard on the 11th and 12th July 1921.

Leslie Scott, K.C., *Greaves-Lord*, K.C., and *E. Stewart-Brown*, for the appellants.

Wright, K.C., *Miller*, K.C., and *L. Noad*, for the respondents.

Balloch, for the owners of damaged craft.

The following cases were cited during the proceedings :

Canadian Pacific Railway v. *Owners of the Storstad*, 14 Asp. Mar. Law Cas. 530 ; 122 L. T. Rep. 440 ; (1920) A. C. 397 ;
The Crathie, 8 Asp. Mar. Law Cas. 256 ; 76 L. T. Rep. 534 ; (1897) P. 178 ;
De Mattos v. *Saunders*, 1 Asp. Mar. Law Cas. 377 ; 27 L. T. Rep. 120 ; L. Rep. 7, C. P. 579 ;
The Emilie Millon, 10 Asp. Mar. Law Cas. 162 ; 93 L. T. Rep. 692 ; (1905) 2 K. B. 817 ;
Jenkins v. *Great Central Railway Company*, The Shipping Gazette, Jan. 13, 1912.
Jones v. *Mersey Docks and Harbour Board*, 12 Asp. Mar. Law Cas. 335 ; 108 L. T. Rep. 722 ; 18 Com. Cas. 163 ;
The Kronprinz Olav, *ante*, p. 312 ; 125 L. T. Rep. 684 ; (1921) P. 52 ;
Leycester v. *Logan*, 1857, 3 K. & J. 446 ;
The Olympic, 12 Asp. Mar. Law Cas. 318, 580 ; 112 L. T. Rep. 49 ; (1913) P. 92 ;
Rankine v. *Raschen*, 1877, 4 Rettie, 725 ; 14 Sc. L. Rep. 470 ;
River Wear Commissioners v. *Adamson* 3 Asp. Mar. Law Cas. 521 ; 37 L. T. Rep. 543 ; 2 App. Cas. 743 ;
The Victoria, 6 Asp. Mar. Law Cas. 335 ; 59 L. T. Rep. 728 ; 13 Prob. Div. 125.

Cur. adv. vult.

Dec. 20, 1921.—The following written judgments were delivered :

Lord Sterndale, M.R., stated the facts, and continued.—Some question was raised before us as to the jurisdiction to make the order releasing the vessel on payment of 5500*l.* into court. I do not think we ought to entertain that question at all. The order was made, and no appeal against it was ever entered, and it must be taken as a right and proper order. It does not seem to me to affect the rights of the parties. If the board had the right to detain the ship, they had the same right over the sum of 5500*l.* which was substituted for

her by the order, but I think a little confusion has been introduced into the proceedings by the fact of the ship being released and money substituted.

The important question is whether the board are entitled to detain the ship, or the money representing it, until they are paid the damage done to their works up to the statutory limit of 8*l.* per ton, irrespective and to the exclusion of other claims arising out of the accident, or whether they have to come in and take their share of 8*l.* per ton *pari passu* with the other claimants. This is, in my opinion, a matter in which the plaintiffs, the owners of the *Countess*, have only an indirect interest, because, for reasons I shall give hereafter, I do not think that a judgment in favour of the right of detainer obliges the plaintiffs to pay more than the statutory amount of 8*l.* per ton. The persons who are really interested are the other persons who have claims against the plaintiffs in respect of the accident. They are not parties to either of the actions, but appeared in the court below ; they were served with notice of the appeal, although not strictly speaking respondents, and counsel has argued the matter on their behalf before us.

The question depends upon the proper construction of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xvii.), s. 94 ; the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 503 and 504 ; and the Merchant Shipping Act 1900 (63 & 64 Vict. c. 32), s. 1. The first-named section is as follows : [His Lordship read it.] There seems to be no question but that this section gives a right to detain a vessel doing damage, or a deposit in lieu thereof, until the whole of the damage is paid. It is a possessory lien given by statute, which it is not necessary to enforce by action, and is not, in my opinion, subject to the same considerations as a maritime lien. Although the section speaks of the amount of damage being ascertained, it does not specially provide any method of ascertainment, and I think it must have contemplated the usual method, that is, that the owner of the ship or the deposit should demand its release on payment of a certain amount, and that the question of whether that amount was sufficient, or whether the board were entitled to detain for a larger sum, should be determined either in an action of detinue or an arbitration to determine the amount. I do not think it was necessary for the board to bring an action against the shipowner, although they could have done so. It was enough for them to rely upon their lien and refuse to give up the ship until payment. It was suggested during the argument that the proper method was by a claim under the Merchant Shipping Act 1894, s. 504. But this certainly should not have been so under the corresponding sect. 514 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), at the time of the passing of the Act of 1858, for sect. 514 only took effect in case of a limitation under sect. 103. Nor could it have been so under sect. 503 of the Merchant Shipping Act 1894, until 1900, for until then there was no limitation for damage like this done to dock works.

The learned president has held that, by virtue of the Mersey Dock Acts Consolidation Act 1858, s. 94, the board had a right to detain the ship until a decree had been made in a limitation action, and as no such decree had been made at the date of the writ in the detinue action that action must fail, and in that I agree with him, but he held that when a decree in a limitation action had been made, the board lost any right of detainer which they had, or only retained an absolutely useless right, that is to say, a right to detain a proportion of the 8*l.* per ton *pari passu* with the other claimants, for which no right of detainer is necessary, as, according to his contention, that sum is awarded to the board by the court out of the money in court. If the plaintiffs had not asked for the limitation, it is not disputed that the board would still have had a right of detainer for the larger sum. It seems odd that the right of detention, which, as I have said, affects the other claimants more than the plaintiffs, for if it exists, it gives the board possession of the ship and the right to be paid out of it in preference to any other claimants, should exist or not exist according to the decision of the plaintiffs to limit or not to limit their liability, but this may be the correct view.

The question really arises upon the defendants' counter-claim, by which they ask for a declaration that they are entitled to payment of the sum paid into court under the order of the Court of Appeal. They ask : " To be paid out of the sum paid or to be paid into court under the said order of the Court of Appeal the sum of 4468*l.* 4*s.* 9*d.*, or such other sum as shall be decreed by the court to be the statutory limit of the liability of the said steamship under the Merchant Shipping Acts 1894-1906, or if there shall be no such decree the actual amount of the damage done to the works belonging to the defendants pursuant to the provisions of sect. 94 of their said Act of 1858 " ; and : " That the defendants are entitled to payment of the damage done to the works belonging to the defendants by the said steamship and to the expenses of raising and removing her and of detainer. . . ." I am not sure that the counter-claim is quite accurate, for the defendants are only entitled to detain the vessel or the money until the damage is paid to them, but as the sum of 4468*l.* 4*s.* 9*d.* is taken as the statutory limit and it is admitted that the damage to the defendants' property exceeds that amount, in substance they are entitled to receive that sum, if they are entitled by reason of this right of detainer to enforce payment of the amount legally due to them irrespective of other claimants. The learned president, however, has held that, although the defendants were entitled at the issue of the writ in the detinue action to detain the ship, they are not entitled to detain the amount in court representing the ship after the decree in the limitation action,

and has ordered the sum paid into court in the detinue action to be transferred to the credit of the limitation action. The effect of this is to deprive the defendants of the right of detainer, which they admittedly had at the commencement of the detinue action, even for the statutory amount of liability, and to leave them to share equally with the other claimants, in other words, to deprive them of the preferential position as regards other creditors in which they were put by sect. 94 of the Act of 1858.

This result the learned president thinks is produced by the Merchant Shipping Act 1900, s. 1 in conjunction with the Merchant Shipping Act 1894, ss. 503 and 504. Up to the Act of 1900 no limitation of liability applied to damage such as to that suffered by the defendants, but as I have shown, and as the president has decided, they were entitled to detain the ship for the full amount of the damage, as they are still if there be no limitation of liability, which might well happen in the case of a foreign owner with no property in this country but the ship. Now that shipping has fallen to a lower value, the position of a ship, whose value at 8*l.* a ton is 4468*l.*, being worth 34,000*l.*, cannot exist. [His Lordship then read the Merchant Shipping Act 1900 (63 & 64 Vict. c. 32), ss. 1, 2, and 3, and continued :] I have read sects. 2 and 3 because the learned president attaches some weight to them, but I cannot myself see their bearing on the position at issue. Sect. 3 applies the limitation to all claims however arising, but it does not deal in any way with their remedies or methods of recovering the limited amount. To determine the question of the right of the board, it is necessary to look at their position when the Merchant Shipping Act 1900 was passed and the effect of that Act upon their position ; it existed at any rate as early as the Merchant Shipping Act 1854, sects. 404 and 514 of which Act correspond to sects. 503 and 504 of the Act of 1894, and the position as to limitation was therefore the same when the Mersey Dock Acts Consolidation Act 1858 was passed as after the passing of the Merchant Shipping Act 1894. It is true that the measure of limitation was not the same in 1854, the measure of 8*l.* per ton being introduced by the Merchant Shipping Act 1862, s. 54, but the principle is the same. That position was that limitation of liability did not apply to claims by a dock authority for damage done to their property, and that such an authority had a right of lien on or detainer of the wrong-doing vessel until the whole amount of the damage was paid. This right might of course entirely deprive other claimants in respect of damage by the same accident of any compensation for the damage suffered by them, for the lien might very well exist in respect of an amount far greater than the value of the ship at 8*l.* per ton.

This being the position, it is in the next place necessary to see what alteration in the rights of the board was made by the Merchant Shipping Act 1900. The relevant section of that Act is sect. 1, which I have already read. That is in terms nothing more than a limitation of the amount which a dock authority can recover under sect. 503 of the Merchant Shipping Act 1894 ; it does not in any way mention the lien given by the Mersey Dock Acts Consolidation Act 1858 for the damage, and, in my opinion, it has no other effect than to limit the amount for which the lien can be exercised. It seems to me that to be quite clear that the Merchant Shipping Act 1900 affects only the amount to be recovered ; it includes in the statutory limitation damage done to dock property, but it does not expressly or impliedly affect in any way the method of recovering the amount which is legally recoverable. I think its only effect is to limit the amount for which the ship may be determined to the statutory limit of 8*l.* per ton. The object of sect. 1 is only to limit the amount for which the shipowner is liable ; it is not in any way concerned with the way in which a legal right given to one creditor for the recovery of that amount may affect the rights of other claimants. No enactment was mentioned to us which in express terms deprives the defendants of their lien, but it was argued, and the learned president has held, that they are deprived of it by implication from the terms of sect. 504 of the Merchant Shipping Act 1894. It cannot be suggested that that section was passed in any way in view of this lien, for, as I have said, it is merely a repetition of a section existing in 1854, before the lien was created, and at a time when no limitation in respect of damage of this nature existed. To deprive any person of a lien expressly given by implication from a section passed in respect of other matters altogether seems to me unusual and to require very clear and distinct words raising that implication. I cannot find such words here.

Sect. 503 of the Merchant Shipping Act 1894, like sect. 504 of the Merchant Shipping Act 1854, merely limited the amount of the liability, and without any other section would have given a right to plead that limitation in defence. It seems, however, to have occurred to the framers of the Act that, where there were conflicting claims to which the limitation applied, great confusion might result if actions in respect of all claims were allowed to proceed in the face of that defence, and therefore sects. 504 and 514 were passed giving power to the court to determine the amount of the owners' liability and distribute that amount rateably—whatever may be the meaning of that word—among the claimants, to stay proceedings in actions, and do other things on such terms as to security and otherwise as the court shall think fit. Of course when the earlier of those sections was passed there was no right of lien in favour of any claimant to whom the Act applied, and no difficulty could occur in the working of that section. This is so now in the vast majority of cases, and the ordinary businesslike way of proceeding is for the shipowner to pay 8*l.* per ton

into court, and for the court to distribute that amount *pari passu* amongst the claimants who, in ordinary cases, stand on the same footing. The provisions of sects. 504 and 514 are not, however, compulsory; the owner need not apply under them, and the court is not compelled to act under them, if to do so would work injustice to one of the claimants, and this would be the case if one of the claimants were thereby deprived of a lien of which they had not otherwise been deprived. The very word "may" in sect. 504 seems to me to carry the meaning "may if the circumstances permit," and not "shall whatever may be the circumstances and whatever the rights of the claimants whould otherwise be." The words in sect. 514 of the Merchant Shipping Act 1854, are very similar: "It shall be lawful . . . for the court . . . to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability . . . and for the distribution of such amount rateably. . . ." The position would be an extraordinary one: the defendants are not deprived of their lien by sect. 1 of the Merchant Shipping Act 1900, but by that section and sect. 504 of the Merchant Shipping Act 1894, coupled with two acts of the shipowner which he may or may not do according to his will—(i.) to limit his liability, and (ii.) if he do limit his liability to make an application under sect. 504—and coupled also with an act of the court—that is, to make an order distributing the amount at which the shipowners' liability has been determined *pari passu* among the claimants. I cannot think it can have been intended that a right of lien, expressly given by statute, should be destroyed by such an indirect implication as this. I think that the learned president has overlooked the fact that the provisions of sect. 504 are not compulsory, and has assumed that, in every case of limitation of liability, the shipowner is obliged to pay 8*l.* per ton into court for distribution among the claimants, irrespective of whether there is a lien on the ship or not. I am under this impression, because he seems to assume that the necessary consequence of holding the defendants entitled to a lien on the ship, or the deposit representing it, would be to compel the plaintiffs to pay the amount twice over. I think here the substitution of a sum of money, 5500*l.*, for the ship, has led to confusion. In law the defendants' lien, if it exist, is on the ship, and if they were holding it under a lien and an application were made by the shipowner under sect. 504, the court, in circumstances like these, where the amount of the lien exceeded the value of the ship, would not order the shipowner to pay any more, and, if it thought fit to stay the other claims, ought not, in my opinion, to require as a condition any security. It seems to me that the defendants were under no necessity to bring any action against the plaintiffs, or to bring in any claim under sect. 504. If I am right that their right of lien extended to the amount of their damage up to the statutory limit, there was no question in this case as to the amount due to them.

I have assumed up to this that the word "rateably" in sect. 504 means *pari passu* or proportionately to their damage, and it is necessary to do so in order to give any foundation at all to the plaintiffs', or rather, the other claimants' arguments. I do not, however, think that this is the necessary meaning. I think "rateably" may well mean "among all the claimants, having regard to any special right or remedy that any claimant may have, and in the absence of any such special right, proportionately to their damage." If this be the proper meaning, sect. 504 presents no difficulty to the plaintiffs, and the result to the other claimants is that which always follows where another creditor has a lien on the property out of which all claimants have to be satisfied. I prefer, however, to base my judgment on the ground which I have endeavoured to set out, that is to say, that it could not have been and was not intended to take away a right expressly given by statute by such an implication arising so indirectly and subject to such conditions.

The result is that, in my opinion, there is nothing in any of the legislation to take away the right of lien or detainer given by the Mersey Dock Acts Consolidation Act 1858, or to affect it, except to limit the amount recoverable to the statutory limit, and that, therefore, the defendants are entitled to hold the amount in court representing the ship until payment is made to them for their damage, which is, in effect, payment to them of that sum. It follows that the order for the payment of that sum to the credit of the limitation action is wrong. It is not for me to consider the policy of giving preferential rights to public bodies like the Mersey Docks and Harbour Board, but when such rights are given expressly and distinctly by a special Act, I think they ought not to be and cannot be taken away by difficulties which it is said they cause in the permissive working of general statutes not directed to this special point and passed *alio intuitu*, as sect. 504 must have been, for this state of things did not exist for years after it was passed.

It remains to deal with the limitation action, and I do not know that matters are made easier by the two actions being tried together. The first paragraph of the decree is right. I have already said that I think the second paragraph, so far as it orders the money in court to be paid to the credit of the action, is wrong, and it remains to deal with the other paragraphs of the plaintiffs' claim. I do not think that it follows, from the conclusion at which I have arrived, that the plaintiffs are bound to pay the amount, which they ask to pay, into court, or that the court is bound to order them to do so and then proceed to distribute that amount. No doubt that prayer, which is the usual one in ordinary circumstances, was put in to enable the plaintiffs to argue that a judgment in the

detinue action in favour of the defendants would oblige the plaintiffs to pay 16*l.* per ton, and not 8*l.*, and to be contrary to the law as to limitation. I do not think that is the case. I think the court will have to deal with the matter on the footing that the plaintiffs have already paid up to the statutory amount of their liability and cannot be called upon to pay any more. It seems to me that the court can adopt one of two courses. It may refuse to stay the actions mentioned, and leave the plaintiffs to set up their limitation of liability as a defence, which they can do; or it may stay them without requiring any security or any money in court, on the ground that no good result can be produced by proceeding with them. In some cases there are great difficulties in setting up the statutory limitation as a defence, but I do not think that would be so in this case. It would be enough to plead that the statutory amount had already, by force of law, been paid in respect of that liability. I think, however, that in the circumstances the proper course is for the court to stay the actions without requiring security or the payment of money into court. I think the court has power to take such a course, if it appear that to allow the actions to proceed would only produce useless expense and no good result.

There is another point raised in this case which is of great, although not of equal, importance to the defendants, that is, whether they are entitled to detain the ship in respect of the expenses of securing and repairing her. This, as I have said, was agreed to 1048*l.*, and was paid into court under the order of the Court of Appeal, when the ship was released. If the defendants cannot recover this sum as expenses, they can possibly recover it as salvage, and the importance of the point arises because the regularity of the proceedings of the assistant marine surveyor is questioned. The matter depends upon the Mersey Docks and Harbour Board Act 1912 (2 & 3 Geo. 5, c. xii.), s. 7. [His Lordship read the section.] The facts and arguments on this point are very clearly set out in the judgment of the learned president, and as I agree with him, I do not think it necessary to set them out again. I think his judgment on this point is right.

In my opinion the appeal should be allowed and the cross-appeal dismissed, but as the other members of the court are of a different opinion on the first point, both appeal and cross-appeal are dismissed with costs.

ATKIN, L.J.—The issues raised in this case are of importance to shipowners and dock companies, and present complications which make it very necessary carefully to consider the facts. [His Lordship stated them, and continued:] The rights of the respective parties appear to have been as follows: (i.) The defendants had a maritime lien against the *Countess* for damage done to their dock gates. This lien they might have enforced by proceedings against the *Countess*. They have taken no such proceedings; and in their counter-claim in the detinue action they seek for no relief in respect of their maritime lien, or any rights *in personam*. The defendant's sole rights now in respect of any such damage, except as expressed by statute, would be confined to sharing rateably in the distribution in the limitation suit. (ii.) The owners of the barges had a maritime lien against the *Countess* for damage done. This they have enforced by proceeding *in rem* in which bail has been given. The *Countess* was thereupon freed from their lien and from any liability to arrest in respect of the claims for which bail was given. All these actions have been properly stayed in the limitation suit, and the sole right of these claimants is to share rateably in whatever distribution is made in that suit. (iii.) Subject to their having complied with the formalities prescribed by sect. 7 of the Mersey Docks and Harbour Act 1912, the defendants were entitled to detain the *Countess* in respect of wreck expenses, and to sell her in order to recoup themselves those expenses. The rights of the defendants over the ship are now transferred, under the order of the Court of Appeal, to the sum in court representing the estimated amount of those expenses. The limitation suit does not in any way affect the defendants' rights to these expenses, and the sole question for determination is whether the statutory conditions have been complied with. (iv.) Under the Mersey Dock Acts Consolidation Act 1858, s. 94, the defendants were entitled to detain the *Countess* until the damage done to the dock gates has been paid for. This they continued to do until the above-mentioned order of the Court of Appeal. Under the order the money paid into court was to be treated as though it represented the deposit which, under the section, it was the alternative right of the defendants to receive and retain until the entire amount of the damage was paid. The result of the order seems to be that the defendants no longer are deemed to retain the ship, but are deemed to retain the deposit on the terms of the section.

What, then, are the rights of the defendants under the section? (*a*) They have only a right to detain the ship, or, as now, to retain the deposit until payment. They have no right to realise the ship or pay themselves out of the deposit. In other words, they are given by a statute a possessory lien. (*b*) The statutory right appears to be a right paramount to previously attaching maritime liens. This was the decision of the court in *The Emilie Millon* (10 Asp. Mar. Law Cas. 162; 93 L. T. Rep. 692; (1905) 2 K. B. 817) in respect of the dock company's powers under sect. 253 of their Act, to detain ships until dock tonnage rates are paid. I am unable to distinguish such power of detention from the power to detain for dock damage under sect. 94, and I must accept the decision as binding on us. (*c*) They have no power to determine for themselves what the amount of the damage is, on payment of which the right of detention ceases. This was

expressly admitted before us by counsel for the board, and in any case seems clear. The amount of the damage when in dispute must, therefore, be determined by some appropriate legal tribunal and on legal principles. (*d*) I think it follows from the above that if the amount of damage recoverable is limited by statute, the limited amount is the amount for which the board may detain, and the right to detention ceases when that limited amount of damage is paid. I can see no difference in this respect between a maritime lien for collision damage and a statutory possessory lien for collision damage.

The Merchant Shipping Act 1894, s. 503, provides that the owner of a ship shall not, where any loss or damage is caused to another ship by reason of improper navigation, be liable in damages in respect of damage to vessels beyond an aggregate amount not exceeding 8*l.* per ton. It is in fact common ground that the defendants cannot detain the *Countess*, and cannot detain the deposit for more damages than the aggregate amount of the limited liability of the owners. I think it also follows that the board are also bound by the provisions of sect. 504, and can only claim a rateable share of the total liability of the owners. Again, I see no distinction between the maritime lien and the statutory lien. It is to be noticed that the section as to rateable distribution applies, notwithstanding that one or more of the damage claimants have arrested the ship and are actively enforcing the maritime lien. But in truth the matter seems to be finally disposed of in the Merchant Shipping Act 1900, s. 3. The Act applies the limitation of liability to liability for damage to docks, and sect. 3 says that the limitations of liability under the Act is to apply "whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act." It is in this respect that I differ reluctantly from the judgment of the Master of the Rolls. Once it is conceded that the limitation of liability applies to the lien so as to limit the amount of damage for which the ship can be held, I can see no logical ground for restricting the full operation of the statute. If 10,000*l.*, the full damage, is to be reduced at all, it appears to me that it must be reduced not merely to 4468*l.*, but to the board's rateable proportion of 4468*l.* I see nothing, however, in the limitation of liability Acts to deprive the board of the advantage of their possessory lien, whether exercised over the ship, or over a deposit made under sect. 94 of the Mersey Dock Acts Consolidation Act 1858. I think that they are entitled to exercise that lien until they are in fact paid the rateable amount of the total liability to which they are entitled under the limitation of liability Acts. The money paid into court in the detinue action should remain in court in that action. Except by consent, I see no power to transfer it to the credit of the limitation suit. I regret this part of my decision, for it is obvious that the board for all practical purposes will always be sufficiently secured by the sum paid into court in the limitation suit. Statutory rights, however, are not to be abrogated except by plain enactment, and it is sufficient to assume that in a great shipping port such a representative body as the Mersey Docks and Harbour Board are not likely to exercise their rights unconscionably or so as to embarrass shipowners unreasonably.

The point as to wreck expenses can be disposed of shortly. It is clear that the board acted with care and prudence in taking the steps they did to prevent the stranded *Countess* from being a danger to navigation. The objection that was pressed on us was the technical objection that the judgment of the assistant surveyor, that the vessel was a danger to navigation, was formed when the vessel was afloat and was at that time neither a wreck nor stranded. I reserve consideration of whether a vessel, holed by collision, in imminent peril of sinking, and out of control, is a wreck. It is plain from the evidence that the assistant surveyor of the board formed his judgment on the basis that the vessel, although then afloat, must, under the circumstances, inevitably be beached.

It seems to me impossible to give effect to the contention of the plaintiffs in this matter without putting such a narrow and unreasonable construction on the statute as would seriously limit its useful operation. I think, therefore, that the decree of the president should be amended in respect of the transfer of the sum in court from the detinue action to the limitation suit, but that, in substance, the appeal fails, and that the cross-appeal should be dismissed. The order of the court in the appeal in the detinue suit is that the decree of the president be varied by omitting the order for transfer of the sum of 4451*l.* 13*s.* 1*d.*, to the credit of the limitation suit, and by adding an order that such sum remain in court until further order, with liberty to either party to apply as to payment out, and subject to such variation, that the appeal of the board and the cross-appeal of the owners of the *Countess* be dismissed with costs.

In the appeal in the limitation suit the order of the court is that the decree of the president be varied by omitting the words from "upon the transfer to the credit of this action" down to "making together the sum of 4468*l.* 4*s.* 9*d.*," and substituting "upon payment into court of the sum of 4468*l.* 4*s.* 9*d.*," and that, subject to such variation, the appeal of the board be dismissed with costs.

Younger, L.J.—There have been in this litigation very serious issues of detinue raised between the owners of the *Countess* on the one hand—I shall in this judgment refer to them as the "owners"—and the Mersey Dock and Harbour Board on the other. These issues were decided against the owners by the learned president. They were made the subject of a cross-appeal before us. I agree with my

Lord and the Lord Justice that they were rightly decided against the owners, and that their cross-appeal with reference to them fails. I dispose of those issues at the very outset, although they were only the subject of a cross-appeal, in order at once to emphasise the fact that these have been throughout the only issues in this litigation in which the owners had any primary interest.

The issue which remains for consideration is one not merely of difficulty, but, to the board, of permanent interest and of great importance, and to the barge-owners of vital consequence ; but it is for the owners, as it has turned out, of little moment in any view of the case. It is, I think, now agreed that their maximum liability in respect of all claims arising from the negligence of those on board the *Countess* on the 5th June 1920, has been effectually limited to the sum of 8*l.* for each ton of her registered tonnage. That sum the owners have found, and as directed by the Court of Appeal, they have paid it into court, and they have had their vessel released. No one contends that they can be required to make any further final payment on that account ; while, as the admitted claims against the payment already made far exceed the whole fund, they have no further concern in its proper distribution.

That proper distribution is the remaining important issue to which I have referred, and on that it is the barge-owners who are in acute controversy with the board. These barge-owners, in consequence of the negligence of those on board the *Countess* on the day in question, have sustained damage amounting in the aggregate to a sum far exceeding any sustained by the board on the same occasion, and for the satisfaction of their claims they can only now look to their proper share of the compensation fund. But the board claim the whole of that fund for themselves. If, therefore, the contentions of the board be sustained, the barge-owners will, in respect of their loss, receive no compensation at all, and the whole of the only fund to which recourse for the purpose can be had will go to or be retained by the board. And yet by a series of fatalities in procedure, amounting almost to a record of invincible mischance, this issue of such vital concern to the barge-owners has throughout been staged and contested as if they had no concern in its result. It has been raised and fought in the detinue action between the owners and the board, an action to which the barge-owners were in no sense either parties or privies. It was to the credit of that action that the compensation fund stood. It was so paid into court by an order made without notice to the barge-owners. The limitation suit, in which an appearance on behalf of the barge-owners was entered, and in which alone, any claim is competent to them, was uncontested by the board either by pleadings or, so far as I can find, at the trail. The barge-owners were not made respondents to the notice of appeal of the board from the learned president's judgment in the detinue action in which the ultimate destination of the limitation fund was dealt with, and on which appeal the board claim payment of it to themselves. The barge-owners are not even made parties to the notice of appeal of the board from the order of the president in a limitation suit. How, in short, it has come about that all through the real position of the barge-owners with reference to this fund has been so completely lost sight of, I cannot even conjecture. It is true that, as a matter of courtesy I presume, their solicitors were informed by the solicitor of the board of the pendency of the appeals as raising, I suppose, a discussion sufficiently intimate to justify a watching, if not an active, interest on their part ; and it was doubtless in consequence of that informal intimation that counsel attended the court on the barge-owners' behalf, and, after the board and the owners had by their counsel contested the questions at issue, did they, at the invitation of my Lord, present to us the views of the barge-owners. Their counsel's presence, and the assistance he rendered upon the appeals, probably removes any technical difficulty in the way of our now dealing with a question in which throughout the barge-owners should have been protagonists. Nevertheless, I myself doubt very much whether the failure throughout the proceedings properly to recognise their position with reference to this part of the case, has not coloured all through, and to their prejudice, the course of the discussions. It has certainly, I think, tended to concentrate attention on the question whether the Merchant Shipping Act 1900, could be construed so as to deprive the board of their statutory rights against the owners under the Mersey Dock Acts Consolidation Act 1858, s. 94, and has diverted consideration from the same question framed as the barge-owners would frame it, namely, whether that same sect. 94 remains effective to enable the board, when included for the first time by the Merchant Shipping Act 1900, as claimants upon a limited compensation fund, to sweep away for themselves, as in this case, not a rateable proportion of the fund, but the whole of it, leaving for the barge-owners, the remaining claimants, nothing at all. It may well seem to some minds that this consequence of the Act of 1900 is as startling as the other would be. In any case, the true effect of the statute on the position of the board under their own Act cannot, as I think, be ascertained with any confidence unless the balance between these opposing considerations is throughout strictly maintained. This I shall attempt to do in what follows.

The question to be considered as the president has phrased it, is one as to the effect upon the powers of the board, under sect. 94 of their Act of 1858, of the statutory provisions for limitation of liability embodied in the Merchant Shipping Act 1894, ss. 503 and 504, as extended by the Merchant Shipping Act 1900, ss. 1 and 3, by which last-mentioned statute liability for

such damage as was here done to the docks of the board is brought within liabilities capable of limitation under sects. 503 and 504 of the earlier Act. Is the board's right of detention, given them by sect. 94 of their earlier Act of 1858, taken away by these sections of the Merchant Shipping Acts in a case like the present? Does the lien upon the vessel created by sect. 94 survive, notwithstanding the fact that the owners have obtained a declaration of limitation of liability? If it does, is it a lien for the whole amount of their damage, or for the whole of the limitation fund if that be less than their damage, or only for their due proportion of that fund rateably with the other claimants upon it? It will be convenient to deal with the sections in their inverse order. The Merchant Shipping Act 1900, s. 1, while clearly bringing the liability of the owners of the damage done to the dock gates of the board, within the class of liabilities capable of limitation, does not specifically refer to dock or canal owners or harbour authorities as being thereby affected. By sect. 2, however, these dock or canal owners and harbour authorities are expressly mentioned and are in terms enabled to limit their own liability for damage caused to vessels by the negligence of their servants, and it cannot be doubted, I think, that the two sections, so far as these owners and authorities are concerned, are complimentary, the one to the other, a circumstance lending point to sect. 3 which, referring to the limitation of liability "under this Act," that is, under both sects. 1 and 2, enacts that such limitation of liability "shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act." These last words, of course, directly and immediately apply to the board so as to reduce any statutory liability of the board, as limited by sect. 2, to the amount thereby defined. On the other hand, their presence makes it less difficult to conclude that the provisions of such Acts are not to stand in the way, so far as they give rights in respect of compensation against the owners out of accord with the position of the board as claimants against the limitation fund to which sect. 1, in a proper case, relegates them.

I come now to sects. 503 and 504 of the Merchant Shipping Act 1894. Certain characteristic features of these sections have from time to time been observed upon in judgments dealing either with them or with similar sections in earlier statutes which these have now superseded. It may not be amiss to refer to some of these observations with reference to the sections. Lord Sumner, in *Canadian Pacific Railway* v. *Storstad* (*owners*), said (14 Asp. Mar. Law Cas. 530; 122 L. T. Rep., at p. 442; (1920) A. C. at p. 401): "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." Next, it is to be observed that the claimants against the fund are by sect. 504 to rank rateably, and I have not myself found any case in which this has not brought about a ranking *pari passu*. The language of that section is a description of the procedure adopted by the Court of Chancery in the administration and division of a deficient fund amongst claimants, ascertained by that court in accordance with its invariable procedure. It was the Court of Chancery by which, in England, the powers of sect. 514 of the Act of 1854, were to be exercised, and its former procedure, now open to adoption by any division of the High Court, is the procedure still pointed at in the present section. The earlier cases in the section are cases in the Court of Chancery, and one of the earliest in which this question of priority arose was *Leycester* v. *Logan* (1857, 3 K. & J. 446), before Lord Hatherley, then Sir Page Wood, V.-C. In that case the defendant Logan, by proceedings in Admiralty, had obtained the advantage of sentence against the ship doing the damage, he thereby obtaining, as the Vice-Chancellor put it, security for his costs with which the limitation sections did not enable the court to deal. But although he had also thereby obtained security for his whole claim, Lord Hatherley held that the sections did enable the court to deal with that security, and he held that the defendant's security was, by virtue of these sections and the limitation decree, limited to his rateable share of the amount to be paid, and he gave directions for the transfer into court of the proceeds of sale of the ship, there to be dealt with under the sections. Here we have an instance of a claimant with a security being deprived of any priority over other claimants against the fund "created," as Lord Sumner says, "by the operation of the sections themselves."

Speaking for myself, I cannot doubt that the language of sect. 504 points to rateable *pari passu* distribution amongst the claimants. This must, I think, be the normal case. *Leycester* v. *Logan* (3 K. & J. 446) shows that the principle obtains even as against a claimant with a pre-existing security. The Scotch case of *Rankine* v. *Raschen* (4 R. 725), where the purchaser of a claim was subrogated against the fund to the rights of the original claimant, irrespective of the sum he had paid for those rights, establishes the same, and not, as seems to have been contended, the opposite principle. And I find the same principle carried out by the Court of Appeal in *Jenkins* v. *Great Central Railway*, reported apparently only in the *Shipping Gazette*, and cited in Halsbury's Laws of England, vol. 26, p. 614. I specially refer to that case because the procedure adopted there might not be inappropriate here

on one view of the board's position. In that case a cargo-owner had succeeded in the court of first instance in a claim against a shipowner for loss of cargo consequent on collision. The whole amount due under the judgment was paid into court as a condition of stay pending appeal. Notice of appeal was given, but subsequently the shipowner, having, after the judgment, obtained a limitation decree and paid into court the full amount for which he was liable under the Merchant Shipping Acts, asked leave to withdraw his appeal, claimed to have the money he had paid in returned to him, and sought an order that the cargo-owner should be left to satisfy his claim out of the limitation fund. The Court of Appeal is stated to have held that the shipowner was entitled to the payment out and to the order he sought.

But the matter may be stated more broadly. It seems to me that the idea of priorities amongst the claimants against a limitation fund is inconsistent with the principle underlying sect. 504 itself. That is a section designed for the protection of the shipowner, who is himself free from personal fault. On the terms that in the limitation suit he puts up or provides a fund equal to the prescribed limit of his statutory liability, the shipowner and his property are, as a result of the court's decree, relieved of all claims in respect of the act of negligent navigation in question competent to anyone who can be reached by the court's order. All such claimants, if they would receive their share of the fund, must prove their claim in the suit. Independent actions against the shipowner by any claimants are stayed. Any security for his claim, obtained by a claimant as a result of any such action, ceases to be either valuable or appropriate, because security for every claimant to the full extent of the shipowner's limited liability is now provided in the limitation suit to which and to the fund there all claimants must now resort for satisfaction. They may resort to no other fund. If they were permitted to do so, the shipowner would not enjoy the protection aimed at and provided for him by the section. And as against that fund the only condition of ranking is that the claimant shall establish his claim. Thereupon he becomes entitled to his rateable share as soon as all other claims upon the fund have been ascertained. A security upon any other property of the shipowner can be of no advantage to a claimant against the fund, and priority of ranking against the fund itself is not contemplated by the section. Equality here is equity.

Remembering that it is to such a fund so administered, that the board are now by the Merchant Shipping Act 1900 relegated in respect of their present claim against the owners, we may proceed to consider the effect of that situation upon the rights of the board under sect. 94 of their Act of 1858, passed, of course, in view of no such state of things. How far are these rights necessarily modified by the fact that the claims of the board against a shipowner for injury done by his ship to their property are now a subject of limitation under the Merchant Shipping Acts? I apprehend that their rights under the section must, for the future, be exercised with full reference to that fact, and in due subordination to the privileges of the owner under these Acts, as so extended.

That being, as I conceive, the general principle to be applied, I will now proceed to consider the application of it more in detail. And first, for the reason that the sections in question of the Merchant Shipping Act 1894, have no effect unless the shipowner chooses to bring them into operation, it follows that, except in that instance, and it will, I imagine, be of infrequent occurrence in cases of damage done by a vessel to dock property, sect. 94 of the Act of 1858 remains in full force. This again involves that the section remains in full force until these sections have effect; and in my judgment, that moment certainly does not arrive until a decree of limitation has been made. Until that moment it cannot be known whether the decree will be finally asked for, or whether, if asked for, the shipowner will be entitled to it, or whether it will be made.

It is, however, I understand now conceded by the board that when such a decree is made, the deposit capable of being retained by them can never exceed the amount of the limitation fund. They concede that the provision of sect. 503 of the Merchant Shipping Act 1894, that the owners shall not be liable beyond that amount, must at least to that extent have full effect notwithstanding the provisions of sect. 94 of their Act of 1858, which fixes the deposit as being that of a sum equal in amount to the claim or demand made by the board for the estimated amount of the damage done by the vessel to their property. The board do not therefore now contend—they could not, I think, do so with success—that on a decree for limitation being made they retain any lien for the whole of their damage. The sole question, therefore, now is whether they have a lien to the extent of the whole of the limitation fund, if less than their damage, or only for their due proportion of that fund rateably with the other claimants upon it; and after decree made and fund provided in the limitation suit, whether they have any lien at all. In my opinion they certainly have not more than a lien for their due proportion. The operation of the sections of the Merchant Shipping Act 1894, which is effective to reduce the deposit, must be effective also, as I think, to reduce their share of it. I can see no true distinction between the position of the board and that of the defendant in *Leycester* v. *Logan* (*sup.*), or of other claimants with a pre-existing maritime lien. I am led to this conclusion on a consideration of the general principles underlying sect. 504, to which I have already referred. In my opinion these are quite inconsistent with the retention of a lien for any

larger amount. It is said, I know, that this conclusion involves a serious interference with the board's statutory rights never, at least in terms, repealed. I feel greatly the force of that view held as it is by my Lord, but I cannot myself resist the conclusion that an alternative, which would preserve intact and paramount the board's lien over the deposit, even extinguishing, as in the present case, all interest in the fund of all other claimants, involves an interference with what I conceive to be the position of those claimants under the Merchant Shipping Acts, far more drastic and far-reaching. Indeed, if I followed my own view alone, I should in this case be ready to go as far as the learned president has gone, and would direct now the transfer of the limitation fund from the credit of the detinue action to that of the limitation action, on the ground that, so soon as the fund is constituted in the limitation action after decree made, all right on the part of the board to retain their deposit is at an end. On the view I am disposed to take the board's position, *Jenkins* v. *Great Central Railway* (*sup.*) would justify an application by the owners to have the deposit paid out to them so soon as an equivalent amount had been paid to the credit of the limitation action in accordance with their own submission to make it, and to require that payment to be made in the present case would be mere circuity of procedure. But I recognise that this course, convenient though it may be, and not without justification as I must think it is, does disregard the provisions of sect. 94 of the Act of 1858, further than is strictly necessary for the working of the limitation procedure, even although it deprives the board of no substantial benefit.

I acquiesce, therefore, although not without some reluctance, in the course proposed by the Lord Justice, who is of opinion that the board cannot be required to part with their deposit until they have actually received in the limitation action their proportionate part of the fund in satisfaction of their claim.

Lord Sterndale, M.R., said that on the judgment of the majority of the court, he agreed with the variations suggested in the decrees by Atkin, L.J.

Appeals dismissed.

Solicitors for the plaintiffs, *Charles Lightbound* and *Co.*

Solicitor for Mersey Docks and Harbour Board, *W. C. Thorne.*

Solicitors for the owners of damaged craft, *Thomas Cooper* and *Co.*, for *Hill, Dickenson*, and *Co.*, Liverpool.

Thursday, April 6, 1922.

(Before Lord Sterndale, M.R., Warrington and Younger, L.JJ.)

Samuel Sanday and Co. *v.* Keighley, Maxted, and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Construction—Vessel chartered by sellers—"Expected ready to load late September"—Grounds for expectation—Absence of reasonable grounds—Delay—Frustration of contract.

Sellers, who had chartered a steamship which had left Norfolk, Virginia, for Rio de Janeiro with coal, and was to go on to the river Plate in ballast, contracted on the 20th Sept. 1920 to sell to K. M. and Co. 1000 tons of clipped La Plata oats for shipment from the river Plate. The contract contained the following clause: "Shipment in good condition per first-class steamer I., expected ready to load late September." The steamer experienced engine trouble, and had not arrived at Rio at the date of the contract. She left Rio on the 29th Oct., and the sellers stated that she would arrive in the river Plate about the 12th Nov. The buyers claimed that the delay had frustrated the contract. The matter was referred to arbitration, and the arbitrators found that the statement "expected ready to load late September" was not justified, and that the delay was so great as to frustrate the contract.

Held, that the finding of the arbitrators must be taken to mean that the sellers could not have had an honest expectation founded on reasonable grounds that the vessel would be ready to load by late September. The arbitrators were justified in that finding, and their award must be upheld.

Decision of McCardie, J. (38 *Times L. Rep.* 273) *affirmed.*

Appeal from a decision of McCardie, J.

On the 20th Sept. 1920 Messrs. Sanday and Co. contracted to sell to Messrs. Keighley, Maxted, and Co. 1000 tons of clipped La Plata oats for shipment from the river Plate. The contract contained a clause as follows: "Shipment in good condition per first-class steamer *Indianapolis*, expected ready to load late September." The sellers, Sanday and Co., had chartered the *Indianapolis*, and she had left Norfolk, Virginia, for Rio de Janeiro with a cargo of coal on the 10th Aug., to go on to the river Plate in ballast. She experienced engine trouble, and at the date of the contract had not arrived at Rio. She left Rio on the 29th Oct., and on the 2nd Nov. the sellers informed the buyers that she was expected to arrive in the river Plate about the 12th Nov. The buyers replied that as the delay had been so great, the contract could not be performed according to the words, "expected ready to load late September."

The matter was referred to the Appeal Committee of the London Corn Trade Associa-

(*a*) Reported by Fitzroy Cowper, Esq., Barrister-at-Law.

tion, who found as a fact that at the date of the contract the steamer was already overdue at Rio, and that there was no prospect of her being ready to load in the river Plate in late September; that the statement, "expected ready to load late September," was not justified, and that the delay was in fact so great as to frustrate the contract.

McCardie, J. affirmed the award. He was of opinion that the statement amounted to a condition, and that though there was a certain latitude, yet if that latitude were exceeded, the condition became operative, and the contract ceased to bind the buyers. He found that at the date of the contract the position of the vessel was such that the sellers could not reasonably have expected her to be ready to load in the river Plate at the time indicated.

The sellers appealed.

R. A. Wright, K.C., *Clement Davies*, and *Wilfred Lewis* for the appellants.

Le Quesne for the respondents.

Lord Sterndale, M.R.—It is not open to this court to interfere with the findings of the arbitrators on what were in effect findings of fact unless the arbitrators have adopted a wrong view, and have misdirected themselves on the findings. The real question is as to what is the meaning of the words "expected ready to load late September." Counsel for the respondents has suggested three possible meanings: (1) That the words have an objective meaning—that the vessel must in fact be at the time in such a position that any ordinary man who knew her position would expect her to be able to load at the end of September; (2) That "expected" meant expected by the sellers, and not necessarily by the shipping world generally; (3) That the sellers honestly, though without good grounds, expected that the vessel would be in the river Plate by the end of September. It is difficult to see how the third suggested meaning differs from the second, because if a man could honestly expect the vessel to be there, it could hardly be without some knowledge on which to base that expectation. The first meaning does not seem to be the correct one, for any ordinary man would certainly read the words as meaning the expectation of the party putting in the clause. In my view, the second suggested meaning is the right one, that is, that in view of the facts known to the seller at the time, the expectation was one which he could have held honestly and on reasonable grounds. That is very largely a question of degree. If the voyage had been one of, perhaps, a month, and the seller had no news of the chartered ship for two or three days after the time of her expected arrival, it would be difficult to say that he had no reasonable grounds for expecting that she would arrive at the proper time. On the other hand, if she were a very long time overdue, he would not be justified in the expectation, because it would have been brought home to him that something abnormal had happened. It, therefore, becomes really a question of fact, and the arbitrators have found that on the 20th Sept. the sellers had no grounds for expecting that the vessel could load by the date specified. The meaning of that finding seems to me to be that the sellers could not have an honest expectation founded on reasonable grounds. It is not enough that the expectation was honest. It must be founded upon some reasonable grounds in order to justify its being held. On the whole, it seems to me that the arbitrators were justified in their findings, and they were findings with which this Court cannot interfere.

Warrington, L.J.—It has been contended for the buyers that, upon the true construction of the contract, the phrase "expected ready to load" must have an objective meaning, that is to say, that the vessel could not be said to be "expected ready to load" by a given date unless, according to the actual facts of her position, whether known to the parties or not, she could be said to be in such a position that the expectation would probably be realised. That does not appear to be the true construction. The phrase resulted from the desire to give the buyers some idea of the period of the year when it was likely that they would receive delivery, and it was a case where the sellers took upon themselves to say what might reasonably be expected; and, in my view, words so inserted mean that it was in the mind of the sellers that the expectation existed. Assuming that to be so, what is the kind of expectation that the sellers must properly have? In my opinion it must, first of all, be an honest expectation, and, secondly, it must be based upon reasonably sufficient grounds. The sellers must expect, and must have reasonable grounds for expecting, that their representation will be realised. The arbitrators have based their decision upon that view of the contract, for they have found that the vessel had no chance of loading at the date specified, and that the sellers could not have expected her to be ready to load at that date. The arbitrators have not proceeded upon any wrong basis of law, and they have made findings of fact with which this court cannot interfere. The appeal must, therefore, be dismissed.

Younger, L.J. concurred.

Appeal dismissed.

Solicitors for the appellants, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the respondents, *Botterell* and *Roche*, for *Hearfields* and *Lambert*, Hull.

April 5 and 7, 1922.

(Before Lord STERNDALE, M.R., WARRINGTON and YOUNGER, L.JJ.)

AMBATIELOS *v.* ANTON JURGENS MARGARINE WORKS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

*Charter-party—Exceptions clause—Construction—General followed by particular words—"Et cetera"—*Ejusdem generis *rule.*

Where general words in an exceptions clause in a charter-party are followed by particular words, the ejusdem generis *rule should not be applied.*

A charter-party contained the following exceptions clause: "Should the vessel be detained by causes over which the charterers have no control, viz., ice, hurricanes, blockade, clearing of the steamer after the last cargo has been taken over, &c., no demurrage is to be charged and lay-days not to count." The chartered vessel was detained for a number of days beyond the lay-days by a strike of dock labourers at the port of discharge. Upon a claim for demurrage,

Held, that the governing words of the clause were "causes over which the charterers have no control," the particular causes mentioned being merely instances to which, as they followed the general words, the ejusdem generis *rule ought not to be applied, and that the words "et cetera" only meant "and so on," and had not the effect of getting rid of the preceding general words.*

Decision of McCardie, J. reversed.

Herman *v.* Morris (35 *Times L. Rep.* 574) *not followed.*

APPEAL by the charterers from a decision of McCardie, J. upon a case stated by an arbitrator.

The following statement of the facts is substantially taken from the judgment of the learned judge. The point arises under two charter-parties, one of a ship called the *Ambatielos*, the other of the *Penagis*. Both vessels were chartered from ports in the East to Amsterdam or Rotterdam. The charter of the first vessel provided that the cargo should be loaded and discharged in fourteen weather-working days, reversible, and in the case of the second in twenty weather-working days, reversible. Both charters contained the following clause: "Time at loading and (or) discharging port to count twenty-four hours after steamer's arrival at or off the port, whether in berth or not, or in harbour, or roads, or as near the port as the authorities will allow, notwithstanding any custom of the port or law of the country, or anything contrary in this charter. Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, &c., no demurrage is to be charged and lay-days not to count." The charter-party of the *Ambatielos* gave twenty days' demurrage at 500*l.* a day, and that of the *Penagis* provided that she should be allowed twenty days' demurrage at 350*l.* a day. The *Ambatielos* arrived at Rotterdam early in 1920, and was there detained for forty and a half days beyond the lay-days allowed by the charter-party. The *Penagis* also arrived at Rotterdam and was there detained for forty-six days beyond the lay-days. The claims for demurrage were referred to Mr. Raeburn, K.C., who in his award said: "I find as a fact that the sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from the 14th Feb. to the 28th April 1920. I further find as a fact that the said strike was a cause over which the charterers had no control and that but for the said strike the said steamships could and would have been discharged within their lay-days." The charterers contended that they were protected by the clause above referred to, but the arbitrator found against them and awarded that they should pay the owners 43,450*l.* demurrage and damages for detention.

McCardie, J., upheld the award of the umpire.

The charterers appealed.

Sir *John Simon*, K.C., and *Jowitt*, K.C., for the appellants.

Dunlop, K.C., and *S. L. Porter* for the respondents.

The following cases were referred to:

Aktieselskabet Frank v. *Namaqua Copper Company, ante*, p. 20; 123 L. T. Rep. 523;

Alexander and Sons v. *Aktieselskabet Dampskebet Hansa*, 14 Asp. Mar. Law Cas. 493; 122 L. T. Rep. 1; (1920) A. C. 88;

Re Allison and Richards, 20 Times L. Rep. 584;

Anderson v. *Anderson*, 72 L. T. Rep. 313; (1895) 1 Q. B. 749;

Cambridge v. *Rous*, 8 Ves. 12;

Chapman v. *Chapman*, 4 Ch. Div. 800;

Dakin's case, 1670, 2 Saunders, 290; 2 Wms. Saunders, 678;

Dean v. *Gibson*, 36 L. J. Ch. 657; L. Rep. 3 Eq. 713;

Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law Cas. 24; 92 L.T. Rep., 274; (1905) A. C. 93;

Gover v. *Davis*, 30 L. J. Ch. 505; 29 Beav. 222;

Herman v. *Morris*, 35 Times L. Rep. 574;

Knutsford Steamship Company v. *Tillmanns and Co.*, 11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) A. C. 406;

Magnhild (*owners*) v. *M'Intyre Brothers and Co.*, *ante*, p. 230; 124 L. T. Rep. 160; (1920) 3 K. B. 321; 124 L. T. Rep. 771; (1921) 2 K. B. 97;

Nelson Line (*Liverpool*) *Limited* v. *Nelson and Sons Limited*, 10 Asp. Mar. Law Cas. 581; 96 L. T. Rep. 402; (1907) 1 K. B. 769;

Parker v. *Marchant*, 11 L. J. Ch. 223; 1 Y. & C. 290;

(*a*) Reported by FITZROY COWPER, Esq., Barrister at-Law.

Price v. *Griffith*, 1 De G. M. & G. 80 ;
Price and Co. v. *Union Lighterage Company*, 9 Asp. Mar. Law Cas. 398 ; 89 L. T. Rep. 731 ; (1904) 1 K. B. 412 ;
Re Richardson and Samuel and Co., 8 Asp. Mar. Law Cas. 303 ; 77 L. T. Rep. 479 ; (1898) 1 Q. B. 261 ;
Rosin and Turpentine Import Company v. *Jacobs and Sons*, 11 Asp. Mar. Law Cas. 231, 260, 363 ; 101 L. T. Rep. 56 ; affirmed in H. L., 102 L. T. Rep. 81 ;
Stukely v. *Butler*, Hob. 168 ;
Thames and Mersey Marine Insurance Company v. *Hamilton Fraser and Co.*, 6 Asp. Mar. Law Cas. 200 ; 57 L. T. Rep. 695 ; 12 App. Cas. 484.

Cur. adv. vult.

Lord STERNDALE, M.R.—In this case a very large sum of money depends upon an unintelligible clause in a charter-party. When I say unintelligible, I do not think it would be very difficult to interpret it, if we were in a natural atmosphere and were at liberty to say what we thought it meant, but in matters of this kind we are not. We are in an artificial atmosphere composed of *ejusdem generis* and of vagueness and want of precision in the interpretation of exceptions. [His Lordship stated the facts and referred to the exceptions clause in the charter-party, and continued :] The steamer was delayed by a strike which prevented her from being discharged, and the question is whether the strike is covered by that clause which I have read. Now if I were reading that clause apart from other decisions I do not think I should have any doubt whatever as to what it meant, and that when the parties started by saying : " Should the vessel be detained by causes over which the charterers have no control," they meant by that to define the class of cases which would excuse the charterer, and that the other words which follow did not deprive them of the protection given by those words. But the learned judge has held, I think, two things. He has held that the large exception " by causes over which the charterers have no control " is controlled by the *ejusdem generis* doctrine which he applies to the following words : " videlicet, quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc." as constituting a genus. They strike one off-hand as being very dissimilar things, but the genus which he says comprehends them all is, I think, this, that they are all the effect of a regulated, and ordered action of a constituted authority, either human or divine : —quarantine, the authorities of the port ; ice and hurricanes, the forces of nature ; blockade, the action of an authority ; and clearing of the steamer, the action of the customs authorities. I confess that it seems very difficult indeed to find any genus which will include all these matters.

Then I think he has held that, that being so, the " etc." which follows them must mean " and other like causes." I am sorry to say I do not agree with either of those views. Then he has also, I think, held that in any event the clause is so vague that it does not protect the charterer, because it does not come within the very well-established doctrine, that if a man wishes to bring himself within an exception, he must show clearly that the exception applies to him.

The first difficulty which I feel in applying the doctrine of *ejusdem generis* to this case is that in this case, unlike any other which has been cited to us, and from answers given by counsel during the argument, I think, unlike any case which is known to any of them, the specific words follow the general words and do not precede them. In all the *ejusdem generis* cases, so far as I know, the clause consists of the enumeration of a number of particular things, and then a clause following— " and all other causes " or " all causes beyond the charterer's control," and in many of those cases it has been held that those general words, following a line of particular words, are to be read as being of the same kind as the particular words. In some cases it has been held that they must not be so read, and the difficulty of reconciling the decisions arises from the fact that the difference in the wording of the clauses where the doctrine has been applied, and where it has not, are so minute that it is very difficult indeed to trace a principle amongst them, but I have the fact that what was here intended by the parties to be the class or genus of the events which protect the charterers comes first, which makes a great deal of difference. I do not say that you cannot apply the *ejusdem generis* rule in any case where the general words come first. There is no case, however, that I know of, in which it has been so applied, and it is obviously very difficult to apply. Therefore, I think that in this case you start with this—that the primary thing which the parties were contemplating was " causes over which the charterers have no control." Is that cut down, or is that in fact done away with by the words which follow ? I doubt very much whether the parties considered the exact meaning of " videlicet " or the exact meaning of " etc." when they put those words in. I am not at all sure that they did not think that " videlicet " meant the same thing as *exempli gratia*. They have put it in, and we must interpret it as best we can. I do not think we get much assistance, if any, from considering what the meaning of the words in question might be in classical Latin. I do not know that charter-parties of this description existed in the days of classical Latin. I have never seen one, nor am I sure that we get very great help from the meaning given in dictionaries such as Murray's Dictionary, which was cited. They are used loosely—I will not say commercially, as meaning the same thing—but they are used loosely by commercial men without considering very accurately what their meaning is.

The argument in support of the learned judge's judgment was put before us, I think,

in this way, in stages. It was said that if there were no exceptions the charterers would be liable. If the only exception were causes beyond the charterers' control then the charterers would be protected. If the words following "causes over which the charterers have no control," that is "quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over" stood without the "etc." that would cut down the general words so as to take away the protection, or prevent the charterers from being protected. The last stage is that the word "etc." is too vague to do away with the cutting-down effect, if I may call it so, of these particular words. It was put before us, by the junior counsel for the respondents, very clearly and ably, but I do not think myself that that is quite the right way to look at the matter. I do not think that you can arrive at the interpretation of a clause like this by cutting it up into pieces, and considering each piece by itself, and the effect which each piece might have upon the other pieces, if the others stood by themselves at first, and then were joined together. I think we must look at the whole clause as it stands, and looking at it in that way, in my opinion, the governing words are "causes over which the charterers have no control." Then there follows, "namely, quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc." and "etc." in my opinion, simply means "and so on." I think that was suggested by one member of the court during the argument. Although they are introduced by "videlicet" and not by *exempli gratia*, I think all that is meant to be done, and all that is done by those words is to set out a number of instances finishing up with "etc." to include others that are not named—instances which come under the words with which they start—"causes over which the charterers have no control." If there be any question of genus here, I think that is the genus, but I do not think it is a question of genus. Those are the governing words, and the others are, in my opinion, however incorrectly the Latin words may have been used, only instances or examples of the matters that come under that general clause.

Then the last point that was taken was that in any case this was so ambiguous that the charterers could not say they were protected by it, because a charterer must protect himself by unambiguous language. That is a well-established doctrine, but it is so difficult to know what language is unambiguous.

Perhaps the difficulty is exemplified more clearly than anywhere else in *Rosin and Turpentine Import Company* v. *Jacobs and Sons* (11 Asp. Mar. Law Cas. 231, 260, 363; 101 L. T. Rep. 56; 102 L. T. Rep. 81). In that case the learned judge in the court of first instance thought the matter was so ambiguous that the exception could not apply. One learned judge in the Court of Appeal agreed with him, and the two others disagreed, and thought it was quite plain. It then went to the House of Lords where one noble and learned Lord thought it was too ambiguous for the exception to apply, and the four other noble learned Lords thought it was quite plain, so that it is very difficult indeed to say what is ambiguous and what is not, and I do not think any test can be applied, except that of the person who is dealing with it. If it does not seem ambiguous to him, I am afraid that the only thing he can say is—"It may seem ambiguous to others, but it does not to me." That is the opinion I have formed upon this clause. I think that, properly looked at, the governing idea throughout is this: the charterer is to be protected from detention from causes which are beyond his control, and that governing idea is not got rid of, for the reasons I have given, by the subsequent words. Therefore I think that the appeal should be allowed, and it takes the form of answering a question in the learned arbitrator's award in a sense different from that in which he answers it. The appellants will have the costs of the appeal.

Warrington, L.J.—I am of the same opinion. In the present case the two ships were detained by causes over which the charterers had no control. Under the charter-party in that event the charterers are excused from payment of demurrage, and the question raised is whether the words of the charter-party by which they claim exemption are sufficient to give them that exemption. There is no question that there has been applied to charter-parties and bills of lading an artificial rule of construction which, in Scrutton, L.J.'s book (Scrutton on Charter-parties and Bills of Lading (9th edit., p. 221), is stated in these terms: "Where specific words are followed and amplified by the addition of general words, the latter are to be confined in their application to things of the same kind as the preceding specific words," and, further than that, I think it has been established that where a clause in that form is found in such a document as we have to construe, the court ought not to depart from that which, under the artificial rule, is the accepted meaning of such a clause without clear and unambiguous words enabling them to give another meaning to it.

For the last principle I refer to the case of *Herman* v. *Morris* (35 Times L. Rep. 574) in this court—I shall have something to say upon that case presently. In my opinion however, such a construction gives an unnatural meaning to the words used. Ask any intelligent person, familiar with the English language, what is the meaning of such a clause as this which I am going to read: "except strikes, lock-outs, accidents to railway, and also other causes beyond the charterers' control." I think there is no doubt that the intelligent lay person, familiar with the English language, would say that that excepts all causes not within the charterers' control, but the artificial rule says: No, it does not. It only excepts such causes as are *ejusdem generis* with those which are expressly specified.

There is also another principle which has been expressed by Lord Esher, M.R., in *Anderson* v. *Anderson* (64 L. J. Q. B., at p. 459; (1895) 1 Q. B., at p. 753), which has sometimes been applied to such clauses as those to which I have just referred, and that is this. After citing a passage from a judgment of Knight Bruce, V.-C., in *Parker* v. *Marchant* (11 L. J. Ch. 223; 1 Y. & C. 290), he goes on to say this: "Nothing can well be plainer than that to show that, *primâ facie*, general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before."

Now I will try to apply those principles to the present case. [His Lordship read the exception clause and said:] That clause is not in the usual form. The usual form is an exception of specific cases, followed by general words. It is admitted that no similar case can be found in any of the reports. I think that we are therefore freed from the considerations which deter the court from departing from the well-known meaning familiar to the framers of such documents. That it was that consideration which influenced the Court of Appeal in *Herman* v. *Morris* (*sup.*), to which I have already referred, is perfectly plain. I need, I think, only refer to one passage in the judgment of Bankes, L.J., but there are similar passages in the judgments of both the other Lords Justices. The passage in the judgment of Bankes, L.J., is this: "His Lordship thought that where the phrase used in the present case (without the 'etc.') had, as was the fact, obtained a well-known meaning, it was necessary for the parties if they wished to depart from that meaning to indicate clearly the cause by reason of which the defendant was to escape liability," and then he goes on to say that the word "etc." was not, in that case, sufficient so to specify that cause.

Now in the present clause the position of the general words seems to me to be most significant. It indicates that the dominant idea was to excuse the charterers from expense for detention occasioned by any cause beyond his control. That is the first thing that strikes one at once in reading this clause. Those general words are followed by specific examples of such causes introduced by a "videlicet." It may well be, and I am not concerned to dispute, though I do not affirm, that if there had been nothing more than the specific examples, without the word "etc." the passage introduced by the "videlicet" might have had a limiting effect on the preceding words, but those words are followed by the symbol for "et cetera." The expression "et cetera," whatever may be its dictionary meaning, or whatever may be its meaning in classical Latin, unquestionably enlarges the list of causes to be included in the exception beyond the specified examples. But then it is said: True it may enlarge that list of specific causes, but it only enlarges it by bringing in causes falling under the same category, or the same genus as those specified. Supposing that it is so, what is the category to which all those causes belong? I confess that I can find none except that which would bring in the cause of detention in the present case, namely, a cause of detention resulting from the operation of some force external to the charterer, and over which he had no control. An attempt was made to bring the examples within a narrower category. With all respect to the learned counsel who argued the case extremely ably, I cannot myself see that these words can be brought under such narrower category. It is said they can be brought within this description, that they are all causes either arising from the operations of nature, or arising from the operation of constituted authorities; but what can be more different than a cause arising from regulations as to quarantine, which are imposed by the harbour authorities at the place where the ship is supposed to be, and detention arising from blockade, which is imposed by the military force of some hostile power over that port. Really, the only common feature of these things that are specified is the operation of some external force, either of nature or of man. A strike is as much the exercise of force external to the charterers as is, for example, quarantine.

In my opinion, therefore, the attempt to restrict the effect of the word "etc." as enlarging the specific examples fails, and I read the whole clause as meaning that if the ship is detained by causes over which the charterers have no control, followed by a specification of particular causes, itself followed by an expression which would bring in all the other causes over which the charterers have no control, all such other causes are brought in. Then it is said that in order to make the exception effectual it must be expressed in unambiguous language. All I can say about that is that it strikes me as being perfectly unambiguous language. I think, therefore, the appeal ought to be allowed, and the order made which my Lord has indicated.

YOUNGER, L.J.—The charterers here have, under these charter-parties, bound themselves to unload two vessels within a fixed period of time. Their obligation amounts to an absolute and unconditional agreement, for the non-performance of which they are answerable unless the impediment which prevented them from performing it was one covered by the exceptions in the charters. The impediment in the present case was a general strike of dock labourers at Rotterdam, which prevailed from the 14th Feb. till the 26th April 1920. It is found as a fact by the learned arbitrator that the strike was a cause over which the charterers had no control, and that but for it the two steamships in question could and would have been discharged within their lay-days. Each charter-party contains an exception. [His Lordship read the clause, and continued:] Is that exception, in the

circumstances, found by the learned arbitrator, so phrased as to release the charterers from liability for the delay in unloading due to that general strike? If the words of the exception had been the words of a will or a conveyance, the answer to that question, on principles well ascertained in the construction of such instruments, would, I think, have been clear. A gift, for instance, of residue expressed in general terms, followed by an enumeration of various particulars concluding with "et cetera" is not so phrased as to restrict the meaning or effect of the general words. "The subsequent enumeration," says Sir John Romilly in *Gover* v. *Davis* (30 L. J. Ch., at p. 507; 29 Beav., at p. 225), "was merely intended to show, that the general statement was to extend to and include them, and then it goes on with the words, if properly speaking they can be called words, 'etc., etc.,' the proper interpretation of which is 'and all other things.'" "Such an enumeration," says Sir William Grant in *Cambridge* v. *Rous* (8 Ves. Jun., at p. 26), "under a 'videlicet,' a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles." "It is, however, incumbent on those who would contend for a limited construction," says Knight Bruce, V.-C., in *Parker* v. *Marchant* (11 L. Jour., Ch., at p. 226; 1 V. & C., at p. 300), "to show that a rational interpretation of the will requires a departure from that which ordinarily and *primâ facie* is the sense and meaning of the words." The effect attributed to the general words in these cases is explained in another way by Page Wood, V.-C., in *Dean* v. *Gibson*, where he observes (36 L. Jour. Ch., at p. 659; L. Rep. 3 Eq., at p. 717), that there is a strong presumption that a testatrix does not, by using general words followed by a specific enumeration, intend only to do that which she might have effectually done by the specific enumeration alone. And the same rule of construction as applied to the parcels in a conveyance is very clearly set forth in the following passage from Williams Saunders (at p. 680), to which counsel for the appellants called attention in his argument: "For the natural and proper use of a videlicet, says Lord Hobart, is to particularise that which is general before, and to explain that which is indifferent, doubtful, or obscure; but it must neither be contrary to the premises, nor increase nor diminish the precedent matter; and therefore if a man seised in fee of Blackacre, Whiteacre and Greenacre in D., should grant all his lands in D., that is to say, Blackacre and Whiteacre, yet Greenacre shall also pass by the grant; but if lands lying out of D. are added under the scilicet, they will not pass. So a videlicet may sometimes restrain the generality of the former words, where they are not express and special, but stand indifferent so as to be capable of being restrained without apparent injury to them; as if lands be granted to a man and his heirs, that is to say, the heirs of his body, it is an estate tail—*Stukely* v. *Butler*."

These authorities, and they might be indefinitely multiplied, demonstrate, I think, that if the form of expression with which we are now concerned had been used to make a gift in a will, or to describe parcels in a conveyance, there could be no doubt as to its proper interpretation. And it will be observed that, so far, I have in no way been concerned with the application of the *ejusdem generis* rule of construction. That rule is not, up to this point, under discussion. These authorities are directed to the significance which, as a matter of construction, should continue to be attributed to the introductory general expression, such as we have in these charter-parties notwithstanding the addition of subsequently enumerated particulars. One must, however, I agree, apply with caution such authorities to the construction of similar words in a clause of exception in a charter-party. I apprehend that the judicial attitude towards words of exception in a charter-party is somewhat different from such words in a will. The court requires clear words of exception to relieve the charterer from his primary liability. And although his words were only directly referable to the *ejusdem generis* rule, some such construction may have been present to Lord Macnaghten's mind when in *Knutsford Steamship Company* v. *Tillmans and Co.*, he said (99 L. T. Rep. 399; (1908) A. C., at p. 409): "The rule of *ejusdem generis* applies as laid down in *Thames and Mersey Marine Insurance Company* v. *Hamilton* (*sup.*), and I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents rather than from cases that dealt with real property and settlements."

It so happens, however, that in the present case the clauses of exception in these charter-parties are not in a common form, and no judicial interpretation of such clauses in such a connection is forthcoming for our guidance. Accordingly, as it seems to me, the authorities to which I have referred are most useful as guides to a sound result provided only that due attention is paid to the necessity of finding in the present case the requisite freedom from ambiguity.

Counsel for the respondents, feeling in these circumstances the force of the arguments against them, directed their arguments, and the junior counsel especially directed his energies to establishing a construction of this exception which would either weaken the effect of the general words "causes over which the charterers have no control" or would suffice to neutralise their effect altogether. The first result counsel sought to attain by seeking to apply to these words the *ejusdem generis* rule, transposing their position from the place which they occupy to the end of the clause so that the clause would read: "Should the vessel be detained by quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., or causes over which the charterers have no control," and he was, in relation to a clause so framed,

able to point to the decision of this court in *Herman* v. *Morris* (*sup.*), in which the court did apply the *ejusdem generis* rule to the general words. But in my opinion such a transposition of words is not permissible for the purpose of introducing that rule, when the rule has no application to the words in the place in which they stand. And to the words, placed as they are, the rule does not, I think, apply. It is necessary, as it seems to me, for its application, that the specific words must be followed and amplified by the addition of the general words. The rule does not apply to general words where they precede or introduce the specific enumeration. This view of the matter dispenses with the necessity of further considering the case of *Herman* v. *Morris* (*sup.*), on which so much reliance was placed. I would only observe with regard to it, that if reference be made to *Richardson* v. *Samuel & Co.* (*sup.*), on which it was avowedly rested, and the words there used are considered, and the importance attributed, at least by Collins, L.J., to the presence amongst them of the word "other" which is to be found neither in *Herman* v. *Morris* (*sup.*) nor in the present case, it will become doubtful whether the decision in *Herman* v. *Morris* (*sup.*) is of general application. I would observe also with regard to *Re Allison and Richards* (20 Times L. Rep. 584), in which the word "other" was also absent from the clause in question, that in effect was really considered by the court to be introduced by reference to another clause in the instrument where it was duly inserted. In my opinion, therefore, this point does not avail the respondents.

But next it was contended that these general words to which I have referred might here in construction be ignored; and the learned judge in his judgment has, in effect, ignored them and has found the entire ambit of the exception to be included in the events specifically enumerated. To the criticism of Page Wood, V.-C., on such a construction to which I have already alluded, I may again refer. It seems to me to be distinctly in point. The argument suggests that the draftsman of the exception has only succeeded in saying the same thing twice over. That is not an easy proposition to accept in any case of construction. It presents in this case the additional difficulty that the enumerated particulars are to be looked at. Although, as to all of them, they may be correctly, although not very aptly, included in "causes over which the charterers have no control," they would, as to four out of five of them, be much more naturally described otherwise as, for example, acts of God or of the King's enemies; and as they and not other events more immediately apposite are selected for illustration of the general words, the object suggested to my mind by their use is not that suggested by counsel for the respondents, but that it is intended by the selection of these items, somewhat remote from the general expression, to show that even they are included in the phrase. In my view the words are really words of exemplification, the words "et cetera" being equivalent to the words "and so on"—a fair meaning, I think, in this connection, of the words, and well justified as a permissible meaning to attribute to them.

The result, to my mind, is that with sufficient clearness "causes over which the charterers have no control" are in these charter-parties and without qualification causes which excuse the charterers from liability.

In the view I take of the case it is unnecessary for me to deal specifically with the words "et cetera" as words which may introduce the *ejusdem generis* rule. I will only say that the words have in many cases in Chancery been held to have that effect.

Appeal allowed.

Solicitors for appellants, *Slaughter* and *May*.
Solicitors for respondents, *Holman*, *Fenwick*, and *Willan*.

Friday, May 19, 1922.

(Before WARRINGTON and YOUNGER, L.JJ.)

THE SHROPSHIRE. (*a*)

APPEAL FROM THE PRIZE COURT AND ADMIRALTY DIVISION.

Practice—Interrogatories— Information sought on matters not alleged—Admissibility.

Interrogatories which aim at furnishing a plaintiff with proof of a cause of action not alleged in the pleadings, or with knowledge of the defendants' information on matters not required to be pleaded by them, are bad and will not be allowed.

The plaintiffs were the owners of the steamship S. *The defendants were two firms of ship repairers who were employed by the plaintiffs to repair the* S. *Whilst repairs were being carried out by the defendants a fire broke out on board, and the* S. *was damaged. In an action by the plaintiffs to recover for the damage to the* S. *it was alleged in the statement of claim that the fire was caused by unscreened candles used by the defendants' workmen. By their defence defendants admitted that the* S. *was in their hands and under their control for repairs. They also admitted that the fire took place and denied negligence, but put forward no explanation of the cause of the fire. The plaintiffs obtained leave to deliver interrogatories relating to the alleged use of the candles, but the registrar refused leave to deliver the following interrogatory: "What do you say was the cause of the fire?"*

Held, that as the interrogatory appeared to be framed with the object of compelling the defendants to set up an affirmative case, or, alternatively, to disclose their defence to the plaintiffs' case, it was properly disallowed.

Decision of the President affirmed.

SUMMONS adjourned into court.

The plaintiffs were the Federal Steam Navigation Company, and the defendants were

(*a*) Reported by FITZROY COWPER and GEOFFREY HUTCHINSON, Esqrs., Barristers-at-Law.

Messrs. G. and R. Green, and Silley Weir Limited, two firms of ship repairers. The plaintiffs' claim was for damage caused to their steamer *Shropshire*, which took place on board whilst the defendants were carrying out repairs upon her in the ship repairing yard of one of them at Falmouth. By their statement of claim the plaintiffs alleged that the fire was caused by unscreened candles used by the defendants' workmen. The defendants by their defence admitted that the fire took place whilst the *Shropshire* was being repaired by them. They denied negligence, but put forward no explanation of the cause of the fire.

The plaintiffs obtained leave to deliver eleven interrogatories relating to the alleged use of the candles, but the registrar refused leave to deliver the following interrogatory. "12. What do you say was the cause of the fire?" The plaintiffs appealed from the decision of the registrar by summons, which was adjourned into court.

G. St. C. Pilcher for the plaintiffs.

H. G. Robertson for the defendants.

May 8.—Sir Henry Duke, P.—The plaintiffs employed the defendants to execute repairs in a ship. The defendants were impliedly bound to use due care and skill in the employment. Fire broke out on board the ship during the execution of the repairs and caused damage and loss to the plaintiffs. They bring this action to recover damages and allege that the fire was due to the failure of the defendants to exercise due care and skill, and that the defendants their servants or agents, negligently caused or allowed the fire to break out. Particulars of the negligence are given in the statement of claim. The defendants deny the allegations and deny that the fire was caused or allowed by reason of the alleged, or any, negligence on the part of them or their servants or agents. The plaintiffs applied in the registry for leave to administer twelve interrogatories to the defendants, eleven of which are directed to establish the specific allegations contained in the statement of claim by requiring the defendants to make oath as to the truth of the matters alleged, and as to what they allege to be the truth in regard to the matters so alleged and in question. The twelfth of the proposed interrogatories is: "What do you say was the cause of the said fire?" It was disallowed by the registrar, and on appeal I thought that it was rightly disallowed. If the interrogatory is to be regarded as being directed to the plaintiffs' case it is a question by way of cross-examination. If it is directed to the defendants' case it is not framed to elicit the truth as to any particular allegation of either party.

The defendants do not set up any affirmative case, and the plaintiffs have covered by their specific questions the case on which they found their claim. On the whole, it seems to me to come within a principle which was applied by Sir Robert Phillimore in *The Radnorshire* (43 L. T. Rep. 319; 4 Asp. Mar. Law Cas. 338; 5 Prob. Div. 172), and by the Court of Appeal in *Hooton* v. *Dalby* (96 L. T. Rep. 537; (1907) 2 K. B. 18), and to be an interrogatory of a vague kind intended by its general form to elicit information in the hope that it may furnish the plaintiffs with proof of a cause of action not at present alleged, or with information as to the defendants' information on matters not required by the rules to be pleaded by them, but probably capable of use at the trial.

Summons dismissed, with leave to appeal.

The plaintiffs appealed.

A. T. Miller, K.C. and *Pilcher* for the appellants.

R. A. Wright, K.C. and *H. G. Robertson* for the respondents.

Warrington, L.J.—This interrogatory was apparently framed with the object of compelling the defendants to set up an affirmative case, or, alternatively, to disclose their line of defence to the plaintiffs' attack. In either case, I do not think that it was a proper question to deliver. The observations of Cozens-Hardy, M.R. in *Hooton* v. *Dalby* (96 L. T. Rep. 537; (1907) 2 K. B. 18), to which the President referred, show the impropriety of allowing an interrogatory which is directed to no part of the plaintiffs' case, and which does not tend to disprove the case of the defendant. The appeal must therefore be dismissed.

Younger, L.J. concurred.

Appeal dismissed.

Solicitors: for the plaintiffs, *W. A. Crump and Son*; for the defendants, *Deacon and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 17 *and* 24, 1922.

(Before Bailhache, J.)

Federated Coal and Shipping Company Limited v. The King. (*a*)

Charter-party — Defence of the Realm — Coal strike—Detention of ship loading coal—Admiralty orders—Claim by charterers for compensation—Claim against the Crown—Reg. 39BBB *Defence of the Realm Regulations—Indemnity Act* 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 2.

In 1920 *the suppliants were engaged in carrying coal from South Wales for the French railways. By a time charter-party they had hired the steamship* N., *the rate of hire being* 279*l. a day. In Oct.* 1920 *the steamship* N. *was at Cardiff loading coal for Nantes. She had nearly finished loading when the coal strike broke out. The naval transport officer, acting under Admiralty instructions given by virtue of their powers under Emergency Regulation* 39BBB, *ordered the* N. *to go out to Barry Roads and lie there and wait for further orders. The*

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

vessel was detained in Barry Roads for eighteen days, and was then allowed to proceed on her voyage to France. The suppliants then applied to the shipping controller for compensation for the detention, for bunker coal burnt while waiting for orders, extra wages and other expenses arising by reason of the detention. The shipping controller replied that, as the vessel had not been actually under requisition, he could not pay any compensation. The suppliants thereupon brought a petition of right claiming from the Crown damages for the detention of their vessel. They alleged that they were requested by the Admiralty to let the N. *lie in Barry Roads and that they assented, and that from such request and assent there arose an implied promise by the Admiralty to indemnify them against loss. On behalf of the Crown it was contended that there was no contract whatever between the Crown and the suppliants. Reg.* 39BBB *provides for the payment of compensation for a requisitioned ship but not for a ship under orders or detained as the* N. *was. The suppliants were not in possession of the vessel nor had they a lien on her. They had only a contractual right to order her master to perform voyages with her for their benefit and profit.*

Held, (1) *that there was no implied contract with regard to the payment of compensation for the loss due to the detention of the ship ;* (2) *that the suppliants had no right of compensation under reg.* 39BBB *or at common law, and* (3) *that if the suppliants were entitled to any compensation under the Indemnity Act* 1920, *their only tribunal was the one set up by that Act, namely, the Defence of the Realm Losses Commission.*

PETITION of right.

The suppliants, who were time-charterers (not by demise) of the steamship *Norburn*, claimed, by petition of right against the Crown, 5000*l.* by way of compensation for the detention of the steamship *Norburn*.

In 1920, during a coal strike in this country, the steamship *Norburn* was at Cardiff loading coal for Nantes in France. She had nearly completed loading when the coal strike broke out in Oct. 1920. The vessel had been chartered by the suppliants on time charter at 279*l.* a day, and they employed her in carrying coal for the French state railways.

When the strike broke out the naval transport officer at Cardiff, acting under Admiralty orders under the Defence of the Realm Regulations, ordered the steamship to go out to Barry Roads to await orders. The steamship obeyed, and after being detained out in Barry Roads for eighteen days, she was allowed to proceed. The suppliants thereupon applied to the shipping controller for compensation for detention, for the bunker coal burnt while waiting for orders, for extra wages and for other outgoings. The shipping controller replied that as the steamship had not been actually under requisition, he could not pay anything. The suppliants thereupon brought this petition of right claiming over 5000*l.* from the Crown in respect of the eighteen days' detention in Barry Roads.

Le Quesne (*R. A. Wright*, K.C. with him) for the suppliants.—There is an implied promise to indemnify the suppliants against the loss sustained by them in complying with the request of the Admiralty. Where the subject has been deprived, even for a time, of his property there must be a right to compensation. See :

London and North-Western Railway Company v. *Evans*, 67 L. T. Rep. 630 ; (1893) 1 Ch. 16 ;

Central Control Board v. *Cannon Brewery Company*, 121 L. T. Rep. 361 ; (1919) A. C. 744.

Sir *Ernest Pollock* (A.-G.) and *G. W. Ricketts* for the Crown.—In this case the Admiralty were acting in the national interest in time of emergency. There is no contract express or implied to support the suppliants' claim for compensation. Their only remedy is to proceed before the War Compensation Court under the Indemnity Act 1920. See :

Elliott Steam Tug Company v. *Shipping Controller*, *ante*. p. 78 ; 126 L. T. Rep. 158 ; (1922) 1 K. B. 127.

R. A. Wright, K.C. replied.

Cur. adv. vult.

March 24.—BAILHACHE, J. read the following judgment.—The suppliants in this case claim compensation from the Crown in the following circumstances. In Oct. 1920, the steamship *Norburn*, which was on time charter to the suppliants (not by demise) was loading coal in Barry Dock for carriage to Nantes. The coal strike was in progress and the naval transport officer at Cardiff, acting for the Admiralty and within the scope of his authority, ordered the master to leave the docks and take his ship into the roads to await further orders. It was thought that the coal might be wanted for some ill-supplied British port.

The *Norburn* had not quite completed her cargo, and the master requested the transport officer to put his orders into writing, which he did in a letter dated the 18th Oct. The *Norburn* was kept waiting in the roads until the 4th Nov., and was then allowed to proceed on her voyage. The suppliants have been obliged to pay the chartered hire for the eighteen days' detention, amounting to some 5000*l.*, and they claim to recover either this sum, or at any rate some sum of money, by way of compensation for the loss suffered by them in consequence of the master obeying the Admiralty orders, as he was bound to do.

The suppliants say that they were requested by the Admiralty to let the *Norburn* lie in Barry Roads at its disposal, and that they assented, and that from such request and assent there arises an implied promise to indemnify them against the loss thereby sustained. If this was the correct view to take of the facts, I should consider the claim of the suppliants

well founded, and this court competent to entertain it. Unfortunately for the suppliants, I see two objections to this view of the case, either of which is fatal to their claim. In the first place the instructions given to the master of the *Norburn* were not a request, but an order justified under reg. 39BBB. The so-called assent of the suppliants was obedience to an order which they were powerless to resist. From such facts no implied contract arises: (see the speech of Lord Dunedin in *Attorney-General* v. *De Keyser's Royal Hotel Limited*, 122 L. T. Rep. 691; (1920) A. C., at p. 523; and that of Lord Atkinson in the same case, 122 L. T. Rep. 691; (1920) A. C., at p. 533, and the authorities cited by him.)

Secondly, if the Admiralty instructions are to be treated as a request, and the obedience of the master as an assent, the request was to the master as having control of the ship for his owners, and not as being under the directions of the time-charterers as to her engagements. What was wanted was the ship, and the contract, if any, was between the Admiralty and the owners. Of the time-charterers the Admiralty knew nothing and cared less. Before leaving the first contention of the suppliants I ought perhaps to say why I should have entertained a claim based on contract if I thought that it could be sustained. Reg. 39BBB makes provision for compensation for a requisitioned ship, but none for a ship under orders or directions, as was the *Norburn*; and I take the law to be that where a case for compensation is made out, and no exclusive existing method of preferring the claim is prescribed, the courts are open.

The suppliants' alternative way of putting their claim is this: They say that they were deprived of the use of the *Norburn* for eighteen days by the exercise of the powers conferred on the Admiralty by the regulation, and they say that the principle of law, often laid down, that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it, is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms, and that the principle applies whether the property is taken away altogether or only for a time, and they ask me to apply this principle to their case.

Here again there is a fatal obstacle in the suppliants' way. It is to be observed that the principle which I have stated in the words of Lord Atkinson in the case of *Central Control Board* v. *Cannon Brewery Company* (121 L. T. Rep. 361; (1919) A. C., at p. 752), is confined to property. The suppliants had no property in the *Norburn*. They were not in possession of her. Their charter-party was not by demise. They had not even a lien upon her. They merely had a contractual right to order her master to perform voyages with her for their benefit and profit. To such rights the principle of law on which the suppliants rely has no application. The use or abuse by a third party of a chattel over which such rights exist, and the consequent injury to those rights give rise to no claim at law by the persons possessing such rights. If authority were wanted for this well-settled proposition, it will be found in the judgment of Scrutton, L.J., in *Elliott Steam Tug Company* v. *Shipping Controller* (*ante*, p. 78; 126 L. T. Rep. 158; (1922) 1 K. B. 127), and the cases there cited by him, and particularly in the judgment of Blackburn, J., in *Cattle* v. *Stockton Waterworks Company* (30 L. T. Rep. 475; L. Rep. 10 Q. B. 453).

The conclusions at which I have arrived are: (1) There was no implied contract; (2) there is no right to compensation under reg. 39BBB. or at common law. These conclusions dispose of the case in favour of the Crown, but as the Indemnity Act 1920 (10 & 11 Geo. 5, c. 48) was pleaded and referred to, I think it right to say that, as I read that Act, claims founded on contract are excepted from its operation and left to the courts. Further, notwithstanding my second conclusion, it may be that sect. 2, sub-sect. 1 (*b*) of the Act of 1920 gives the suppliants some right to compensation. If it does, their only tribunal is that provided by the Act, namely, the Defence of the Realm Losses Commission. There will be judgment for the Crown with costs.

Judgment for the Crown.

Solicitors: for the suppliants, *Botterell* and *Roche*; for the Crown, *Solicitor to the Board of Trade.*

Naval Prize Tribunal.

April 5 and 7, 1922.

(Before Lord PHILLIMORE, Sir GUY FLEETWOOD WILSON, and Admiral Sir DOVETON STURDEE.)

THE CANADIA. (*a*)

Naval Prize Fund—Neutral ship ordered into port for examination—Loss of ship and cargo—Ship and cargo not liable to condemnation—Negligence of the prize crew—Negligence of the ship's master—Claims by the owners—Admission of liability by the Admiralty—Money paid in settlement—Amount chargeable on the Naval Prize Fund—Naval Prize Act 1918 (8 & 9 *Geo.* 5, *c.* 30), *sched. part II., par.* 5.

The C., *a neutral vessel, was stopped by a British cruiser and sent into port under a prize crew for examination. By an error of the navigating officer she was lost before reaching the examination port. It subsequently appeared that the cargo on board the* C. *was not contraband, that the* C. *had not committed any un-neutral act, and that if she had reached port she would have been released after examination. Claims by the neutral owners for the loss of the* C. *and her cargo were eventually admitted by the Government, and certain sums were paid to them in compensation. The Treasury claimed to have these sums charged on the Naval Prize*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Fund under part II. (5) *of the schedule to the Naval Prize Act* 1918 (8 & 9 *Geo.* 5, *c.* 30), *which provides that there shall be charged on and payable out of the Naval Prize Fund* "*costs, charges, expenses and claims which the tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by prize courts, as being costs, charges, and claims which, had there been a grant of prize to captors, captors would have been liable to pay.*"

At the hearing it appeared that the loss of the C. *was due to her speed having been inaccurately given to the Prize officer by her master, and not to the negligence of the Prize officer.*

Held, that an unconditional admission of liability by the Government did not constitute binding and un-rebuttable evidence that there was a liability, nor relieve the Naval Prize Tribunal of determining for themselves whether a claim was to be treated as one which the captors would have been liable to pay having regard to the principles and practice heretofore observed by prize courts. But in view of the difficulty of defending the case in the Prize Court, and of the fact that the admission of the Government had perhaps saved the fund from an adverse decision, such sum as might reasonably have been paid to effect a settlement ought to be charged on the Prize Fund. Half the sums paid ordered to be charged on the Prize Fund.

CLAIM by the Exchequer that certain sums paid to the owners of the Danish steamer *Canadia* and her cargo, which were lost in March 1915 whilst being taken into Kirkwall by a prize crew from H.M.S. *Hilary*, were chargeable on the Naval Prize Fund.

Wylie for the Exchequer.

Sir *R. H. B. Acland*, K.C. and *Darby* for the Fleet.

April 7.—Lord PHILLIMORE delivered the following written judgment of the Tribunal:

This case has given the Tribunal considerable difficulty. It is a claim on behalf of the Exchequer that the sum of 145,488*l.* being the sum total of payments made to the owners and underwriters of the *Canadia*, and her cargo, and to and for the crew, together with some further items not yet ascertained, be declared to be a charge on the Naval Prize Fund under par. 5, Part II., of the schedule to the Act.

The *Canadia* was a Danish vessel bound on a voyage from Galveston, Texas, with a cargo of cotton and flour, destined for Christiania and Gothenburg. She was stopped in the North Atlantic on Thursday the 11th March 1915, by the British cruiser *Hilary*. An officer and six men were sent on board her, with orders to take her into Kirkwall, and instructions to reach their destination by steering north of Fair Island, between the Orkneys and the Shetlands, and then turning to the southward. The first course steered was in a general way east magnetic. On the following day, the 12th, land was sighted about 4.30 p.m. and a bearing of Noup Head was taken, and after the ship had run a certain distance on her course a second bearing was taken, which, if the speed of the ship was accurately known, would give the distance from the land. The weather then became thick, and soundings were taken from time to time. These, however, owing to the configuration of the sea bottom, would be in fact of little use. At 7.10 the Prize officer reckoned that he had got abreast of or past Fair Isle and could haul away to the south-east. But, as it turned out, this could not have been the case, for about 8.45 land was seen close ahead, and notwithstanding every effort the vessel struck on Fair Isle and became with her cargo a total loss. The ship's and prize crews escaped with their lives largely owing to the skill and coolness of the Prize officer, Captain Herbert Spencer. As it turned out, the cargo on board the *Canadia* was not contraband and she had not committed any un-neutral act, and if she had reached Kirkwall she would have been released after examination.

Claims were put forward by the Danish Government for compensation to the owners of the ship and cargo. At first the Admiralty refused to admit liability, but on the 5th Feb. 1916, they agreed to pay any reasonable claim which should be put forward, and thereafter paid sums already mentioned.

The question which we propose first to consider is whether the loss was due to the negligent navigation of the Prize officer, so as to bring the case within the principles laid down by Sir William Scott in *Der Mohr* (3 C. Rob. 129; 4 C. Rob. 314) and in *The William* (6 C. Rob. 316) and, if the old law had to be applied, make the captor, and now, therefore, the Naval Prize Fund, liable for the loss. The loss was, no doubt, due to an error as to the position of the ship when her course was altered to the south-east at 7.10 p.m. The chart traced by Commander Sutcliffe and the other facts before us show that this must have been the case, and there were three factors in this error. The ship was probably nearer Noup Head, and she did not run on her course so far as was assumed, and the allowance for the strength and set of the tide was insufficient.

As regards this last point, counsel for the Fleet submitted that there was no negligence on the part of the prize officer, as he had no chart to guide him but the one which the master of the *Canadia* possessed, which was one taking in the seas round the whole of Great Britain, and on much too small a scale to be useful for this purpose, and, in fact, having no notes upon it as to the set of the tides. If this was the only defence for the navigation of the ship it is to be doubted whether the tribunal could accept it. To begin with, there was a proper chart in the *Hilary*, and the officer probably might have examined it and taken notes from it before he boarded the *Canadia*. And assuming the absence of sufficient charts on the *Hilary* so that the officer could not be supplied with one though that might exonerate the officer and the captain of the *Hilary* from blame, it would

only throw the blame further back, and the neutral powers might rightly complain that their ships were sent into dangerous positions without the officers being provided with proper charts. As to the principle of law, reference might be made to our judgment in *The Oregon* (1921) P. 224) and to *The Ostsee* (Spinks, 170), and the cases there cited. But the conclusion to which we have ultimately come renders it unnecessary to consider this question of charts.

In our view, there would have been no misfortune if the speed of the ship had been correctly given by the master. It was upon him that for this purpose the prize officer had to rely, and he appears to have given the speed as nine and a half knots according to his patent log. First of all on this speed the distance off Noup Head was calculated, and, secondly, the spot at which it would be safe to turn to the south was determined. Now Commander Sutcliffe's marked chart and statement show that the vessel cannot have arrived at that spot, and that to bring about the stranding it is necessary to infer that the speed was not more than seven knots. The ship, therefore, was nearer the land on the starboard hand than she was judged to be, and she had not reached a position when it would be safe to turn to the south. Assuming that the officer did not make sufficient allowance for the set of the tide, still there would have been no loss if the ship's speed had been rightly given. Therefore we do not consider that there was negligence on the part of the prize officer. Some other suggestions were made against him, the Danish captain for instance complained that he stood on at night into dark and dangerous waters. In our view it was as between various dangers, including those from submarines, the safer course. In conclusion we may add that the charge of negilgence was but faintly made by the counsel for the Exchequer.

A second question then arises. Does the act of the Admiralty in admitting liability for the loss make the money paid a charge upon the Naval Prize Fund? At the time when the admission was made the legal position as to naval prize was the same as when the settlement was made, in *The Oregon* (*sup.*)—*i.e.*, before the passing of the Naval Prize Act—and as we said in *The Oregon* (*sup.*) "At a time when no one had any interest in prize money except the Crown, and when, therefore, the officers of the Crown were able, and, indeed, bound on behalf of the Crown, to make such conditions and arrangements as they might think upon the whole reasonable." No doubt the Danish claim was a difficult one to meet. The ship was an innocent neutral, and was navigated under the charge of the British officer when she was lost. If any proceedings had been taken on behalf of the Danish claimants the burden of discharging the officer from negligence would have lain upon the Crown, and the case would be obviously one for compromise, if by such compromise a substantial portion, say, for example, 50 per cent., of the damages could have been saved. Such a compromise would have been reasonable, and we should have upheld it. But while upholding the power of the officers of the Crown to protect the Prize Fund by reasonable settlements, as we did in the case of *The Oregon* (*sup.*) we are not prepared to say that an unconditional admission or surrender without any *quid pro quo* would constitute binding and unrebuttable evidence that there was a liability, or relieve us from the duty of determining for ourselves whether it is in fact a claim which, having regard to the principles and practice heretofore observed by the Prize Courts, may reasonably be treated as one which the captors would have been liable to pay.

We therefore cannot allow this claim in full. On the other hand, if no settlement had been made the claimants might, as they were invited in the early stages of the proceedings to do, have prosecuted their claim in the Prize Court. Then, the case, being a difficult one, and the captors starting with so much legitimate prejudice against them, might have ended unfavourably. The act of the Government in admitting liability has saved the Prize Fund from such a decision.

On the whole, we have thought that we ought to treat this case as one in which we can allow as a claim the sum at which it would have been reasonable to purchase the release of a disputed claim, and that the claim may therefore stand for half the amount already paid and half any further sum which may have to be paid. As to this further sum, we should remark that it is not very easy to see how it can arise, and that at any rate by this time the items of it ought to be known, and should be put forward by the Exchequer for consideration by the advisers of the Fleet forthwith.

We declare, therefore, that the sum of 72,744*l.*, and such further sum as may be proved within three weeks' time, and no more, is a charge upon the Naval Prize Fund. The counsel for the Fleet will have, as usual, their costs out of the Prize Fund.

Sir GUY FLEETWOOD WILSON and Admiral Sir DOVETON STURDEE concurred.

Solicitor: *The Treasury Solicitor.*

END OF VOL. XV.